No. 14-1468

In The
Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

North Dakota is one of 13 states that make it an offense for a motorist, who has already granted implied consent to submit to chemical testing, and who has been arrested for driving under the influence, to refuse to submit to a chemical test of her blood, breath, or urine to detect the presence of alcohol. The question presented here is:

Whether North Dakota's refusal statute violates a motorist's rights under the Fourth Amendment when the motorist has impliedly consented to a chemical test but refuses to submit to a chemical test and no test is administered.

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JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions contained in this Petition, the following statutory provision is also relevant to this case:

North Dakota law, N.D.C.C. § 39-20-01 (2013) provides in relevant part:

> 1. Any 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 is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath or urine. As used in this chapter, the word "drug" means any drug or substance or combination of drugs or substances which renders an individual incapable of safely driving, and the words "chemical tests" or "chemical analysis" mean any test to determine the alcohol concentration or

presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, approved by the director of the state crime laboratory or the director's designee under this chapter.

2. The test or tests must be administered at the direction of a law enforcement officer only after placing the individual, except individuals mentioned in section 39-20-03, under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest. The law enforcement officer shall determine which of the tests is to be used.

3. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; 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; and that refusal of the individual to submit to the test directed by the law enforcement

> officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges. The law enforcement officer shall determine which of the tests will be used. . . .

STATEMENT OF THE CASE

On October 10, 2013, petitioner Danny Ray Birchfield drove off of Morton County Road 139 into a ditch. North Dakota Highway Trooper Tarek Chase arrived on the scene to observe Birchfield attempting to drive out of the ditch. Trooper Chase went to Birchfield's vehicle to provide assistance. When Trooper Chase approached Birchfield he smelled a strong odor of alcohol and saw that Birchfield's eyes were bloodshot and watery. And when Trooper Chase initiated conversation, he noticed that Birchfield's speech was slurred. Trooper Chase asked Birchfield to come to his vehicle; he was unsteady on his feet trying to get to the patrol car. All of these factors led Trooper Chase to believe that Birchfield was intoxicated. At that point Trooper Chase asked Birchfield if he would be willing to submit to field sobriety testing. Birchfield agreed. Pet. App. at 2a.

Birchfield failed or performed poorly on all four tests Trooper Chase gave – the Horizontal Gaze Nystagmus, the alphabet test, the counting backwards counting test, and the finger count test. At that point Trooper Chase read Birchfield the implied-consent

advisory – *i.e.*, told Birchfield that under state law, any person who drives a car is deemed to have consented to submitting to chemical tests to measure his or her blood alcohol level – and asked him to take a preliminary breath test. Birchfield agreed to, and produced, a breath alcohol sample, which showed a .254 breath alcohol concentration. Trooper Chase then placed Birchfield under arrest for Driving under the Influence, read him his *Miranda* rights, and then read the implied-consent advisory a second time. At that point, Birchfield stated, "I'm going to refuse." Trooper Chase took this as a refusal to submit to additional tests and issued a criminal citation for refusal.

Birchfield was charged with refusing to submit to a chemical test.[1] Birchfield filed a motion to dismiss the criminal charge based on his refusal to submit to a chemical test and to find the implied-consent law unconstitutional. The District Court denied the motion, Pet. App. 22a-28a, after which Birchfield entered into a conditional plea of guilty and reserved his right

[1] Birchfield asserts that "[a] first refusal to consent to a chemical test qualifies as a misdemeanor under N.D.C.C. § 39-08-01(1), while subsequent offenses may qualify as a felony." Pet. 3. That statement does not fairly convey how the law operates. Under N.D.C.C. § 39-08-01(4), first and second violations under § 39-08-01 in a seven-year period are class B misdemeanors, a third offense in a seven-year period is a class A misdemeanor, and only a fourth and subsequent offense is a class C felony.

to appeal the district court's order denying his motion to dismiss. Pet. App. at 2a-2b.

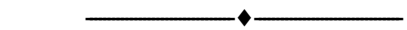
On appeal, the North Dakota Supreme Court rejected Birchfield's constitutional argument and affirmed the District Court. Pet. App. 1a-18a.

The North Dakota Supreme Court specifically articulated that "implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe that the defendant is under the influence, and the defendant will already have been arrested on the charge." Pet. App. 12a-13a.

The court considered this Court's opinion in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Pet. App. 7a-9a. The court further considered the decisions of other state courts that considered refusal statutes after *McNeely*.[2] Pet. App. 9a-12a. The court also considered, and distinguished, *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523

[2] Birchfield asserts that the North Dakota Supreme Court relied on the Minnesota intermediate appellate decision in *State v. Bernard*, 844 N.W.2d 41 (Minn. Ct. App. 2014), for the proposition that the criminal-refusal statute is constitutional whenever an officer could have secured a warrant. Pet. 5. That is not correct. This same argument was made in a subsequent case before the North Dakota Supreme Court and the court explained, "our decision in *Birchfield* was not based solely on the Minnesota Court of Appeals decision in *Bernard*." *State v. Kordonowy*, 867 N.W.2d 690, 693 (N.D. 2015). The North Dakota Supreme Court here was simply setting out the Minnesota appellate court's reasoning.

(1967). Pet. App. 12a-13a. Then, after explaining the State's preference for drivers to submit to chemical testing, the court found "[t]he criminal refusal statute satisfies the general reasonableness requirement of the Fourth Amendment." Pet. App. 16a.



REASONS FOR DENYING THE PETITION

In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), this Court said that "States have a broad range of tools to enforce their drunk-driving laws and to secure [Blood Alcohol Content] evidence without undertaking warrantless nonconsensual blood draws." *Id*. at 1566. The very first example the Court offered was "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id*. And, of particular relevance here, the Court explained that "[s]uch laws impose significant consequences when a motorist withdraws consent," such as revoking the driver's license and using "the motorist's refusal to take a BAC test as evidence against him in a subsequent criminal prosecution." *Id*. Every State has enacted such a law, and these laws have long withstood legal attack. *Id*. (citing *South Dakota v. Neville*, 459 U.S. 553 (1983)).

In 13 states, the "significant consequence[ ]" of a motorist's withdrawal of consent, after he is arrested on probable cause of committing a drunk-driving

offense, is that the withdrawal is an independent offense, and in North Dakota, it is only a misdemeanor offense, unless it is for a fourth violation of N.D.C.C. § 39-08-01. Some motorists have challenged those laws, but the appellate courts – spanning cases before and after *McNeely* – have uniformly rejected those challenges. This Court's intervention is therefore not needed, and certiorari is not warranted.

I. The North Dakota Supreme Court's decision does not conflict with any decisions by other state or federal appellate courts.

Birchfield tries to create the specter of a conflict among the Courts (Pet. 11), but as his counsel concede in the reply brief in *Bernard v. Minnesota*, No. 14-1470 (filed June 16, 2015), no direct conflict exists. *See* Reply Brief, *Bernard v. Minnesota*, No. 14-1470, at 5 (Minnesota's "observ[ation] that there is no square conflict" is "correct"); *id*. at 6 ("Even absent a direct conflict in the lower courts, these erroneous rulings . . . should be corrected by this Court."); *id*. ("[E]xpress conflict or not, ...").

The reason for counsel's concession is plain: All the appellate courts that have addressed challenges to laws similar to North Dakota's implied-consent and criminal-refusal statutes have rejected them. For example, in *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *pet. for cert. filed*, No. 14-1470, the Minnesota Supreme Court upheld Minnesota's refusal statute. After police arrested Bernard for driving

while impaired, he refused to take a breath test. Bernard alleged that Minnesota's test-refusal statute violated substantive due process and the Fourth Amendment, but the court disagreed. The court reasoned that a breath test of Bernard would have fallen with the search-incident-to-arrest exception of the Fourth Amendment. *Id.* at 766. The court then rejected Bernard's substantive due process claim, ruling that because a warrantless search of Bernard's breath incident to his arrest would have been constitutional, he had no fundamental right to refuse a constitutional search. *Id.* at 773.

The Ninth Circuit and the intermediate courts of appeals of Alaska, Hawaii, and Virginia have reached the same conclusion. The Alaska Court of Appeals and the Ninth Circuit both addressed a challenge by one Peter Burnett to Alaska's criminal-refusal statute. Burnett pleaded no contest to a charge of refusing a breathalyzer test, but reserved the right to challenge the constitutionality of the statute on appeal. On direct review, the Alaska Court of Appeals rejected his challenge after concluding that a breathalyzer is a reasonable search incident to arrest. *Burnett v. Municipality of Anchorage*, 678 P.2d 1364 (Ala. Ct. App.), *cert. denied*, 469 U.S. 859 (1984). The Ninth Circuit later rejected Burnett's request for habeas relief, holding that there is no Fourth Amendment right to refuse to submit to testing. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986). The court stated, "No rights were relinquished here, however, because there is no Fourth Amendment

right to refuse a breathalyzer examination." *Id*. at 1450.

The Hawaii Court of Appeals upheld that state's criminal-refusal statute in *State v. Yong Shik Won*, 332 P.3d 661 (Haw. Ct. App.), *cert. granted*, *State v. Yong Shik Won*, 2014 WL 2881259 (Haw. June 24, 2014). The court reasoned that, "[i]n balancing the government's interest against the individual's privacy interest, . . . obtaining a driver's breath test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment." 332 P.3d at 681.

Likewise, the Virginia Court of Appeals rejected a constitutional challenge to its criminal-refusal statute, Va. Code Ann. § 18.2-268.3. *See Rowley v. Commonwealth*, 629 S.E.2d 188 (Va. Ct. App. 2006). The court recognized the general rule that a search authorized under an implied-consent statute is valid: "The general rule applies here because Rowley, like all drivers, consented to submit breath samples by exercising the legal privilege of driving on the Commonwealth's roads." *Id*. at 191. Agreeing with *Burnett*'s conclusion that there "is no Fourth Amendment right to refuse a breathalyzer examination," the court held that it follows that there is "no Fourth Amendment violation in punishing a DUI suspect for refusing to provide a breath sample under Code § 18.2-268.3." *Id.* (quoting *Burnett*, 806 F.2d at 1450).

Finally, the Ohio Supreme Court rejected a Fourth Amendment challenge to a similar statute,

Ohio Rev. Code § 4511.19(A)(2), which increased the criminal penalty that may be imposed for driving under the influence if the motorist refused to submit to a chemical test. *See State v. Hoover*, 916 N.E.2d 1056, 1060-61 (Ohio 2009), *cert. denied*, 559 U.S. 1093 (2010). The Ohio Supreme Court, noting that "the request to submit to a chemical test does not occur until after probable cause to arrest exists," held that the statute does not violate the Fourth Amendment. *Id*. at 1061.

In the end, the only purported "conflict" Birchfield can muster is different reasoning used by the lower courts in reaching the same conclusion. But "[t]his Court reviews judgments, not statements in opinions," *Camreta v. Greene*, 131 S. Ct. 2020, 2037 (2011) (internal quotation marks omitted), and the judgments have been uniform. Implied-consent and refusal laws are a longstanding part of the states' legal landscape, and their validity is well established. There is no need for this Court's intervention.

II. The North Dakota Supreme Court's decision does not conflict with any decisions by this Court.

In the end, Birchfield seeks this Court's review because he disagrees with the North Dakota Supreme Court's decision. Even if that were a sufficient basis for certiorari – and it is not – it would not justify review. The North Dakota Supreme Court's decision

is consistent with this Court's precedents interpreting the Fourth Amendment.

1. Birchfield contends that the lower court's ruling would essentially read *McNeely* "off the books." Pet. 10. That incorrectly characterizes that decision. In *McNeely*, this Court held that the natural metabolization of alcohol in the blood stream does not present a *per se* exigency that "justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. Rather, the "exigency . . . must be determined case by case based on the totality of the circumstances." *Id.* *McNeely*'s holding is therefore straightforward and limited – it applies only to driving-under-the-influence cases in which law enforcement, without obtaining a warrant and absent an exigency based on the totality of the circumstances, compels chemical testing after an individual has refused to submit to chemical testing.

The Court recognized, however, that "drunk driving continues to exact a terrible toll on society" and provided reassurance that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." 133 S. Ct. at 1565-66. In particular, the Court pointed to the fact 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 BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent. . . .

133 S. Ct. at 1566 (citations omitted). Nowhere in *McNeely*, therefore, did this Court hold or suggest that implied-consent and refusal laws are unconstitutional or that a State may not sanction a motorist who withdraws the consent he had impliedly given.

Leaving the North Dakota Supreme Court's decision in place would not result in "sweeping warrantless searches" (Pet. 8) because, as the court recognized, "[i]f a person refuses to submit to testing under section 39-20-01 . . . , none may be given." Pet. App. 4a. Once the person withdraws his implied consent, no search may be conducted (absent an exigency). And beyond that, the North Dakota law applies only to persons who have been arrested based on probable cause to believe they are driving under the influence – a limitation Birchfield's petition often ignores. *E.g.*, Pet. 7 ("the question [is] whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search").

For similar reasons, Birchfield's reliance on *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523 (1967), is misplaced. *Camara* addressed a provision of a local housing code that authorized all city employees to enter "any building, structure, or premises in the [c]ity" and made it a crime to refuse such entry. *Id*. at 526-27 (quoting

§ 503 of San Francisco Housing Code). As the North Dakota Supreme Court correctly recognized (Pet. App. 12a-13a), *Camara* is distinguishable in multiple ways.

The regulation at issue in *Camara* applied even where government officers lacked any suspicion of wrongdoing; it allowed for suspicionless searches of every building in the city. *Id.* at 526. In addition, that regulation did not involve motor vehicles, which are "the subject of pervasive regulation by the State"; "[e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York v. Class*, 475 U.S. 106, 113 (1986). Further, "[u]nlike the regulation in *Camara*, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." Pet. App. 13a.

2. Birchfield also argues that North Dakota's refusal statute violates the unconstitutional conditions doctrine. Pet. 9. As an initial matter, this Court lacks jurisdiction to address that issue because Birchfield did not assert an unconstitutional conditions argument before the state courts and the North Dakota Supreme Court did not pass on that issue in this case. Rather, it first addressed whether the State's implied-consent and test-refusal statutes impose an unconstitutional condition in *Beylund v. Levi*, 859 N.W.2d 403 (N.D. 2015) (*Beylund I*). The court issued that decision *after* its decision here and stated, "[t]his Court has not previously addressed

Beylund's argument on the 'unconstitutional conditions doctrine.'" *Id*. at 409; *see also id*. at 410 ("it is a question of first impression, whether North Dakota's implied consent law represents an unconstitutional condition").

In any event, Birchfield's unconstitutional conditions argument lacks merit. Again, this Court in *McNeely* approvingly discussed state laws that "impose serious consequences when a motorist withdraws [the] consent" he impliedly gave to BAC testing, including making "an adverse inference" against the motorist "in a subsequent criminal prosecution." 133 S. Ct. at 1556 (citing *Neville*, 459 U.S. at 563-64). Birchfield fails to explain why that "serious consequence" is permissible yet the "serious consequence" North Dakota and 12 other states impose is not.

The unconstitutional conditions doctrine – which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," *Koontz v. St. Johns River Water Mgmt. District*, 133 S. Ct. 2586, 2594 (2013) – is therefore inapplicable. For Birchfield to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he impliedly consented to it when he obtained his driver's license. He cannot do so here.

And even if Birchfield could show he had a constitutional right to refuse the test, his argument would still fail. The government may impose a condition where, as here, it has a "vital interest in doing

so." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980)). This Court has repeatedly recognized the states' interest in public safety in removing drunk drivers from their highways. *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing that the interest in public safety is substantially served by summary suspension of driver's license by those who refuse to be tested upon arrest); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); *McNeely*, 133 S. Ct. at 1565 ("[D]runk driving continues to exact a terrible toll on our society."). North Dakota's implied-consent and refusal statutes further its vital interest in removing drunken drivers from the road.

North Dakota's implied-consent and refusal statutes are also consistent with this Court's repeated recognition that there are often consequences for not participating in searches. In *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004), this Court held that a state does not violate the Fourth Amendment by criminally punishing individuals for passively or nonviolently refusing to provide their identities to the police during a valid *Terry* stop. *Id*. at 189 (noting that "[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity"). States may also compel an individual to stand in a lineup or wear particular clothing, or to

produce incriminating non-testimonial evidence such as a blood sample, handwriting exemplar, or voice exemplar. *Doe v. United States*, 487 U.S. 201, 210 (1988). And in *Neville*, the Court permitted the State to use an individual's refusal to cooperate with such requests as evidence of the individual's guilt. *Neville*, 459 U.S. at 566.

North Dakota's statutory scheme fits well into this line of cases. Ultimately, "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for the suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Id*. at 564.

III. There is no pressing need for this Court to resolve the question presented.

Birchfield's last ground for why this Court should grant certiorari is that state test-refusal statutes are applied with considerable frequency and may impact hundreds of thousands of convictions each year. Pet. 12. The frequency of a *constitutional* practice, however, is not cause for concern. And so Birchfield's "importance" argument amounts to a repeat of his error-correction argument, namely, that the various appellate courts to have addressed criminal-refusal statutes have all gotten it wrong. As shown above, however, they have not. That these statutes are applied frequently thus shows merely that they are operating as they were designed to operate. And the fact that some other states are considering legislation

that would impose similar criminal penalties shows only that protecting citizens from drunk driving remains a large concern throughout the country, and that implied-consent and refusal laws are considered a fair and reasonable way to accomplish that objective.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 24th day of September, 2015.

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