No. 14-1468

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (Pet. App. 1a-18a) is reported at 858 N.W.2d 302. The decision of the North Dakota District Court (Pet. App. 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. 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 in relevant part:

> 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 * * *.

North Dakota law, N.D. Code § 39-08-01, pro- vides 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.

* * *

3. An individual violating this section or equivalent ordinance is guilty of a class B misdemeanor for the first or second offense in a seven-year period, of a class A misdemeanor for a third offense in a seven-year period, and of a class C felony for any fourth or subsequent offense within a fifteen-year period.

STATEMENT

North Dakota and Minnesota criminalize a driver's refusal to submit to a warrantless chemical test of his or her blood, breath, or urine to detect the presence of alcohol.[1] Under these test-refusal statutes, refusal to submit to a test is a crime wholly independent of the substantive offense of driving while impaired. A person may be convicted of test refusal even if he or she is not charged with a driving offense, as was the case with the petitioner here. Indeed, a person may be convicted of test refusal even if he or she is acquitted on an impaired-driving charge.[2]

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[1] Eleven other States have similar statutes: Alaska (Alaska Stat. § 28.35.032); Florida (Fla. Stat. § 316.1932); Hawaii (Haw. Rev. Stat. § 291e-68); Indiana (Ind. Code. § 9-30-7-5); Kansas (Kan. Stat. Ann. § 8-1025); Louisiana (La. Stat. Ann. § 14:98.7); Nebraska (Neb. Rev. Stat. §§ 60-6,197, 60-6,211.02); Rhode Island (R.I. Gen. Laws § 31-27-2.1); Tennessee (Tenn. Code Ann. § 55-10-406); Vermont (Vt. Stat. Ann. tit. 23, § 1201(b), (c)); and Virginia (Va. Code Ann. § 18.2-268.3). The Supreme Court of Hawaii recently held Hawaii's compelled-consent statute unconstitutional. *State* v. *Won*, 361 P.3d 1195, 1198-1199 (Haw. 2015).

[2] This prospect is not theoretical; the North Dakota Supreme Court recently upheld the test-refusal conviction of a motorist who was acquitted of driving while impaired. *State* v. *Kordonowy*, 867 N.W.2d 690, 692 (N.D. 2015).

In affirming convictions for violations of these test-refusal statutes, state courts have invoked a variety of justifications: that such test requirements are per se reasonable; that motorists may be deemed to have consented to the administration of a warrantless test; and that such tests may be treated as routine searches incident to arrest, which are excepted from the Fourth's Amendment's warrant requirement. The court below, in this case and in *Beylund* v. *Levi*, No. 14-1507 (cert. granted Dec. 11, 2015), relied on the first two of these theories; the Minnesota Supreme Court in *State* v. *Bernard*, No. 14-1470 (cert. granted Dec. 11, 2015), relied on the third.

All three rationales, however, are fatally flawed. They ignore or misunderstand this Court's Fourth Amendment decisions, while robbing this Court's holding in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), of all practical import. And ultimately, they stand for the extraordinary proposition that persons may be subjected to criminal penalties for asserting their constitutional right to resist a search that is not supported by a warrant or an exception to the warrant requirement. Such decisions should not stand.

Although the issues in this case, *Bernard*, and *Beylund* overlap to some degree, we have attempted to avoid duplication in the briefing. Legal issues common to the three cases are addressed in this brief; petitioners' briefs in *Bernard* and *Beylund* address questions unique to those cases.

1. In North Dakota, "[a]ny individual who operates a motor vehicle" on any public or private road in the state is deemed to have "consent[ed], and shall consent, * * * to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration * * * in the individual's blood, breath, or

urine." N.D. Code § 39-20-01(1). In 2013, North Dakota amended this statute to make "refusal to take the test directed by the law enforcement officer * * * a crime punishable in the same manner as driving under the influence." Pet. App. 26a; see N.D. Code § 39-08-01(2)-(a).[3] A first refusal to consent qualifies as a misdemeanor, with escalating penalties for further refusals; fourth and subsequent refusals over a fifteen-year period are treated as felonies. N.D. Code § 39-08-01(3).

2. Here, after petitioner drove his car off the road, he failed a field sobriety test administered by a highway patrol officer. Pet. App. 2a. A preliminary breath test suggested that petitioner was intoxicated, and the officer placed petitioner under arrest and read him the State's mandatory implied consent advisory. *Ibid.* This advisory informed petitioner "that North Dakota law requires [him] to take [a chemical alcohol] test to determine whether [he] 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." N.D. Code § 39-20-01(3)(a); see Pet. App. 2a, 5a. Petitioner nonetheless refused to submit to a blood test. Pet. App. 2a, 24a, 26a. He was charged with refusal to submit to a chemical test, but not with driving under the influence. *Id.* at 2a.

Petitioner moved to dismiss the charge, asserting that it is "unconstitutional" under the Fourth Amend-

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[3] Criminal sanctions for test refusal are possible if, among other enumerated circumstances, an officer places a motorist "under arrest and inform[s] that individual that the individual is or will be charged with the offense of driving * * * while under the influence of intoxicating liquor." N.D. Code § 39-20-01(2).

ment for a State to criminalize refusal to submit to a chemical test of a driver's blood. Pet. App. 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 view, 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 test-refusal offense but, as noted in the criminal judgment, "specifically reserve[d] the right to appeal" the denial of his motion to dismiss. Pet. App. 19a-21a. The court sentenced petitioner to thirty days in jail, twenty of which were suspended for one year; placed him on one year of unsupervised probation; imposed a $1,500 fine and $250 of court fees; required petitioner to participate for one year in a "twenty-four seven sobriety program"; and mandated that petitioner obtain a substance abuse/addiction evaluation. *Id.* at 20a.

3. On appeal, the Supreme Court of North Dakota affirmed. Pet. App. 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 (*id.* at 5a) it concluded that the State may prosecute an individual for failing to consent to such a warrantless search. The court appeared to rest this conclusion on two principal rationales.

First, the court opined that attaching criminal penalties to test refusal in this context is, as a general matter, reasonable. The court cited 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." Pet. App. 9a (quoting *Bernard*, 844 N.W.2d at 42).[4] Here, the North Dakota court explained that its State's implied consent law does "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." *Id.* at 13a. Thus, the court viewed it as reasonable to compel an individual to consent to a chemical test when an officer believes that probable cause exists 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 (quotation marks 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

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[4] The Supreme Court of Minnesota subsequently rejected this reasoning of the Minnesota appellate court. See *State* v. *Bernard*, 859 N.W.2d 762, 766 (Minn. 2015).

Fourth Amendment 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." Pet. App. 13a; see *id.* at 12a-13a (distinguishing *Camara* v. *Mun. Court 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" (Pet. App. 16a) because the threat of criminal action for refusal "is not unconstitutionally coercive in violation of a person's Fourth Amendment rights." *Id.* at 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 Fourth Amendment so long as the unconstitutional search does not in fact occur.

SUMMARY OF ARGUMENT

As a starting point, we assume all agree that a State may not subject people to criminal sanctions for exercising rights granted them by the Constitution—which means, in the context here, that a person may not face criminal penalties for refusing to submit to a search that is not authorized by a warrant or permissible under an exception to the warrant requirement. North Dakota seeks to evade that principle by arguing that a warrant was not required in this case because petitioner consented (or can be deemed to have consented) to administration of a blood test, which allows the State to prosecute petitioner for refusing to submit to the test. That argument misunderstands the nature of consent and, if accepted, would allow States to coerce the surrender of fundamental constitutional rights.

A. As a general matter, law enforcement officers may not conduct a search in the absence of a warrant, unless one of the few and well-delineated exceptions to the warrant requirement is present; that rule applies to blood tests of the sort at issue in this case. And no exceptions to the warrant requirement are present here. We show in *Bernard* that the search-incident-to-arrest exception is inapplicable. Under *McNeely*, the exigent circumstances exception does not apply. The "special needs" exception can come into play only when the justification for the search is unrelated to the State's general interest in law enforcement; yet the search would have been conducted in this case *only* as an element of an ordinary law enforcement investigation. And the State's suggestion that it would be "reasonable" to dispense with a warrant in this context because impaired driving is a serious societal problem cannot be squared with *McNeely* and a host of this Court's other decisions that have emphasized the importance of having the inferences supporting a search drawn by a neutral and detached magistrate.

B. The court below was incorrect in holding that the consent exception to the warrant requirement may fairly be invoked in this case. Whether consent was given must be determined by a consideration of all the circumstances, and consent is present only when it is the product of a free and unconstrained choice rather than of "duress or coercion."

Under that standard, it is nonsensical to suggest that petitioner *actually* consented to a warrantless blood test. State law *requires* motorists to consent. There is no basis to believe that motorists understand that they have granted consent to be tested simply by virtue of driving in North Dakota. And given the practical necessity of driving to carry out the essential

activities of daily life, consent obtained upon threat of losing the ability to drive surely is the product of duress or coercion.

Nor may the State prevail by contending that it may *deem* drivers to consent to be searched. Allowing a State to deem that an entire category of persons has consented in advance to be searched, regardless of what they actually knew or intended, would fly in the face of this Court's direction that consent must be determined based upon the totality of the circumstances. In fact, the only context in which the Court ever has accepted a version of "implied" consent under the Fourth Amendment is that of the administrative search, which is directed at a participant in one of the small number of industries that have a history of pervasive government oversight. That doctrine has no application to persons engaged in the everyday activity of driving down a public road.

C. North Dakota also may not support its compelled-consent law on the theory that States simply may condition permission to drive on motorists' mandatory advance surrender of their Fourth Amendment right to resist otherwise unconstitutional searches. This Court's decisions establish that the Constitution precludes the imposition of criminal penalties for the assertion of a constitutional right, whether or not the State purports to make acceptance of those penalties a condition on the award of a license or benefit. In the Fourth Amendment context, such penalties may be imposed only upon satisfaction of the administrative search exception to the warrant requirement.

And even assessed on its own terms, the State's rationale cannot be squared with the unconstitutional conditions doctrine. It is fundamental that the State may not grant a benefit on the condition that the recip-

ient surrender a constitutional right, thus achieving indirectly a result that it could not command directly. This is a paradigm case for application of the doctrine: North Dakota would deny permission to drive specifically to coerce drivers' into either ceding the constitutional right to resist an unwarranted search or accepting criminal penalties for asserting that right. There can be no justification for this exchange; the coercive force of the condition is apparent, while there is only a very attenuated connection between the imposition of criminal test-refusal penalties (the State's condition) and the exercise of the ability to drive (the benefit provided by the State).

D. Invalidation of compelled-consent laws will not hamper the State's efforts to combat impaired driving. In fact, the empirical evidence, including review by the National Highway Traffic Safety Administration, shows that compelled-consent laws are ineffective. States have available a wide range of other tools, including expedited warrant procedures and numerous mechanisms to keep impaired drivers from getting behind the wheel in the first place, that are more effective—not all of which currently are used by North Dakota. Use of those approaches, and not the imposition of unconstitutional penalties for the assertion of Fourth Amendment rights, is the proper answer here.

ARGUMENT

The question in this case is whether a State may impose criminal penalties on a driver who, after being arrested on suspicion of impaired driving, refuses to submit to a warrantless search. The answer to that question must turn on whether, in the circumstances, the Fourth Amendment required law enforcement officers to obtain a warrant before conducting the search at issue. If a warrant was required, the Con-

stitution surely does not allow the imposition of criminal penalties for the act of refusing to submit to an unwarranted—and therefore unconstitutional—search. And here, the State's arguments that a warrantless search would have been permissible cannot be squared with this Court's doctrine.

A. The Fourth Amendment prohibited a warrantless search in this case.

1. Warrantless searches are impermissible in the absence of a recognized exception to the warrant requirement.

The background Fourth Amendment principles that govern here are settled and not in dispute. It is fundamental that, as a general matter, law enforcement officers must, "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). Thus, the Court's decisions consistently "have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant.'" *Riley* v. *California*, 134 S. Ct. 2473, 2482 (2014) (ellipses omitted) (quoting *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995)). "Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Ibid.* (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)). Accord *Schmerber* v. *California*, 384 U.S. 757, 770 (1966).

Accordingly, the Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate,

are *per se* unreasonable under the Fourth Amendment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions." *Ibid.* See *Riley*, 134 S. Ct. at 2483; *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013); *Skinner* v. *Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989); *Katz*, 389 U.S. at 357.

There is, moreover, no dispute that the blood test demanded by the State in this case is a Fourth Amendment "search" of the sort that is subject to the usual warrant requirement. The Court has "long recognized that a compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." *Skinner*, 489 U.S. at 616 (quotation marks omitted; brackets in original).[5] A blood test "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Ibid.* In fact, in a context virtually identical to that here, the Court made clear "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt." *Schmerber* v. *California*, 384 U.S. 757, 770 (1966). Accord *McNeely*, 133 S. Ct. at 1559-1560. Therefore, absent the presence of a recognized exception to the warrant requirement, the State in this case was not entitled to demand that petitioner be subjected to a warrantless blood test. We do not understand the State to disagree with this fundamental understanding.

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[5] The brief for petitioner in *Bernard* addresses the characteristics of breath tests.

2. No exception to the warrant requirement is applicable in this case.

Here, no exception to the warrant requirement applies.

a. The Minnesota Supreme Court in *Bernard* held that the search-incident-to-arrest exception to the warrant requirement governs in these circumstances. But neither the North Dakota Supreme Court nor the State of North Dakota in its opposition to review embraced that contention in this case. That is for good reason: As explained in petitioner's brief in *Bernard*, that exception has no application to chemical tests of blood, breath, or urine, which by definition can have no bearing on officer safety or evidence preservation—the two essential rationales for invocation of the doctrine.

b. This Court has already held, in *McNeely*, that the exigent circumstances exception to the warrant requirement does not, as a general matter, justify warrantless blood tests in the DUI setting. Although "the natural dissipation of alcohol in the blood may support a finding [that a warrantless search was acceptable] in a specific case, * * * it does not do so categorically." *McNeely*, 133 S. Ct. at 1563. Rather, whether exigency existed "in this context must be determined case by case based on the totality of the circumstances." *Id.* at 1556. Where it is possible for "police officers [to] reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 1561.

In opposing certiorari, North Dakota nevertheless appeared to contend that *McNeely* did not govern here because motorists in that State may refuse to submit to a chemical test—albeit on pain of criminal penalties

under the compelled-consent statute. Br. in Opp. 11. But this argument is circular. *McNeely* holds that, absent a showing of case-specific exigent circumstances, a motorist may not be subjected to a warrantless chemical test. North Dakota's test-refusal statute is specifically designed to coerce motorists into surrendering that constitutional right. Insofar as the statute's coercive force is effective in inducing the motorist to submit to a search, it vitiates the right recognized in *McNeely*; insofar as it is not, it subjects motorists to criminal penalties for exercising the Fourth Amendment right recognized in *McNeeley*. As we show below (at 31-33), in our discussion of *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967), such an outcome is impermissible.

c. On the face of it, this is not a case where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (citation and internal quotation marks omitted). The Court has recognized circumstances where "special needs" make a warrant—and, for that matter, probable cause and individualized suspicion—unnecessary to authorize a search. But the special needs exception to the warrant requirement is limited and narrowly-circumscribed; most notably, a "'special need' that [is] advanced as a justification for the absence of a warrant or individualized suspicion [must be] one divorced from the State's general interest in law enforcement." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 79 (2001). As Justice Kennedy has described the special needs doctrine:

> The special needs cases [the Court has] decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legiti-

> mate, civil objectives. The traditional warrant and probable-cause requirements are waived in [the Court's] previous [special needs] cases *on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes*.

Id. at 88 (Kennedy, J., concurring in the judgment) (emphasis added).

Thus, in *Skinner*—the Court's leading special needs decision—the Court upheld mandatory warrantless and suspicionless blood and urine testing of specified categories of railroad employees following serious train accidents. In doing so, the Court emphasized that the testing served "'special needs' *beyond normal law enforcement*." *Skinner*, 489 U.S. at 620 (emphasis added; citation omitted). It also pointed to a number of related considerations. Although "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents * * * a warrant would do little to further these aims" in *Skinner* "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program," which meant that "there [were] virtually no facts for a neutral magistrate to evaluate." *Id.* at 621-22. The need to rely for administration of the testing program in *Skinner* on private railroads that "are not in the business of investigating violations of the criminal laws" would have made imposition of a warrant requirement in such a context impracticable. *Id.* at 623. And expectations of privacy were diminished by the railroad employees' participation in an industry "that is regulated pervasively." *Id.* at 627. See *Vernonia School Dist. 47J* v. *Acton*, 515

U.S. 646 (1995); *Nat'l Treasury Emp. Union* v. *Von Raab*, 489 U.S. 656 (1989). Cf. *Michigan Det. of State Police* v. *Sitz*, 496 U.S. 444 (1990); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

None of those considerations, however, is present here: In the context of traffic stops, there are *no* "special needs" that justify warrantless breath tests. The test is given in this setting *only* as an element of "the normal need for law enforcement." *Skinner*, 489 U.S. at 619. The officer who arrested petitioner, of course, *was* "in the business of investigating violations of the criminal laws." *Id.* at 623. And it surely is too late in the day to maintain that driving is such an intensively regulated activity that warrants are categorically unnecessary when drivers are compelled to submit to searches; any such rule would sweep away any number of this Court's decisions, not least *McNeely* and *Schmerber*. Cf. *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2454 ("Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor.'") (ellipses omitted) (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978)).

This context, moreover, is one where a warrant serves a clear and essential purpose. The application of blood alcohol tests plainly is "subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." *Maryland* v. *King*, 133 S. Ct. 1958, 1970 (2013) (citations and internal quotation marks omitted). Indeed, under the North Dakota and Minnesota statutes, the officer in the field has complete discretion both as to whether a test is administered at all and, if one is administered, whether the

test is to be of breath, blood, or urine. This is the paradigmatic situation where "discretion * * * could properly be limited by the 'interpolation of a neutral magistrate between the citizen and the law enforcement officer.'" *King*, 133 S. Ct. at 1969 (citation and brackets omitted). There is, as a consequence, no "special needs" justification for abrogation of the warrant requirement here.

d. The court below (Pet. App. 15a-16a), and the State in opposing review (Opp. Br. 15), suggested that, in light of the importance of combating impaired driving, it is "reasonable" as a general matter for law enforcement officers to undertake warrantless searches of drivers who have been arrested on probable cause for DUI. But if this is meant to invoke an exception that goes beyond the special needs doctrine, it is not a supportable argument. As the plurality explained in *McNeely*, "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." 133 S. Ct. at 1564. Specifically addressing "the compelling governmental interest in combating drunk driving," the plurality added: "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *Id*. at 1565. See *id*. at 1569 (Kennedy, J., concurring in part) ("The [plurality's] repeated insistence * * * that every case be determined by its own circumstances is correct, of course, as a general proposition.").

In fact, it appears the Court in *McNeely* was unanimous on this point: No Justice suggested that a theory of "general reasonableness" makes invocation of the

exigent-circumstances exception unnecessary to support a search in DUI cases. To be sure, Members of the Court disagreed about the proper *application* of that exception. But all accepted that the exigent-circumstances exception was the proper focus of the inquiry. See 133 S. Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part); *id*. at 1574 (Thomas, J., dissenting).

The State does not advance its argument in this regard by emphasizing, as the court below also noted (Pet. App. 12a-13a), that North Dakota's compelled-consent statute applies only to persons who have been arrested on probable cause. See Opp. Br. 12. That typically is the situation in test-refusal cases—and was in *McNeely* itself, where the Court rejected the State's argument "that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain a blood sample without a warrant." 133 S. Ct. at 1560. In fact, as we have shown (at 12-13, *supra*), it is fundamental that, probable cause and arrest or not, the interpolation of a neutral magistrate between individual and law enforcement officer is essential before a search is conducted. See *Riley*, 134 S. Ct. at 2482; *Schmerber*, 384 U.S. at 770.

That necessarily is so. By relying on the "general reasonableness" of DUI-related searches as a matter of public policy, the State and the court below depart from the principle of individualized assessment that lies at the core of Fourth Amendment doctrine. 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. And under those principles, the Court's "cases have historically recognized that the

warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency.'" *Riley*, 134 S. Ct. at 2493 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971)). That principle disposes of the State's argument for a "general reasonableness" exception to the warrant requirement in this case.

B. North Dakota's criminal refusal statute is indefensible under any theory of consent.

The court below, and the State in opposing review, also defended compelled-consent requirements on the theory that drivers, by the act of driving, have consented in advance to the administration of a chemical test. Although the elements of this theory are in some respects obscure, the argument appears to involve two discrete submissions: that drivers *actually* have given their consent to be tested; and that, even if drivers have not given their consent in the ordinary sense of the word, the State may *deem* them to have consented to the test because they chose to drive in a State that has a compelled-consent statute. These arguments, however, cannot be squared with any common-sense—or constitutionally effective—understanding of what it means to consent.

It is of course true that a person may consent to a search for which a warrant otherwise would be required. This "'jealously and carefully drawn' exception [to the warrant requirement] recognizes the validity of searches [undertaken] with the voluntary consent of an individual possessing authority" to give it. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (citations omitted). This Court's cases teach, however, that a valid consent must be "the product of an essentially free and unconstrained choice." *Schneckloth* v. *Bustamonte*, 412 U.S.

218, 225 (1973) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961)). That standard is not satisfied here.

1. The statute does not produce actual consent.

The traditional consent framework is familiar. When "the State attempts to justify a search [of a person] on the basis of [the person's] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. The concept of "voluntariness," in this context, asks whether the individual's expression of consent was "the product of an essentially free and unconstrained choice." *Id.* at 225 (quoting *Culombe*, 367 U.S. at 602).

Consent presents a question of fact, requiring "careful scrutiny of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226. Among the circumstances that the Court previously has found relevant to the general consent inquiry are the nature of the request for consent (*id.* at 247), the environment in which the request was made (*ibid.*), the individual's intelligence and education (*id.* at 226), whether the individual fully understood what was being asked of him (*United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980)), and whether the individual was "expressly told that [he] was free to decline to consent" (*ibid.*). When those factors indicate that the individual's will was overborne, his or her acquiescence in the search must be deemed nonconsensual.

Against this background, the suggestion that all drivers on North Dakota's roads *actually* consent to warrantless chemical tests is nonsensical. To begin with, there is nothing "voluntary" about the statutory

scheme. Section 39-20-01(1) states plainly that drivers on North Dakota's roads "*shall consent* * * * to a chemical test, or tests, of the blood, breath, or urine." (Emphasis added). As the Court has recognized repeatedly, "'the mandatory 'shall' normally creates an obligation.'" *Shapiro* v. *McManus*, 136 S. Ct. 450, 454 (2015) (ellipses omitted) (quoting *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). The statutory scheme thus provides that when an officer arrests an individual on suspicion of DUI, "[t]he 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." N.D. Code § 39-20-01(3)(a) (emphasis added). Consent is no consent at all if the person giving it is forbidden from declining, on pain of criminal punishment.

Nor does any other factor suggest that the statutory scheme passes the traditional totality of the circumstances test. It is simply implausible to think that drivers headed eastbound along Interstate 94 understand that consent to a chemical test is being requested and necessarily given simply by virtue of their cars crossing from Montana into North Dakota. See N.D. Code § 39-20-01(1) (consent follows from "operat[ion of] a motor vehicle on a highway" within the State).

Beyond that, a driver's "consent" in this context, even if understood to follow from the act of driving, would surely be the product of "duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. A motorist in North Dakota *must* consent to submit to a chemical test if he or she is to drive in the State. Yet the ability to drive is a practical necessity for most adults in our society; the majority of persons in the United States today are entirely dependent on their

ability to drive to commute to work, attend school, buy groceries, or visit a doctor.[6] That need is especially acute in places like North Dakota, where mass transit options are limited and people often must travel long distances for the necessities of everyday life. In these circumstances, someone who will be denied the ability to drive unless he or she agrees in advance to submit to a chemical search can hardly be said to have "'freely and voluntarily'" consented to such a search. *Id.* at 222 (citation omitted). We are not aware of any case involving remotely similar circumstances in which the Court has held consent to be voluntary.

In opposing review in *Birchfield*'s companion case, North Dakota nevertheless maintained that the consent compelled by its statute is voluntary in the constitutional sense; relying on *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the State insisted that an act is not coerced simply because a person is put to a "hard choice." *Beylund* Opp. Br.17; accord *id.* at 11-13, 16-18. That doubtless is so; not all "hard choices" involve coercion. The State's argument, however, misunderstands both *Neville* and the circumstances here.

Neville held that the *Fifth* Amendment did not preclude a State from using a motorist's test refusal against him in a subsequent DUI prosecution because neither of the options offered the defendant (taking a

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[6] The U.S. Census Bureau estimates that 86.1% of American workers—more than 100 million people—commute to work by car, truck, or van. U.S. Census Bureau, *Commuting in the United States: 2009*, perma.cc/4N9Y-8LBR. Accord U.S. Department of Transportation, *Beyond Traffic 2045: Trends and Choices*, perma.cc/N66B-BRUU ("Only about one quarter of jobs in low- and middle-skill industries in major metropolitan areas are accessible by a less-than-90-minute transit ride.").

blood test or having his refusal used against him at trial) raised constitutional concerns (under *Schmerber*, there is no Fifth Amendment bar to compelled blood testing). *Neville* therefore was not "a case where the State ha[d] subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice." 459 U.S. at 564. But the State here does just what South Dakota did not do in *Neville*: its compelled-consent law is designed to (not-so-subtly) coerce persons to surrender their Fourth Amendment rights by criminally punishing them if they fail to do so. Consent extracted through operation of that law, on condition of being denied the ability to engage in an activity that is essential for daily life, surely is "the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248.

2. The State may not "deem" consent to be given.

Perhaps appreciating the inapplicability of the traditional consent analysis here, the North Dakota court instead described its criminal refusal law as an "*implied* consent statute[]" (*Birchfield* Pet. App. 12a-13a), which imposes "*implied* consent requirements" on drivers (*id.* at 5a) and obligates law enforcement officers to give "*implied* consent advisor[ies]" to DUI suspects (*id.* at 9a) (all emphases added). "The essence of our implied consent laws," according to this line of reasoning, "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." *State* v. *Murphy*, 516 N.W.2d 285, 287 (N.D. 1994). Accord N.D. Code § 39-20-01(1) (all drivers on North Dakota roads are "deemed to have given consent" to chemical tests of their blood). Drivers on North Dakota roads therefore have "a diminished expectation of privacy with respect to enforcement of drunk driving laws, because [they

are] presumed to know the laws governing the operation of a motor vehicle," including the "implied consent laws." *Birchfield* Pet. App. 15a.

That line of reasoning is deeply flawed. As one state court recognized, "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances." *Williams* v. *State*, 167 So.3d 483, 491 (Fla. Ct. App. 2015). It also "would devour the *McNeely* rule and contradict *McNeely*'s general reasoning that these cases must be decided using a totality-of-the-circumstances approach." *Ibid*.[7]

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[7] Since this Court's decision in *McNeely*, "[t]he vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams*, 167 So.3d at 490 & n.4 (citing cases). These courts have recognized that "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). 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).

In fact, the only circumstance in which this Court has ever accepted a version of "implied" consent under the Fourth Amendment is in the administrative inspection context, a variant of the "special needs" exception to the warrant requirement. But that line of cases offers no support to the State.

"[T]he general administrative search doctrine" applies in a very narrow range of cases that involve businesses that "'have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise.'" *Patel*, 135 S. Ct. at 2454 (ellipses omitted) (quoting *Barlow's*, 436 U.S. at 313). Businesses engaged in "liquor sales, firearms dealing, mining, or running an automobile junkyard" are industries of this type. *Ibid.* "[W]hen an entrepreneur embarks upon such a business," the reasoning goes, "he has voluntarily chosen to subject himself to a full arsenal of governmental regulation," and thus "in effect consents to the restrictions placed upon him," including subjection to occasional random searches of the stock and premises of the business. *Ibid.* Such searches are deemed reasonable by the diminution of privacy expectations that follows from "a long tradition of close government supervision, of which any person who chooses to enter such a business [would] already be aware." *Barlow's*, 436 U.S. at 313.

This sort of "in effect consent[]" reasoning, however, has no application here.

First, as we have noted, driving is not a voluntary commercial enterprise, but a necessary aspect of daily living. Practically everywhere in the United States, and especially in heavily rural States like North Dakota, driving a car is necessary to get to town, commute to work, worship, see a doctor, or visit with

friends and family. The administrative inspection doctrine, by contrast, is based on the idea that the business person has "voluntarily chosen" to be subjected to warrantless searches. *Patel*, 135 S. Ct. at 2454. The same cannot be said when it comes to driving, which is an essential element of both personal and professional life in North Dakota and most everywhere else. Simply put, an individual's decision to drive on North Dakota's roads is not akin to an entrepreneur's decision to voluntarily open an automobile junkyard rather than a less regulated form of business.

Second, as we have suggested (at 17-18, *supra*), driving is not "closely supervised" in the sense required by the administrative inspection doctrine. Of course, to operate a vehicle in North Dakota (as in any other State), an individual must have a valid driver's license, vehicle registration, and automobile insurance—none of which must be issued by or in North Dakota. *E.g.*, N.D. Code § 39-19-03. And once on the road, operators must follow typical traffic laws. *E.g.*, N.D. Code § 39-10-01.1. But neither drivers nor their vehicles have historically been subject to warrantless "supervision and inspection" as part of that regulatory scheme. *Marshall*, 436 U.S. at 313.

Patel demonstrates why the administrative inspection rule accordingly cannot apply. At issue there was a criminal refusal statute just like the one here: Hotel operators were required to produce their hotel registries to police officers without a warrant, and "[a] hotel owner who refuse[d] to give an officer access to his or her registry [could] be arrested on the spot." 135 S. Ct. at 2452. Los Angeles attempted to justify its criminal refusal statute under the administrative inspection doctrine, pointing to regulations that required hotel operators to "maintain a license" and follow the rules of

the hotelier's road by "collect[ing] taxes, conspicuously post[ing] their rates, and meet[ing] certain sanitary standards." *Id.* at 2455. The Court roundly rejected that argument: "If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Ibid.* Outside the narrow range of businesses that historically have been subject to warrantless inspections as part of the administrative scheme itself, "business owners cannot reasonably be put to [a] choice" between allowing a search or facing criminal punishment. *Id.* at 2452. Just so here.

Third, even when the doctrine applies, "for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 135 S. Ct. at 2452. That is an essential condition, because there is otherwise "an intolerable risk that searches authorized by [the statutory scheme] will exceed statutory limits." *Id.* at 2452-2453. But by design, there is no precompliance review provided under North Dakota's criminal refusal law; the officer in the field decides whether to demand a test, refusal of which triggers virtually automatic criminal penalties.

Finally, as with other special needs searches, this Court has never sanctioned administrative searches as a tool for general crime control. On the contrary, administrative inspection laws have been met with approval only where "special needs make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is *distinguishable* from the general interest in crime control." *Patel*, 135 S. Ct. at 2452 (citations, brackets, and quotation marks omitted; emphasis added).

Neither condition is satisfied here. North Dakota's criminal refusal statute came into play in this case only after a police officer placed petitioner under arrest. See N.D. Code 39-20-01(2). The act of arrest presupposes that the officer has probable cause to believe that an offense was committed (see *Gerstein* v. *Pugh*, 420 U.S. 103, 111 (1975)); thus, requiring officers to obtain a warrant, whether "by telephone or other reliable electronic means" (N.D. R. Crim. P. 41(c)(2)), before conducting a search generally would not be impracticable. And given that the individual will already be in custody and off the road, there is no public safety rationale to justify the search—its sole purpose is to gather evidence of a suspected crime to facilitate a later prosecution.

In sum, North Dakota's criminal refusal statute is not justifiable on consent grounds. The statute cannot be understood to extract actual consent from drivers under the totality of the circumstances, nor can it be understood to extract implied consent under the Court's administrative inspection cases. Here, as in *Patel*, car drivers "cannot reasonably be put to [a] choice" between acquiescing to a breath, blood, or urine search or accepting criminal punishment. 135 S. Ct. at 2452.

C. North Dakota may not condition permission to drive on surrender of the right to resist an unconstitutional search.

Against this background, we have shown that there is no *actual* consent to be tested in this case and that the State may not *deem* consent to be present. That being so, the real basis for the North Dakota law must be, not that drivers give voluntary consent, but simply that the States may condition permission to drive on drivers' mandatory advance surrender of their Fourth

Amendment right to resist otherwise unconstitutional searches. And in fact, that rationale was an important element of the North Dakota Supreme Court's decisions upholding application of the compelled-consent statutes; the court opined in *Beylund* that "the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable." *Beylund* Pet. App. 12; see *id.* at 17a-19a. Such a theory cannot sustain North Dakota's compelled consent law.

1. The State may not criminalize the assertion of Fourth Amendment rights.

To begin with, the court below did not apply the proper analytical framework to the problem in this case. In our view, the Constitution categorically precludes States from attaching criminal penalties to the assertion of an otherwise applicable Fourth Amendment right, whether or not the State purports to make acceptance of those penalties a condition for awarding a license or other benefit.

That is the holding of decisions like *Patel*. There, a license was required to operate a hotel, just as it is here required to drive. See *Patel*, 135 S. Ct. at 2455. This Court could have said there, as the court below said here, that the government conditioned grant of the license to operate a hotel on the hotel owner's submission to a warrantless search. But the Court did not look at the matter in those terms. It instead inquired whether the nature of the hotel owners' activities was such as to make a warrant unnecessary under ordinary Fourth Amendment analysis. Finding no applicable exception to the warrant requirement (see *id.* at 2452-53), the Court held flatly that "[a] hotel owner who refuses to give an officer access to his or her registry" "cannot reasonably be put to the choice" between

submission to the search and "arrest[] on the spot." *Id.* at 2452.

Thus, according to *Patel*, a government may not criminalize the refusal to submit to a warrantless search in the absence of an independently applicable exception to the Fourth Amendment's warrant requirement. And *Patel* was not the first time the Court had so held. In *Camara*, a San Francisco city ordinance authorized city employees, "upon presentation of proper credentials," to enter any building in the city without a warrant. 387 U.S. at 526. Under the ordinance, "refusal to permit an inspection [was] itself a crime, punishable by fine or even by jail sentence." *Id.* at 531; see *id.* at 527 n.2 (detailing criminal penalties). Camara was convicted of a crime for violating this ordinance when he refused to permit warrantless inspection of his apartment. This Court ordered the conviction set aside, holding that Camara "had a constitutional right to insist that the inspectors obtain a warrant to search" and that he "may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.[8] And the Court reached an identical conclusion in *See* v. *City of Seattle*, 387 U.S. 541 (1967), where it held that the defendant "may not

[8] Although *Camara* involved a suspicionless search rather than one based on probable cause, what made the search defective was the lack of a warrant or other equivalent justification; the Court took issue with the search not because it was suspicionless but because it was warrantless. Indeed, the Court in *Camara* overruled a prior decision, *Frank* v. *Maryland*, 359 U.S. 360 (1959), despite the fact that the ordinance upheld in *Frank* required the inspector to "have cause to suspect" a violation before demanding entry without a warrant. *Camara*, 387 U.S. at 529 n.4 (citing *Frank*, 364 U.S. at 264, 265). By its own terms, then, *Camara* applies whether or not the State had cause to initiate the search.

be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry" into his warehouse. *Id*. at 546.

That was so even though the Court could have said that the cities in those cases had attached submission to a warrantless search as a condition on the right to live, or operate a warehouse, in the jurisdiction. The same understanding applies fully here: Petitioner may not constitutionally be convicted for refusing to submit to a blood test that is unsupported by a warrant or a valid warrant exception. If anything, the Fourth Amendment interests at stake here are more vital than they were in *Patel* or *Camara*, which involved routine inspections rather than searches that police officers sought to undertake as an element of a criminal investigation.

Of course, there may be circumstances when *compelling* justifications permit the government to override constitutional protections. See, *e.g.*, *Skinner*, 489 U.S. at 633. But this is not such a case. The Court has held, in *McNeely*, that a warrantless search in exactly this context fails to meet the standard of reasonableness at all. That being so, the State's reasons for imposing criminal penalties to force submission to a warrantless test are not in any sense "compelling."

2. The State may not condition the grant of a benefit on submission to criminal penalties for failure to surrender a constitutional right.

Although that is enough to dispose of the State's argument, it bears emphasis that the holding below is wrong on its own terms. If submission to a search or to criminal test-refusal penalties is understood to be a condition that North Dakota attaches to the ability to

drive, such a compelled surrender of a constitutional right violates the doctrine of unconstitutional conditions.

a. This Court repeatedly has recognized "an overarching principle, known as the unconstitutional conditions doctrine, that 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). "In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67 (1988). The short of it is that the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

As the Court has long recognized, the "foundational principle" (*Autor* v. *Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014)) underlying this doctrine is straightforward: It would be a "palpable incongruity" to strike down legislation that expressly strips a person's constitutional rights, but to uphold legislation "by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost & Frost Trucking Co.* v. *R.R. Comm'n*, 271 U.S. 583, 593 (1926). If governments had the power to so condition the exercise of rights, the "guarantees embedded in the Constitution" could be "manipulated out of existence." *Id.* at 594.

The unconstitutional conditions doctrine gives effect to this fundamental insight, holding that what the Constitution "precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 78 (1990). The doctrine is "well-settled" (*Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994)), has been accepted by every Member of the Court (*Koontz*, 133 S. Ct. at 2594; *id.* at 2603 (Kagan, J., dissenting)), and has been applied "in a variety of contexts" (*id.* at 2594 (citing cases)).[9]

This is a paradigm case for application of the unconstitutional conditions doctrine. North Dakota is applying "the type of coercion that the unconstitutional conditions doctrine prohibits"—denial of permission to drive—to force drivers to "cede [the] constitutional right" to resist a warrantless search. *Koontz*, 133 S. Ct. at 2594, 2596. Of course, it may be true that the State need not permit anyone to drive, but that is no answer to the constitutional claim here; the Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Id.* at 2596 (citing cases). "Virtually all of [the Court's] unconstitutional conditions cases involve a gratuitous governmental benefit of some kind," but the

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[9] The North Dakota Supreme Court questioned whether the unconstitutional conditions doctrine applies to the Fourth Amendment. *Beylund* Pet. App. 13a-14a. But it is not evident why a doctrine that applies in "a variety of contexts" and rests on a general principle limiting government's authority to accomplish otherwise unconstitutional goals should be inapplicable to any constitutional provision. Cf. *Patel*, 135 S. Ct. 2449 (ruling that facial challenges under the Fourth Amendment "are not categorically barred or especially disfavored").

"greater authority" to deny a benefit altogether "does not imply a lesser power to condition [grant of the benefit] on petitioner's forfeiture of his constitutional rights." *Ibid.*

That principle is controlling here. In North Dakota, persons must either abstain from driving or "consent" in advance to exposure to heavy criminal penalties if they later refuse a chemical test—even if that test is unsupported by a warrant or a recognized exception to the warrant requirement. Like a city that uses its monopoly on land use permits to impose unconstitutional conditions on homeowners (*e.g.*, *Nollan* v. *California Coastal Com'n*, 483 U.S. 825, 837 (1987)) or a State that conditions government employment on refraining from protected speech (*e.g.*, *Perry* v. *Sindermann*, 408 U.S. 593 (1972)), these States use their regulatory authority over driving to coerce the surrender of constitutional rights.

b. There can be no doubt that the threatened denial of the right to drive is coercive in the relevant sense. The Court has recognized in related contexts that coercion exists where "pressure turns into compulsion." *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). To determine the coerciveness of a condition, the Court has considered whether the condition puts "substantial pressure" on the individual not to exercise his or her constitutional right. *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981); see, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (coercion where government "pressure" that is "unmistakable" "operate[s] * * * to inhibit or deter" exercise of constitutional rights); *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (striking down a state law that conditioned eligibility for a tax exemption on willingness to sign a loyalty

oath because the regime "necessarily will have the effect of coercing the claimants to refrain from the proscribed speech"). Cf. *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986) (rejecting a challenge to termination of benefits where it was "exceedingly unlikely" individuals would change their behavior to maintain benefit levels). Such conditions "inevitably deterred or discouraged" the exercise of a constitutional right and "thereby threatened to 'produce a result which the State could not command directly.'" *Sherbert*, 374 U.S. at 405 (quoting *Speiser*, 357 U.S. at 526).

That sort of coercive pressure surely is present in this case. As we have explained, unlike some government benefits, driving is a necessity for millions of people who cannot earn a livelihood or participate meaningfully in society without it. Drivers' license suspension or revocation therefore involves more than the loss of a privilege; it effectively precludes many people from earning a living or engaging in the necessities of daily life. While "a refusal to *fund* protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity" (*Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980) (emphasis added)), the complete incapacitation that may result from denial of an essential means of transportation surely is coercive. "Such interference with constitutional rights is impermissible." *Perry*, 408 U.S. at 597.

c. In addition, in applying the unconstitutional conditions doctrine, the Court in some circumstances—where grant of the benefit might "impose costs on the public" (*Koontz*, 133 S. Ct. at 2595)—has determined that the propriety of a government condition may turn on whether there is a "'nexus'" and "rough proportionality'" between the state-provided benefit and the condition imposed. *Ibid*. (citations omitted). See *Dolan*,

512 U.S. at 386; *Nollan*, 483 U.S. at 837. Where such nexus and proportionality are present, it is less likely that the government is attempting to "leverage its legitimate interest" to achieve "[e]xtortionate demands." *Koontz*, 133 S. Ct. at 2495.[10]

Here, that necessary connection is absent. In this case, the benefit offered by the government is the ability to drive; the condition is the surrender of the Fourth Amendment right to resist a warrantless test *on pain of the imposition of criminal penalties for refusal*. Even granting that a nexus exists between compelled-consent laws and the prevention of drunk driving—and even assuming that States permissibly could impose civil penalties such as license suspension for test refusal, a question not presented here—the North Dakota *criminal* test-refusal penalties fail the requirement of proportionality. Although "rough proportionality" does not require a "precise mathematical calculation," it does involve a more searching

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[10] Although the Court has applied this germaneness inquiry principally in Takings Clause cases, the inquiry may have some bearing in other contexts. In explaining its "special application" of the unconstitutional conditions doctrine in the Fifth Amendment setting, the Court relied on two competing realities of the land-use permitting process: that land-use permit applicants are "especially vulnerable to the types of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit" and that, because "many proposed land uses threaten to impose costs on the public that dedications of property can offset," the State has an interest in regulating the permitting process. *Koontz*, 133 S. Ct. at 2594, 2595. Each of these realities is present, to some degree, in cases like this one: government exercises complete authority over the ability to drive on public roadways, so that it can easily pressure drivers into giving up their Fourth Amendment rights; yet irresponsible driving behaviors may impose significant public costs.

review than an equal protection rational-basis inquiry, looking to an "individualized determination that the [condition] is related both in nature and extent to the impact of the [privilege]." *Dolan*, 512 U.S. at 391. And criminal penalties for test refusal are clearly disproportionate here, for a number of reasons.

First, even assuming that the State has an interest in the warrantless chemical testing of persons suspected of DUI, there is at best a very attenuated nexus, and *no* proportionality, between the benefit (the right to drive) and the condition (criminal fines and imprisonment for test refusal). There is an insufficient state interest in subjecting persons to such penalties as a condition on their ability to drive—penalties that are imposed, after all, not for driving under the influence but for refusal to be subjected to a warrantless search. In fact, we are not aware of *any* case where this Court has upheld a State's imposition of criminal sanctions to penalize an individual's refusal to surrender a constitutional right. Cf. *Patel*, 135 S. Ct. at 2452.

Second, imposition of criminal penalties for test refusal does little to promote the government's interest. Criminalizing test refusal is unlikely to add any deterrent effect to the already harsh penalties the law places on drunk driving. And as we demonstrate below (at 41-47, *infra*), there are approaches that are more effective than criminal compelled-consent laws both at obtaining evidence for the prosecution of driving under the influence and at deterring impaired driving in the first place, including expedited warrant procedures and an extensive set of restrictions that prevent impaired drivers from getting behind the wheel. In such circumstances, where the chilling effect on the exercise of a constitutional right is "unnecessary and therefore excessive," the condition is too removed from the

benefit and cannot be supported. *United States* v. *Jackson*, 390 U.S. 570, 581 (1968) ("Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." (citation omitted)).

d. For its part, the court below made no serious attempt to explain why the unconstitutional conditions doctrine does not apply. Its principal response on the point was the suggestion that, "to proceed with a claim of unconstitutional conditions, the defendant must show the criminal refusal statute authorizes an unconstitutional search." *Beylund* Pet App. 15a; see *Birchfield* Br. in Opp. 14 ("[f]or [petitioner] to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he has impliedly consented to it when he obtained his driver's license"). But as we demonstrate above, that is just what North Dakota's law does when it punishes a driver for failing to submit to a search in the absence of a warrant or an exception to the warrant requirement; the driver is punished for that refusal rather than tested hardly saves the State's scheme.

The State also has contended that this Court approved compelled-consent statutes like North Dakota's in *McNeely*, where it observed that "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 blood alcohol testing if arrested or otherwise detained on suspicion of drunk driving. Under these laws, withdrawal of consent may result in the motorist's driver's license being "suspended or revoked" or use of the motorist's refusal to take the test "as evidence against him in a subsequent criminal prosecution." 133 S. Ct. at 1566. See *Birchfield* Br. in Opp. 6, 11-12, 14.

The state laws described in *McNeely*, however, are qualitatively different from the *criminal* compelled-consent statutes at issue here. The laws noted in *McNeely* impose administrative penalties for test-refusal, simply suspending or revoking the license conferred by the State if the driver refuses to submit to a search.[11] Even assuming that those laws apply in circumstances where nonconsensual searches could not constitutionally be conducted, and assuming further that the laws do not run afoul of the unconstitutional conditions doctrine because they reflect a "'nexus' and 'rough proportionality'" between the state-provided benefit (the right to drive) and the penalty imposed (suspension of that right) (*Koontz*, 133 S. Ct. at 2595 (citations omitted)), it should be obvious that there is a material difference between license-revocation statutes and those that lead to the essentially automatic imposition of serious criminal penalties. As we have explained, criminal penalties have effects that are attenuated from and disproportionate to the State's interest, in ways that simple license revocation does not.

D. Criminal refusal laws are less effective in combating impaired driving than are many constitutional, alternative remedies.

Finally, the State cannot save its statute by arguing that compelled-consent laws contribute to the

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[11] As *McNeely* noted, States also have allowed test refusal to be used as evidence of guilt in a prosecution for driving while impaired. But at least as applied in *Neville*, these statutes raise no unconstitutional-conditions concern because they do not require surrender of *any* constitutional right. See *Neville*, 459 U.S. at 563. Here, in contrast, the State requires surrender of the Fourth Amendment right to resist a warrantless search from persons who would drive in North Dakota.

fight against impaired driving. See *Birchfield* Opp. Br. 7-8; Pet. App. 12-13. Even if compelled-consent laws were effective in advancing the State's purpose, that would not justify departure from fundamental constitutional requirements; that "[p]rivacy comes at a cost" is not a sufficient reason to disregard the mandate of the Fourth Amendment. *Riley*, 134 S. Ct. at 2493. But the fact is, the State's submission is wrong on its own terms: As the Court observed in rejecting a similar contention in *McNeely*, there is no evidence that precluding use of compelled-consent laws "will undermine the governmental interest in preventing and prosecuting drunk-driving offenses." 133 S. Ct. at 1566. This is so for several reasons.

First, compelled-consent laws like North Dakota's simply are ineffective tools with which to combat impaired driving. In *McNeely*, the Court noted that it was "aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them." 133 S. Ct. 1567. In fact, the evidence is to the contrary. Prosecutors obtain convictions for drunk driving at about the same rate regardless of whether or not blood alcohol concentration ("BAC") test evidence was available. Thus, results from a National Highway Traffic Safety Administration study of five different jurisdictions, some with criminal compelled-consent laws and some without, "did not indicate a clear relationship between refusing a BAC test and the probability of conviction for DWI/DUI." Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions*, DOT HS 811 551, at i (2012), perma.cc/LN5Q-K85Z. Indeed, Bernalillo County, New Mexico, a jurisdiction with no criminal compelled-consent law, had a 2% *higher*

impaired-driving conviction rate for test refusers than for non-refusers. *Id.* at 41.

Second, as the Court also noted in *McNeely*, legal and technological developments, including procedures adopted by "[w]ell over a majority of States" that allow for remote warrant applications, "enable police officers to secure warrants more quickly." 133 S. Ct. at 1562.[12]

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[12] Citing to: Ala. Rule Crim. Proc. 3.8(b) (2012-2013); Alaska Stat. § 12.35.015 (2012); Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(D), (E) (West 2010); Ark. Code Ann. § 16-82-201 (2005); Cal. Penal Code Ann. § 1526(b) (West 2011); Colo. Rule Crim. Proc. 41(c)(3) (2012); Ga. Code Ann. § 17-5-21.1 (2008); Haw. Rules Penal Proc. 41(h)-(i) (2013); Idaho Code §§ 19-4404, 19-4406 (Lexis 2004); Ind. Code § 35-33-5-8 (2012); Iowa Code §§ 321J.10(3), 462A.14D(3) (2009) (limited to specific circumstances involving accidents); Kan. Stat. Ann. §§ 22-2502(a), 22-2504 (2011 Cum. Supp.); La. Code Crim. Proc. Ann., Arts. 162.1(B), (D) (West 2003); Mich. Comp. Laws Ann. § 780.651-(2)-(6) (West 2006); Minn. Rules Crim. Proc. 33.05, 36.01-36.08 (2010 and Supp.2013); Mont. Code Ann. §§ 46-5-221, 46-5-222 (2012); Neb. Rev. Stat. §§ 29-814.01, 29-814.03, 29-814.05 (2008); Nev. Rev. Stat. § 179.045(2), (4) (2011); N.H. Rev. Stat. Ann. § 595-A:4-a (Lexis Supp. 2012); N.J. Rule Crim. Proc. 3:5-3(b) (2013); N.M. Rules Crim. Proc. 5-211(F)(3), (G)(3) (Supp. 2012); N.Y. Crim. Proc. Law Ann. §§ 690.35(1), 690.36(1), 690.40(3), 690.45(1), (2) (West 2009); N.C. Gen. Stat. Ann. § 15A-245(a)(3) (Lexis 2011); N.D. Rules Crim. Proc. 41(c)(2)-(3) (2012-2013); Ohio Rules Crim. Proc. 41(C)(1)-(2) (2011); Okla. Stat. Ann., Tit. 22, §§ 1223.1, 1225(B) (West 2011); Ore. Rev. Stat. § 133.545(5)-(6) (2011); Pa. Rules Crim. Proc. 203(A), (C) (2012); S.D. Codified Laws §§ 23A-35-4.2, 23A-35-5, 23A-35-6 (2004); Utah Rule Crim. Proc. 40(l) (2012); Vt. Rules Crim. Proc. 41(c)(4), (g)(2) (Supp.2012); Va. Code Ann. § 19.2-54 (Lexis Supp.2012); Wash. Super. Ct. Crim. Rule 2.3(c) (2002); Wis. Stat. § 968.12(3) (2007-2008); Wyo. Stat. Ann. § 31-6-102(d) (2011); see generally 2 W. LaFave, Search and Seizure § 4.3(b), pp. 511-516, and n. 29 (4th ed. 2004) (describing oral search warrants and collecting state laws).

For example, Arizona has achieved success in combating drunk driving through its pioneering use of electronic warrants, which can take fewer than fifteen minutes to process. Diana Hegyl, *iCISng eSearch Warrant Application*, Jud. Branch News 6 (Mar. 2013), perma.cc/BR6L-EB3S. In 2012 alone, Maricopa County Courts processed 10,510 electronic search warrants for the city of Phoenix. Although Arizona requires a warrant to compel a blood or breath BAC test (see *State* v. *Butler*, 302 P.3d 609, 613 (2013)) and does not have a criminal compelled-consent law, that State has a lower reported incidence of drunk driving than the national average. *Drunk Driving US Map*, Ctrs. for Disease Control & Prevention (Jan. 21, 2015), perma.cc/P5KM-J2ZZ. And since *McNeely*, States have continued to expand their use of electronic warrants, a trend we can expect to continue. See, *e.g.*, Fla. Stat. Ann. § 933.07 (West 2015) (allowing use of electronic warrants); *Notice to the Bar*, New Jersey Supreme Court (Nov. 14, 2013), perma.cc/B5BY-QF84 (authorizing the expanded use of electronic and remote "warrants for nonconsensual blood testing in all driving while intoxicated (DWI) cases where no indictable charge is anticipated").

It is notable, moreover, that police officers themselves support the reliance on warrants to obtain BAC tests. A study of DUI arrests in Arizona, Michigan, Oregon, and Utah, which all experimented with remote warrants, found that "[l]aw enforcement officers inter-

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Missouri requires that search warrants be in writing and does not permit oral testimony, thus excluding telephonic warrants. Mo. Ann. Stat. §§ 542.276.2(1), 542.276.3 (West Supp.2012). State law does permit the submission of warrant applications 'by facsimile or other electronic means.' § 542.276.3." *McNeely*, 133 S. Ct. at 1562 n.4.

viewed in case study States generally supported the use of warrants" and "are willing to take the additional time that the warrant process requires in order to obtain BAC evidence." Nat'l Highway Traffic Safety Admin., *Use of Warrants for Breath Test Refusal: Case Studies*, Dep't of Transp. DOT HS 810 852 at vi-vii (2007), perma.cc/3XKN-YA2K. With simple instructions on how the warrant process works, "almost all drivers * * * cooperate, so that officers rarely need to use force." *Id.* at 11. See *McNeely*, 133 S. Ct. at 1567 (NHTSA study found that the use of warrants "can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence") A follow-up study of "[t]hree counties in North Carolina [that] established the use of warrants in cases of breath test refusals" found that "police officers in these participating counties report that the 15 to 60 minutes of added processing time needed to obtain a warrant and draw blood was time well spent" because "time securing evidence saved time spent in court." Nat'l Highway Traffic Safety Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina*, Dep't of Transp. DOT HS 811 461 at i, 9 (2011), perma.cc/3XKN-YA2K.

Third, North Dakota underutilizes many alternative approaches that plainly comport with the Constitution and are more effective than compelled-consent laws in combating drunk driving. In its review of twenty-nine strategies for addressing impaired driving, the National Highway Traffic Safety Administration gave BAC test-refusal penalties a mediocre grade for effectiveness (three out of five stars). Nat'l Highway Traffic Safety Admin., *Countermeasures that Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices*, Dep't of Transp., DOT HS 811 727 at 23-24 (7th ed. 2013), perma.cc/C5N3-LQJ6.

NHTSA found the following *nineteen* strategies to be *more*, or equally as, effective as compelled-consent requirements: (1) high-visibility sobriety checkpoints; (2) alcohol problem assessment and treatment; (3) alcohol interlocks; (4) alcohol screening and intervention; (5) minimum drinking-age laws; (6) high-visibility saturation patrols; (7) passive alcohol sensors; (8) DWI courts; (9) limits on diversion and plea agreements; (10) DWI offender monitoring; (11) lower BAC limits for repeat offenders; (12) open-container laws; (13) high-BAC sanctions; (14) integrated enforcement; (15) court monitoring; (16) mass-media campaigns; (17) zero-tolerance law enforcement for under-twenty-one drivers; (18) alcohol-vendor compliance checks; and (19) other laws to enforce the drinking age. *Ibid*.

North Dakota, however, has not made full use of all of these effective and constitutional strategies. For example, North Dakota could require the installation of alcohol ignition interlocks for convicted drunk drivers, to prevent them from driving when the device detects the presence of alcohol. "While installed, interlocks are effective in reducing recidivism by a median of 67 percent." Nat'l Highway Traffic Safety Admin., *Evaluation of State Ignition Interlock Programs: Interlock Use Analyses from 28 States*, 2006-2011, Dep't of Transp., DOT HS 812 145, at vi (2015), perma.cc/P6AG-4HUG. "[Twenty] states (and 4 California counties) have made ignition interlocks mandatory or highly incentivized for all convicted drunk drivers." *Drunk Driving Laws*, Governors Highway Safety Ass'n (Dec. 2015), perma.cc/2M39-CULF. Nevertheless, North Dakota does not mandate installation of alcohol ignition interlocks, even for repeat offenders. N.D. Code § 39-06.1-11.

Similarly, because "68 percent of drivers who had been drinking and were involved in fatal crashes had a blood alcohol content of .15 or greater," at least two dozen States deter particularly dangerous drunk driving by providing for enhanced penalties when drivers have BAC levels of 0.15% or higher. *Increased Penalties for High Blood Alcohol Content*, Nat'l Conference of State Legislators (Oct. 14, 2015), perma.cc/-2ZUD-TKS8. North Dakota's enhanced penalties, on the other hand, are applicable only at a BAC of 0.18% or higher. N.D. Code § 39-08-01.

With such a wide array of constitutional and effective strategies for combating drunk driving at its disposal, North Dakota does not need criminal compelled-consent laws to deter and prosecute drunk drivers. In saying this, we of course recognize that "'[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeely*, 133 S. Ct. at 1565 (quoting *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990)). That, however, is why States have developed their extensive arsenal of constitutional approaches that can be used to address the problem—an arsenal that includes expedited warrant procedures, and that need not include criminal penalties for drivers who assert a fundamental constitutional right. As the Court has said in a closely analogous situation, the "answer to the question of what police must do before [requiring a test of a driver's blood, breath, or urine] is accordingly simple—get a warrant." *Riley*, 134 S. Ct. at 2495. That, and not the constitutionally dubious approach of criminalizing constitutionally protected conduct, is the proper answer here.

CONCLUSION

The decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted.

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