Nos. 14-1468, 14-1470, and 14-1507

In the Supreme Court of the United States

DANNY BIRCHFIELD, PETITIONER
v.
STATE OF NORTH DAKOTA

WILLIAM ROBERT BERNARD, JR., PETITIONER
v.
STATE OF MINNESOTA

STEVE MICHAEL BEYLUND, PETITIONER
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH DAKOTA AND MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether a State that requires a driver to consent to a chemical test following an arrest for driving while impaired, or based on probable cause that he was driving while impaired, may constitutionally make a driver's refusal to comply with that condition a criminal offense.

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INTEREST OF THE UNITED STATES

These cases concern the constitutionality of statutes that condition authorization to drive on state roads on the requirement that a driver consent to a

chemical test for alcohol or drug impairment when arrested for driving while impaired or when there is probable cause of that offense, and that impose criminal penalties on a driver who refuses to comply. The United States conditions authorization to drive on federal lands on the requirement that a driver consent to a chemical test if arrested for driving while impaired, when an officer has reasonable grounds to believe that the driver is impaired. 18 U.S.C. 3118. And in the National Park System, it is a misdemeanor to refuse a chemical test requested by an officer with probable cause to believe that a driver is impaired. 36 C.F.R. 4.23(c); 36 C.F.R. 1.3(a).[1] The Department of Transportation's National Highway Traffic Safety Administration (NHTSA), which conducts research and develops traffic safety programs, endorses chemical-testing requirements and criminal penalties for drivers who refuse to comply.

STATEMENT

1. a. Alcohol-related traffic fatalities are a major cause of death, injury, and economic loss in the United States. Motor-vehicle crashes claim more than 32,000 lives per year, making them the leading cause of death for some groups of Americans, including Americans at every age from 16 to 24. NHTSA, *Quick Facts 2014* 1, 6 (2016).

Nearly a third of the fatal crashes involve drivers who were legally impaired by alcohol. NHTSA, *2014 Alcohol-Impaired Driving Traffic Safety Fact Sheet* 1

[1] In addition, permission to drive on military bases is conditioned on consent to a chemical test for alcohol or drugs, if the driver is "lawfully stopped, apprehended, or cited" for an offense while driving on a base. 32 C.F.R. 634.8; see 32 C.F.R. 634.9(a)(3)(i) and (b)(3)(i).

(2015). Moreover, of these, drivers with blood-alcohol concentration (BAC) levels significantly above the legal limit were by far the most likely to be involved in crashes. *Id.* at 5. More than two thirds of alcohol-impaired drivers in fatal crashes have BAC levels of .15 or higher—approximately double the legal limit. *Ibid.*

2. a. States have sought to reduce the toll of impaired driving through increasingly stringent sanctions. All States now make it a crime to operate a motor vehicle with a BAC of .08 or higher. NHTSA, *Digest of Impaired Driving and Selected Beverage Control Laws* v (28th ed. 2015) (*State Law Digest*).

States have also increasingly focused on identifying and treating the high-BAC offenders who pose heightened risks and are particularly likely to be "habitual impaired-driving offenders." NHTSA, *Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices* 1-15 (8th ed. 2015) (*Countermeasures*). While few States had laws directed at these offenders before 1990, NHTSA, *Evaluation of Enhanced Sanctions for Higher BACs: Summary of States' Laws* 17 (2001) (*Enhanced Sanctions*), every State but one now has a scheme of increased penalties based on BAC level, *Countermeasures* 1-15. Common measures imposed on high-BAC offenders include "mandatory assessment and treatment for alcohol problems, close monitoring or home confinement, installation of an ignition interlock, and vehicle or license plate sanctions." *Ibid.*

b. For approximately half a century, States have sought to identify impaired drivers by conditioning authorization to drive on the requirement that drivers consent to a chemical test under limited

circumstances—while at the same time generally eschewing forcible blood testing. Under an approach first adopted in New York in 1953, and made part of the Uniform Vehicle Code in 1962, authorization to drive within a State is conditioned on the requirement that a driver consent to a chemical test of impairment if arrested on a drunk driving charge. Robert L. Donigan, *Chemical Tests and the Law* 177-179 (1966); *id.* at 311 (Uniform Vehicle Code § 6-205.1(c) (1962)). If a driver refuses to comply, however, no test is given. *Chemical Tests and the Law* 177, 311.

All 50 States now condition the authorization to drive on the requirement that a driver consent to a chemical test under specified circumstances. *State Law Digest* xxv-xxx; 1-492. Thirty-one States, including North Dakota, provide that drivers must consent only if arrested for driving while impaired. See *id.* at 334, 1-492; see also 18 U.S.C. 3118 (provision applicable on federal lands).

The remaining States, including Minnesota, require consent to a chemical test if officers have either "probable cause" or equivalent grounds to believe that the driver is impaired. See *State Law Digest* 230-232, 1-494 (setting out statutes requiring "probable cause," "reasonable grounds" or "reasonable cause"); *Draper* v. *United States*, 358 U.S. 307, 310 n.3 (1959) (describing "probable cause" and "reasonable grounds" as "substantial equivalents"); see also, *e.g.*, Minn. Stat. Ann. § 169A.51(1)-(2) (West Supp. 2016). A similar requirement applies to drivers on National Park lands. 36 C.F.R. 4.23(c).

A majority of States pair these implied-consent provisions with measures that ban nonconsensual chemical testing, whether with or without a warrant.

State Amicus Br. 1a-34a (cataloging bans in 28 States and the District of Columbia). For example, Minnesota provides that if a suspect refuses to submit to chemical testing, "a test must not be given." Minn. Stat. Ann § 169A.52(1) (West Supp. 2016).[2] As this Court has explained, this approach of requiring consent but "declin[ing] to authorize * * * police officers to administer a blood-alcohol test against the suspect's will" is designed "to avoid violent confrontations" between intoxicated arrestees and police officers or medical personnel. *South Dakota* v. *Neville*, 459 U.S. 553, 559 (1983).

Implied-consent provisions, including the Minnesota and North Dakota provisions, most commonly require consent to a test of either breath, blood, or urine. State Amicus Br. 1a-34a. Breath tests are the most commonly used method. NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* 1 (2011) (*N.C. Warrants*). Machines used to conduct breath tests are commonly located at police stations where drivers are taken following arrest. In some departments they are also available in the field, so that "the officer may obtain the sample at roadside in the patrol vehicle or in a BATmobile"—a vehicle used "to test and temporarily detain DWI offenders." NHTSA, *Refusal of Intoxication Testing: A Report to Congress* 4 (2008) (*Report to Congress)*; see 1 *Apprehending and Prosecuting the Drunk Driver* § 7.04 (LexisNexis 2015) (noting newest breath-testing machines are "designed to be

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[2] Several States make exceptions to their rules against nonconsensual chemical testing in cases involving especially aggravated circumstances, such as accidents involving death or serious injury. State Amicus Br. 1a-34a.

used as [] fully mobile evidential breath tester[s] in the field"). Because breath tests used for evidentiary purposes require extended breaths to produce "alveolar or 'deep lung' breath," *Skinner* v. *Railway Labor Execs. Ass'n*, 489 U.S. 602, 616 (1989), such tests require the cooperation of their subjects, see Andre A. Moenssens & Fred E. Inbau, *Scientific Evidence in Criminal Cases* 82 (2d ed. 1978).

Most States also provide for blood testing under their implied-consent statutes. State Amicus Br. 1a-34a. That method can detect drugs in addition to alcohol, and it is sometimes favored because it measures blood-alcohol concentration directly, rather than relying on conversion of breath-alcohol levels. 2 *Defense of Drunk Driving Cases* § 18.01 (LexisNexis 2015); 1 *Apprehending and Prosecuting the Drunk Driver* § 7.02.

c. State efforts to accurately identify, sanction, and treat impaired drivers using implied-consent laws have been significantly undercut by drivers who simply refuse compliance—particularly as the penalties for impaired driving have become substantially more serious than the penalties for refusing a test. Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77, 78 (2009) (*Implied-Consent Review*). Early implied-consent provisions that typically punished refusal with license suspension were enacted "in an era when the most serious penalty the court would normally impose for impaired driving" was also license suspension. *Ibid.* But as sanctions for impaired driving escalated, especially for high-BAC and recidivist offenders, license suspensions failed to prevent high rates of test

refusal. NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 1 (2007) (*Case Studies*); see NHTSA, *Breath Test Refusal Rates in the United States—2011 Update* 4 (2014) (*2011 Update*). Approximately one quarter of those arrested for drunk-driving offenses from 1996 to 2001 nationwide thus simply refused to comply with the chemical-test condition of their authorization to drive on state roads. *N.C. Warrants* 1. And some States have much higher refusal rates, with several reporting rates over 70% and several others reporting rates above 40%. *Ibid.*; *2011 Update* 2.

The "drivers who refuse the chemical test mandated by implied consent laws comprise a high-risk group" of particularly serious DWI offenders. NHTSA, *Implied Consent Refusal Impact* xvii (1991) (*Implied Consent Refusal Impact*). Studies demonstrate that they are likely to have especially high BAC levels. See NHTSA, *No Refusal Initiative Facts* 2 (2010) (*No Refusal Initiative Facts*); *N.C. Warrants* 21. In addition, they are especially likely to be recidivist drunk drivers. *Implied Consent Refusal Impact* 26. Indeed, a prior conviction for drunk driving increases the likelihood that a driver will refuse a chemical test more than any other factor. *Ibid.*

In a study examining refusal rates, recidivist offenders frequently reported that they refused "because they believed that the test result would enhance conviction for a multiple DWI" and expose them to penalties that they understood were "more severe than the refusal penalties." *Implied Consent Refusal Impact* xvii, 79. Staff of motor-vehicle departments also observed that because the licenses of many recidivist drunk drivers were already suspended or re-

voked, the threat of license suspension was not a meaningful incentive for those drivers to comply with chemical-testing conditions. *Ibid.*

Because test refusals deprive the public of the best evidence of intoxication, and likely the only evidence of high-BAC offenses, judges, prosecutors, and defense attorneys consistently report that refusals undermine drunk-driving prosecutions and make it especially difficult to enforce high-BAC provisions. *Case Studies* 36; *N.C. Warrants* 12-13; *Implied Consent Refusal Impact* 26-27. Some studies indicate that those who refuse chemical tests are significantly less likely to be convicted of impaired-driving offenses. H.L. Ross et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 59-60 (1995); *Implied Consent Refusal Impact* xvi.

d. As state and federal authorities have identified low sanctions as a principal cause of implied-consent violations, see, *e.g.*, *Report to Congress* 20; *2011 Update* 4, States have increasingly attached criminal penalties to some or all refusals.

Twelve States and the federal government (on National Park lands) now make it a criminal offense to refuse to comply with an implied-consent provision in all cases or in cases involving aggravated circumstances such as a prior refusal, a prior drunk-driving conviction, or when the refuser was driving on a suspended license. See State Amicus Br. 1a-34a (statutes of Alaska, Hawaii, Florida, Kansas, Louisiana, Minnesota, Nebraska, North Dakota, Rhode Island, Tennessee, Vermont, and Virginia); 36 C.F.R. 4.23(c); 36 C.F.R. 1.3(a). Five additional States treat refusal as a separate offense when an offender is also convicted of drunk driving, State Amicus Br. 4a, 32a (statutes of

California and Washington), or a fact that enhances the penalty for a drunk-driving conviction, see Md. Code Ann., Transp. § 27-101(x)(3) (LexisNexis Supp. 2015); 75 Pa. Cons. Stat. Ann. § 3804(c) (West Supp. 2015); Me. Rev. Stat. Ann. tit. 29-A, § 2411(5) (West 1996). A final State treats refusal as an infraction punishable by fines. Ind. Code Ann. § 9-30-7-5(a) (LexisNexis Supp. 2015).

NHTSA has recommended that all States make penalties for refusal greater than those for driving while intoxicated. *Report to Congress* 20.

NHTSA has also studied addressing refusals through search warrants and nonconsensual blood draws. NHTSA's studies suggest that even among States that do not statutorily prohibit nonconsensual blood draws to avoid violent confrontations, use of warrants to conduct nonconsensual blood draws is not widespread. See NHTSA, *Use of Warrants for Breath Refusal: Case Studies* 35 (2007); *N.C. Warrants* 16-17. In a study of jurisdictions that tested nonconsensual warranted blood draws when arrestees refused breath tests, the method substantially increased the time from arrest to test—because of additional steps such as traveling to a medical facility and securing the assistance of a phlebotomist. *N.C. Warrants* 11-12, 15-16.

2. Petitioner Bernard was arrested at a boat launch in Minnesota, after being identified as the individual who drove a truck into the river while attempting to remove a boat from the water. Bernard was holding the truck's keys and wearing only underwear. Officers observed that he smelled of alcohol and that his eyes were bloodshot and watery. When questioned, Bernard admitted he had been drinking, but

refused to perform field sobriety tests. Officers arrested him. 14-1470 Pet. App. 3a.

At the police station, officers read Bernard an implied-consent advisory notifying him that he was required under state law to consent to a breath test. 14-1470 Pet. App. 4a. Bernard refused. *Ibid.* He was charged under Minnesota's first-degree test-refusal statute, which applies to any person with at least three prior impaired-driving convictions over the past ten years. *Id.* at 4a & n.1. (Bernard had four prior impaired-driving convictions in that period. *Ibid.*)

Bernard sought dismissal of the test-refusal charge on the ground that the refusal statute deprived him of due process by penalizing him for failing to submit to an unreasonable warrantless search. 14-1470 Pet. App. 4a. The trial court agreed, *id.* at 47a-61a, but the Minnesota Court of Appeals reversed, *id.* at 35a-46a, and the Minnesota Supreme Court affirmed that decision, *id.* at 1a-34a. The court concluded that the test-refusal statute did not penalize Bernard for failing to submit to an unreasonable search, because a breath test constitutes a lawful search incident to arrest. *Id.* at 7a-19a. Two Justices dissented. *Id.* at 22a-34a.

3. Petitioner Birchfield was arrested after driving his car into a ditch in North Dakota. He failed field sobriety tests, and a preliminary breath test using a portable device indicated his BAC level was more than three times the legal limit. 14-1468 Pet. App. 2a.

Following arrest, an officer read Birchfield North Dakota's implied-consent advisory, stating that Birchfield was required to consent to a chemical test and that refusal was punishable in the same manner as driving under the influence of alcohol. 14-1468 Pet. App. 2a; see N.D. Cent. Code § 39-20-01(3)(a) (Supp.

2015). The officer then asked Birchfield to take a blood test. See 14-1468 Pet. App. 2a, 24a, 26a. He refused. He was charged with violating North Dakota's implied-consent statute. *Id.* at 2a.

After the state trial court denied Birchfield's motion to dismiss on Fourth Amendment grounds, see 14-1468 Pet. App. 22a-28a, Birchfield entered a conditional guilty plea, *id.* at 2a-3a. He was sentenced to 30 days of imprisonment, with all but ten days suspended, and ordered to participate in a yearlong sobriety program; obtain an evaluation for substance abuse and addiction; and pay fees and fines. *Id.* at 20a-21a.

The North Dakota Supreme Court affirmed Birchfield's conviction. 14-1468 Pet. App. 2a-18a. After noting that implied-consent statutes attaching criminal penalties to test refusal had consistently been upheld before and after this Court's decision in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), the court found such statutes to be reasonable under the Fourth Amendment based on a balancing of the public interests served by such provisions against their intrusion on reasonable expectations of privacy. 14-1468 Pet. App. 6a-16a.

4. Petitioner Beylund was arrested following a traffic stop in North Dakota. Before the stop, an officer observed Beylund's vehicle nearly hit a stop sign before stopping, partially in a driveway and partially in the roadway. When the officer approached the vehicle, he could smell alcohol. He also observed an empty wine glass in the center console. Beylund appeared to struggle with his balance upon exiting the vehicle. He refused to perform any field sobriety tests, claiming he had a bad leg. 14-1507 Pet. App. 2a-3a.

The officer arrested Beylund and transported him to a hospital. There, he read Beylund North Dakota's advisory regarding implied-consent requirements and the consequences of refusal. Beylund agreed to a blood test, which showed his BAC level was about three times the legal limit. 14-1507 Pet. App. 3a.

An administrative officer suspended Beylund's driving privileges for two years, finding probable cause that Beylund had been driving while intoxicated, based on the evidence from the traffic stop and chemical test. 14-1507 Pet. App. 40a-42a.

Beylund appealed, contending that the BAC evidence should have been excluded from the administrative proceeding. In particular, Beylund argued that North Dakota's implied-consent law imposed an unconstitutional condition on the right to drive and that his consent to a blood test had been involuntary because it was procured under the threat of unconstitutional sanctions. The state trial court rejected that claim. 14-1507 Pet. App. 23a-37a. The North Dakota Supreme Court affirmed, agreeing that the implied-consent statute did not impose an unconstitutional condition on driving privileges. *Id.* at 1a-20a.

SUMMARY OF ARGUMENT

Petitioners contend that States' use of criminal sanctions to enforce their valid implied-consent laws is unconstitutional. That contention is incorrect. And even if such measures posed a constitutional problem when blood testing was involved, provisions that require warrantless breath testing would survive constitutional review.

A. 1. The statutes at issue here are constitutional, because States may validly use criminal sanctions to enforce a driver's legitimate obligations. All 50 States

have conditioned permission to drive on a limited requirement of consent to chemical testing, through implied-consent measures that this Court has long explained are valid. While States may not use "non-consensual blood testing in all drunk-driving cases" without a more specific analysis of exigency, *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013), they may "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" and impose "significant consequences" on drivers who refuse to comply, *id.* at 1566 (plurality opinion); see *South Dakota* v. *Neville*, 459 U.S. 553 (1983). As this Court has recognized, such rules serve critical interests in deterring drunk drivers, obtaining the most reliable evidence of intoxication, and eliminating the need for forcible, nonconsensual blood draws that most States eschew to avoid violent confrontations.

2. Contrary to petitioner Birchfield's suggestion, the doctrine of unconstitutional conditions does not forbid States from conditioning authorization to drive on these chemical-testing requirements. No blanket ban exists on conditioning government benefits on search requirements. Rather, this Court has upheld such conditions under the Fourth Amendment when they are reasonable in light of a balancing of interests—as implied-consent statutes are, for the reasons developed by this Court in discussing such statutes. And if the Court reassessed implied-consent requirements through an unconstitutional conditions lens, Birchfield would fare no better, for that doctrine bars only conditions that lack an adequate relation-

ship to the benefit at hand or are disproportionate. Implied-consent requirements are neither.

3. Birchfield errs in asserting that even if implied-consent requirements are valid, principles of proportionality forbid the use of criminal penalties to enforce them. The relevant condition here is that, in exchange for the privilege of driving, the driver relinquishes any right to refuse a chemical test under certain limited conditions. Given the validity of that condition, the use of traditional state enforcement mechanisms to secure compliance cannot be considered disproportionate.

The criminal sanctions before the Court in these cases are particularly proportionate because they involve only the level of sanctions necessary to eliminate drunk drivers' incentive to refuse compliance with implied-consent obligations. Research demonstrates that administrative sanctions are inadequate to stem refusals—especially for recidivist and high-BAC offenders. Absent criminal penalties, refusal in the hopes of avoiding a drunk-driving conviction is too tempting. Birchfield suggests no alternative to criminal sanctions for stemming the tide of non-compliance, but instead argues that States could rely on nonconsensual blood draws. That method, however, is materially worse than criminal enforcement, because it requires forcible intrusions that most States ban to protect against violent confrontations.

Finally, Birchfield errs in suggesting that criminal sanctions are disproportionate because States could address drunk driving through strategies like open-container provisions, high-BAC laws, and increased offender supervision. States are not required to choose only one approach to combatting drunk driv-

ing. And Birchfield's suggestion fails on its own terms, because many of the measures he extols require blood-alcohol evidence for effective implementation.

B. Regardless of the validity of implied-consent provisions generally, States may impose criminal penalties for refusal to take a breath test when probable cause of intoxication is established. States may unquestionably use criminal laws to ensure that officers may conduct searches or seizures that do not require warrants under the Constitution. And while this Court has not previously decided whether breath tests are subject to a warrant requirement, a balancing of public and private interests decidedly supports permitting warrantless breath tests based upon probable cause.

Warrantless breath tests serve interests in obtaining evanescent evidence that cannot be adequately served through other means. They also enhance the accuracy of arrest determinations. The countervailing privacy interests are modest, because the intrusion of a breath test is negligible. Because warrantless breath tests based on probable cause are constitutionally reasonable, States may enact criminal provisions to ensure officers can carry out such tests.

ARGUMENT

STATES MAY MAKE REFUSAL TO COMPLY WITH A VALID CHEMICAL-TESTING REQUIREMENT A CRIMINAL OFFENSE

All 50 States condition the privilege of driving on consent to certain chemical testing in circumstances of suspected impairment. No constitutional principle bars States from using criminal penalties to enforce these legitimate obligations. The convictions of peti-

tioners Birchfield and Bernard are therefore valid, and petitioner Beylund was put to no unconstitutional choice. Further, under the balancing that guides Fourth Amendment analysis, warrantless breath tests based on probable cause, such as those at issue in Bernard's case, would pass muster even if petitioners were correct that implied-consent obligations more generally were deficient.

A. States May Enforce Valid Implied-Consent Rules Through Criminal Sanctions

While this Court has held that a State may not use "nonconsensual blood testing in all drunk-driving cases" without a more specific analysis of exigency, *Missouri* v. *McNeely,* 133 S. Ct. 1552, 1556 (2013), it has been equally emphatic that States may "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" and impose "significant consequences" on drivers who refuse to comply, *id.* at 1566 (plurality opinion). Birchfield proffers no good reason to revisit this longstanding guidance. Nor is there merit to Birchfield's alternative contention that principles of "proportionality" limit enforcement of valid implied-consent requirements to administrative sanctions. The criminal sanctions States have imposed are a proportionate means to secure compliance, and Birchfield's administrative alternatives are demonstrably inadequate to that task, particularly for the most dangerous drivers.

1. This Court has properly recognized implied-consent obligations as valid

Over several decades, this Court's cases have provided substantial guidance concerning the measures that States may employ to address the "terrible toll" inflicted by impaired drivers. *McNeely*, 133 S. Ct. at 1565 (plurality opinion). That guidance makes clear that the "broad range of legal tools" available include rules "that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* at 1566 (plurality opinion).

The Court first concluded that States may require consent to chemical testing as a condition of the privilege to drive (and penalize those who refuse to comply) in *South Dakota* v. *Neville*, 459 U.S. 553 (1983). *Neville* considered a Fifth Amendment challenge to South Dakota's implied-consent law, which required drivers to consent to a blood test if arrested for driving while intoxicated, and penalized drivers who failed to comply by revoking their licenses and permitting their refusals to be used as evidence against them in drunk-driving prosecutions. *Id.* at 560. The Court rejected the defendant's constitutional challenge. Critically, its basis for doing so was not that refusals were non-testimonial (a ground that the Court declined to adopt), *id.* at 561-562, but rather that States could legitimately require chemical tests as a condition of licensing and impose significant penalties on those who do not comply with those conditions, *id.* at 560-563. It was "unquestionably legitimate," the Court wrote, for States to impose the penalty of revoking driving privileges on those who refused to

consent to a chemical test required as a condition of the authorization to drive. *Id.* at 560. And because admission of a defendant's statements in evidence could be classified as an additional "attendant penalt[y]" for refusal, the Court concluded that the use of a driver's refusal as evidence in a criminal case posed no constitutional problem. *Id.* at 563.

If there were doubt after *Neville* about the constitutionality of state laws conditioning the privilege to drive on chemical-testing conditions, *McNeely* resolved it. *McNeely* held that absent exigent circumstances, which are not automatically supplied by "the natural dissipation of alcohol in the bloodstream," a State may not conduct warrantless, nonconsensual blood testing in a drunk-driving investigation. 133 S. Ct. at 1568. While no opinion spoke for the Court on the precise definition of exigency, the plurality advancing the narrowest view of the exigent-circumstances question before the Court recognized that States retained a "broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566. This range of tools, it reaffirmed, includes "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing" and that "impose significant consequences when a motorist withdraws consent." *Ibid.* None of the Justices taking broader views of officers' exigent circumstances authority disagreed with that reaffirmation. See *id.* at 1572-1573 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1574-1578 (Thomas, J., dissenting); see also *id.* at 1569 (Kennedy, J., concurring in part) (emphasizing that States retain the pow-

er to "adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment").

The Court's decisions approving of these measures have explained the critical purposes they serve. Drunk driving, this Court has emphasized, exacts a "terrible toll" on society. *McNeely*, 133 S. Ct. at 1565 (plurality opinion); see *Neville*, 459 U.S. at 558; *Mackey* v. *Montrym*, 443 U.S. 1, 17-18 (1979). And accurate identification of the drunk drivers who exact that toll depends on the chemical evidence that forms "the most reliable form of evidence of intoxication." *Mackey*, 443 U.S. at 19. Moreover, evidence of impairment is evanescent, so that blood or breath samples "must be obtained as soon as possible," *Skinner* v. *Railway Labor Execs. Ass'n*, 489 U.S. 602, 623 (1989), in order to most accurately reflect the blood-alcohol level of a driver at the time he was on the road, see *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966); see also *McNeely*, 133 U.S. at 1561.

Against this backdrop, implied-consent requirements serve critical interests. Before a traffic stop occurs, they have deterrent force. While significant penalties are critical to "deterr[ing] * * * drunken driving," *Mackey*, 443 U.S. at 18, those penalties "cannot serve as an effective deterrent unless violators know that they are likely to be discovered," *Skinner*, 489 U.S. at 630. Drivers who expect that a chemical test will reveal their intoxication in the event that they are stopped will thus be less likely to drink and drive. See *Mackey*, 443 U.S. at 18; cf. *Skinner*, 489 U.S. at 632 (explaining that mandatory drug and alcohol testing of railroad employees following certain safety events constitutes a "highly effective means

* * * of deterring the use of drugs by railroad employees").

Second, implied-consent provisions are an important method of obtaining the blood-alcohol evidence that constitutes "the most reliable form of evidence of intoxication," *Mackey*, 443 U.S. at 19, and of doing so "as soon as possible," in light of the evidence's evanescence, *Skinner*, 489 U.S. at 623. Indeed, implied-consent requirements may be indispensable to obtaining blood-alcohol evidence in cases involving testing by breath. Because evidential breath testing devices require active participation by the person being tested, in the absence of implied-consent requirements to induce compliance, the State will simply be unable to conduct a breath test. And while officers may be able to conduct nonconsensual blood draws under the exigent circumstances doctrine or to seek blood-draw warrants in the minority of States that allow those approaches, switching to a blood-draw method will often occasion substantial delay. See p. 9, *supra* (discussing delay occasioned by shift from breath tests to blood draws).

Finally, implied-consent provisions backed by sanctions sufficient to induce compliance are critical to enabling States to detect drunk drivers while avoiding recourse to forcible methods. This Court has recognized that most States bar such methods in order "to avoid violent confrontations" between intoxicated arrestees, officers, and medical personnel. *Neville*, 459 U.S. at 559; see *McNeely*, 133 S. Ct. at 1566 (plurality opinion) (noting most States ban nonconsensual testing).

2. Birchfield's attacks on implied-consent obligations lack merit

Notwithstanding this Court's cases, Birchfield suggests (Br. 33-34) that the "unconstitutional conditions" doctrine forbids States from conditioning authorization to drive on their roads on a requirement of consent to chemical testing.

Birchfield is incorrect. This Court's precedents demonstrate that no flat ban exists against conditioning a government benefit on compliance with a search condition. Instead, this Court has analyzed such requirements for reasonableness—and upheld search-related conditions on persons who receive particular benefits when the conditions were supported by a balancing of interests. See, *e.g. Samson* v. *California*, 547 U.S. 843, 854-856 (2006) (warrantless search condition for parolees who accept early release); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 661-662 (1995) (warrantless drug tests of participants in school athletic program); *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 659 (1989) (urinalysis requirement as to Customs Service employees who seek transfer or promotion to certain positions); cf. *Wyman* v. *James*, 400 U.S. 309, 318-319 (1971) (suggesting Fourth Amendment was not implicated by State's requiring warrantless home inspections as a condition of certain government benefits, but also finding the requirements would be reasonable under the Fourth Amendment). The strong public interests this Court has found served by implied-consent provisions amply support this Court's statements that the implied-consent obligations imposed in all 50 States are reasonable under the Fourth Amendment. And a

requirement that is reasonable under the Fourth Amendment cannot be an "unconstitutional condition."

If this Court reassessed implied-consent requirements through an unconstitutional conditions lens, Birchfield would fare no better. The unconstitutional conditions doctrine provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship*" to the condition imposed, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (citing *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205,* 391 U.S. 563, 568 (1968)) (emphasis added).[3] Sufficiently

[3] This is evident in the materials on which Birchfield relies. For example, Birchfield relies (Br. 33) on *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 593 (1926), which struck down a requirement that those who use state highways accept a condition that the state could not have constitutionally imposed on all citizens, while opining that a State may not condition a "valuable privilege" on "surrender of a right." But this Court later clarified that the condition in *Frost* had been defective only because it was unrelated to the government benefit conferred. *Stephenson* v. *Binford*, 287 U.S. 251, 275-276 (1932). It had been, the Court explained, "in no real sense a regulation of the use of the public highways," so that "the use of the highways furnished a purely unrelated occasion for imposing the unconstitutional condition." *Id.* at 275. *Stephenson* then *upheld* a rule conditioning highway use on a requirement that could not have been imposed on the citizenry as a whole, reasoning that the statute at hand was appropriate highway regulation. *Ibid.* Similarly, the law review article Birchfield cites (Br. 33) for an unconstitutional conditions rule 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), explained that its formulation did not accurately reflect the holdings of this Court's cases, *e.g., id.* at 1416-1417.

germane conditions, however, are not categorically barred. For instance, a State may condition a land-use permit on a relinquishment of property when there is a "nexus" and "rough proportionality" between a state demand and the effects of the private land use authorized by the permit, *Dolan*, 512 U.S. at 386-392; see also *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); a government employer may impose some speech limits as a condition of employment that could not be imposed on citizens at large, *Connick* v. *Myers*, 461 U.S. 138, 147 (1983); and the federal government may condition grants on requirements that States enact particular legislation, when the conditions are sufficiently germane and the grants not so large that denial would be unduly coercive, *South Dakota* v. *Dole*, 483 U.S. 203, 210, 211 (1987). Indeed, Birchfield himself ultimately acknowledges (Br. 36) that this Court has assessed "the propriety of a government condition" based "on whether there is a 'nexus' and 'rough proportionality' between the state-provided benefit and the condition imposed" in those cases "where the grant of the benefit might 'impose costs on the public.'" A risk to the public is plainly present when a State grants permission to maneuver tons of steel down public roads.

Under a nexus-and-proportionality analysis, Birchfield's suggestion that implied-consent requirements are constitutionally deficient again falls short. Birchfield cannot plausibly contend that a test of whether a driver poses a danger to others on the road somehow lacks a nexus to driving privileges. So Birchfield instead asserts (Br. 36) that driving is so necessary that it is impermissibly coercive for a State to attach test conditions to it—no matter the importance of

those conditions to the privilege's safe exercise. This Court, however, long ago foreclosed that approach. Emphasizing that "[m]otor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property," this Court has treated the right to drive as a paradigmatic privilege to which States may attach conditions. *Hess* v. *Pawloski*, 274 U.S. 352, 356 (1927). The conditions it has upheld have included rules that could not have been constitutionally imposed on the public at large. *Ibid.* (upholding requirement that motorist give "implied consent" to appointment of state registrar as representative for service of process in cases arising from accidents); see, *e.g.*, *Stephenson* v. *Binford*, 287 U.S. 251, 275-276 (1932).

Today, driving is subject to even more "pervasive and continuing governmental regulation[] and control[]." *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Unconstitutional conditions principles therefore do not bar States from enacting "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing," and "impose significant consequences when a motorist withdraws consent." *McNeely*, 133 S. Ct. at 1566 (plurality opinion).

3. Principles of "proportionality" do not forbid use of criminal penalties to enforce implied-consent requirements

In the alternative, Birchfield argues (Br. 37-46) that even if it is permissible for States to condition authorization to drive on an implied-consent requirement—as all 50 States do—principles of proportionality that Birchfield derives from Takings

Clause cases forbid States from holding drivers to that bargain through criminal sanctions for refusal. That claim is flawed.

First, Birchfield's claim misunderstands the appropriate object of an unconstitutional conditions or Fourth Amendment analysis. As Birchfield appears at times to recognize (see, *e.g.*, Br. 35), the relevant condition for purposes of analysis under either of these doctrines is the right a citizen is required to forego in exchange for a government benefit—here, the right to refuse a chemical test based on probable cause of impairment or an impaired-driving arrest. When Birchfield protests criminal sanctions for test refusal, he is not protesting this condition—rather, he is protesting the means that many States use to enforce compliance with a condition long recognized as valid. Birchfield points to no case invalidating a mechanism used to hold a citizen to a constitutionally permissible bargain.[4] Once a condition has been deemed valid, no reason exists to consider disproportionate

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[4] Birchfield errs (Br. 30-32) in relying for a prohibition on criminal sanctions on *Los Angeles* v. *Patel*, 135 S. Ct. 2443 (2015), and *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). Those decisions invalidated warrantless inspection schemes as unreasonable under the Fourth Amendment. See *Patel*, 135 S. Ct. at 2452-2456 (finding unconstitutional a rule requiring disclosure of hotel registers without opportunity to first obtain judicial review); *Camara*, 387 U.S. at 540 (concluding that residential inspections could be conducted only pursuant to a warrant, and that petitioner could not be convicted of refusing inspector entry because he "had a constitutional right to insist that the inspectors obtain a warrant to search"). Neither case suggested that the inspection schemes at issue were constitutionally valid, but could be enforced only through civil means.

the use of traditional state enforcement mechanisms to ensure compliance with lawful demands.

In any event, the criminal sanctions before the Court in these cases qualify as proportionate by any measure. By allowing sanctions similar to those for drunk-driving offenses, these statutes allow only the sanctions necessary to eliminate an incentive that otherwise exists for drunk drivers to refuse compliance with valid implied-consent obligations. See, *e.g.*, *2011 Update* 4 ("States noted that refusal rates will remain high if the sanctions for failing a BAC test * * * are more severe than those for refusing to submit to a test."); *Implied-Consent Review* 78; *Report to Congress* 20. Indeed, without criminal sanctions, the incentive to refuse compliance is especially powerful in situations where BAC evidence is most vital—the cases involving extremely impaired drivers whose refusals can utterly stymie the State's ability to prove the aggravated, high-BAC charges that are increasingly a focus of State efforts to stem drunk-driving deaths. Cf. Birchfield Br. 46 (describing high-BAC penalties as a "constitutional and effective strateg[y] for combating drunk driving").

Research bears out that in an era in which serious criminal penalties can follow from drunk-driving convictions, purely administrative sanctions are not adequate to enforce implied-consent conditions. See *2011 Update* 1, 6 (finding average refusal rate of 24%, with the rate exceeding 70% in some jurisdictions). The research also demonstrates that purely administrative sanctions are in fact especially unlikely to deter recidivist and high-BAC offenders. See *No Refusal Initiative Facts* 2; *N.C. Warrants* 21; *Implied Consent Refusal Impact* 26. Indeed, research shows that those

offenders are often driving on suspended or revoked licenses in the first place—making license-related penalties particularly ineffective. *Implied Consent Refusal Impact* 26.

Remarkably, although Birchfield asserts that criminal sanctions are "disproportionate" to enforcing implied-consent requirements (Br. 40), he makes no suggestion that any administrative approach would be adequate to obtain compliance with implied-consent requirements among drunk drivers. Instead, he argues (Br. 41, 45) that States could attack drunk driving *without* enforcing implied-consent requirements, by measures such as forcible blood testing pursuant to warrants, "mass media campaigns," and "alcohol-vendor compliance checks." This argument proves too much, for the obvious implication is that the implied-consent requirements that this Court has described as appropriate are themselves not reasonable or proportionate, simply because States could address drunk driving in other ways.

In any event, Birchfield errs in suggesting that other strategies could readily substitute for implied-consent mechanisms. Birchfield first argues (Br. 41) that use of criminal penalties to secure compliance with implied-consent provisions is disproportionate because States could go without blood-alcohol evidence and prosecute drunk drivers based on officers' observations alone. Such an approach, however, would severely undermine efforts to identify, sanction, and treat drunk drivers because chemical-testing evidence is far and away the most accurate and probative evidence of intoxication. *E.g.*, *Mackey*, 443 U.S. at 15 ("The Commonwealth must have the authority, if it is to protect people from drunken drivers, to require

that the breath-analysis test record the alcoholic content of the bloodstream at the earliest possible moment."); *McNeely*, 133 S. Ct. at 1565 (plurality opinion); *Skinner*, 489 U.S. at 623. Indeed, it is the *only* evidence sufficient to establish that a driver has the very high BAC that reflects a particularly great public-safety threat—a fact of critical importance to the tiered approaches that 49 States use. See *Countermeasures* 1-15.

In the alternative, Birchfield suggests (Br. 42-44) that States can swiftly obtain blood-alcohol evidence by conducting nonconsensual blood draws pursuant to search warrants. This approach, however, is markedly inferior to enforcement of implied-consent provisions, because in addition to occasioning delay, it requires forcible, nonconsensual intrusions that most States ban as a matter of public policy. See *McNeely*, 133 S. Ct. at 1566 (plurality opinion); *Neville*, 459 U.S. at 559. As this Court has recognized, these prohibitions serve the compelling interest of avoiding "violent confrontations" that may ensue when officers attempt to draw blood forcibly from the veins of nonconsenting, intoxicated persons. *Neville*, 459 U.S. at 559.

Experience demonstrates that the risk of such confrontations is far from theoretical. See, *e.g.*, *United States* v. *Bullock*, 71 F.3d 171, 174 (5th Cir. 1995) (arrestee resisted blood draw "by kicking, hitting and attempting to bite" officers), cert. denied, 517 U.S. 1126 (1996); *Carter* v. *County of San Bernadino*, No. E044840, 2009 WL 1816658, at *2 (Cal. Ct. App. June 25, 2009) (during struggle related to blood test, arrestee "physically resisted being rehandcuffed by propelling himself backwards on the gurney and

throwing [officer] into the wall"); *State* v. *Worthington*, 65 P.3d 211, 212, 214 (Idaho Ct. App. 2002) (so much kicking and flailing that "lab technician feared that someone could be accidentally stuck by the needle"); *State* v. *Krause*, 484 N.W.2d 347, 349 (Wis. Ct. App. 1992) (arrestee claimed arm was injured during blood draw because he "struggled throughout the procedure" and "move[d his] arm back and forth so [the technician] couldn't do" the draw); see also *State* v. *Mason*, No. 02C-01-9310-CC-00233, 1996 WL 111200, at *6 (Tenn. Crim. App. Mar. 14, 1996); *McCann* v. *State,* 588 A.2d 1100, 1102 (Del. 1991); *People* v. *Rossetti*, 179 Cal. Rptr. 3d 148, 154 (Cal. Ct. App. 2014); *State* v. *Ravotto*, 777 A.2d 301, 309-310 (N.J. 2001); *Burns* v. *State,* 807 S.W.2d 878, 883 (Tex. Ct. App. 1991), abrogated by *Nguyen* v. *State*, 292 S.W.3d 671 (Tex. Crim. App. 2009); *State* v. *Lanier*, 452 N.W.2d 144, 146 (S.D. 1990), abrogated by *McNeely*, 133 S. Ct. at 1556.

Birchfield finally suggests (Br. 44-46) that States cannot employ criminal sanctions to ensure compliance with implied-consent laws because they could address drunk driving through other measures, like "alcohol-vendor compliance checks" and "open-container laws," which petitioner contends NHTSA has found more effective. As an initial matter, Birchfield is incorrect to assert that NHTSA has concluded that stringent test-refusal penalties are inferior to such strategies. NHTSA has strongly endorsed test-refusal penalties, including criminal sanctions, on the ground that purely administrative penalties are not adequate, *Report to Congress* 20, and that "[r]educed test refusal rates will help the overall DWI control system by providing better BAC evidence," *Counter-*

measures 1-17. The three-star rating of test-refusal penalties in NHTSA's *Countermeasures* manual reflects that as yet only one study has empirically assessed the effect of penalties on refusal rates—showing, as one would expect, that "test refusal rates appear to be lower in States where the consequences of test refusal are greater." *Ibid.*; see *id.* at 1-9 (explaining star ratings).

More critically, however, States are not required to select a single strategy to reduce the "terrible toll" that "drunk driving continues to exact." *McNeely,* 133 S. Ct. at 1565 (plurality opinion). As NHTSA noted in the manual on which Birchfield relies, "there is no 'silver bullet,' no single critical law, enforcement practice, or communications strategy" that is by itself sufficient to counteract drunk driving. *Countermeasures* 1-11. Even when "[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal," this Court has explained that "the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 453-454 (1990).

In any event, Birchfield's suggestion that States could rely on the alternative strategies he identifies instead of implied-consent testing fails to appreciate that many of the strategies he extols—such as high-BAC penalties—depend on BAC evidence for appropriate implementation. See Br. 45-46 (discussing high-BAC sanctions, "limits on diversion and plea agreements," and "DWI offender monitoring" as possible alternative responses). And as noted above, the

forcible blood-testing method Birchfield suggests as an alternative for obtaining BAC evidence is not only barred in most States, but also likely to be less reliable and more dangerous. Under these circumstances, the considered choices by state and federal regulators on the appropriate sanctions for refusal to comply with valid implied-consent conditions should be upheld. If Fourth Amendment reasonableness or an unconstitutional conditions doctrine supported inquiry into the proportionality of sanctions to enforce legitimate conditions, the sanctions here would be proportionate.

B. States May Impose Criminal Penalties For Refusal To Take A Breath Test When Probable Cause Of Intoxication Is Established, Regardless Of The Validity Of Implied-Consent Provisions Generally

Regardless of the validity of implied-consent statutes generally, petitioner Bernard's conviction for refusing to take a breath test upon a showing of probable cause is consistent with the Fourth Amendment. States may undoubtedly use criminal laws to ensure that officers may conduct searches or seizures that do not require a warrant under the Constitution—as they do, for instance, by enacting laws that criminalize resisting arrest or interfering with a lawful search. While this Court has not previously decided whether breath tests are the type of intrusion that generally requires a warrant, the balancing of interests at the heart of Fourth Amendment analysis supports the conclusion that they do not.

1. In light of the Fourth Amendment's overarching command of "reasonableness," *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013), whether a warrant is required for a breath test based upon probable cause depends

on a balancing of the interests at stake. This Court has explained, in particular, that while searches "undertaken by law enforcement officials to discover evidence of criminal wrongdoing" typically require warrants, those procedures are not required for every type of criminal search. *Riley* v. *California*, 134 S. Ct. 2473, 2482 (2014) (citation omitted). Instead, "[a]bsent more precise guidance from the founding era," this Court "generally determine[s] whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 2484 (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)).

Under these principles, this Court has approved warrantless searches or seizures "[w]hen faced with special law enforcement needs," in contexts presenting "diminished expectations of privacy," and for "minimal intrusions"—among other circumstances. *Illinois* v. *McArthur*, 531 U.S. 326, 330 (2001) (citing *Pennsylvania* v. *Labron*, 518 U.S. 938, 940-941 (1996) (per curiam) (search of automobile supported by probable cause); *Sitz*, 496 U.S. at 455 (suspicionless stops at drunk driver checkpoint); *United States* v. *Place*, 462 U.S. 696, 706 (1983) (temporary seizure of luggage based on reasonable suspicion); *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) (temporary detention of suspect without arrest warrant to prevent flight and protect officers while executing search warrant); *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968) (temporary stop and limited search for weapons based on reasonable suspicion)).

2. It is reasonable to forgo warrant procedures for a breath test when probable cause exists to believe that a driver is intoxicated, in view of strong public interests and unusually weak privacy interests.

On the public side are interests in quickly and accurately identifying drunk drivers. No one can doubt the strength of the public interest in identifying, deterring, and punishing drunk drivers, *e.g.*, *McNeely*, 133 S. Ct. at 1565; *Sitz*, 496 U.S. at 451, or the corollary interest in obtaining blood-alcohol evidence "as soon as possible," because blood-alcohol evidence naturally dissipates, *Skinner*, 489 U.S. at 623. Because breath tests can only be obtained with the participation of the person being tested, the public's legitimate interest in obtaining swift BAC evidence requires that States be permitted under the Fourth Amendment to demand a breath test when there is probable cause of impaired driving. The possible alternative—forcible blood draws—will often be inadequate to serve the interest in obtaining evanescent blood-alcohol evidence as swiftly as possible, see, *e.g.*, *Skinner*, 489 U.S. at 623, because while breath tests can be conducted by law enforcement officers as part of arrest processing or in the field, blood tests typically require transport to a medical facility for a test by specialized personnel, see p. 9, *supra*.

The interest in swiftly obtaining this evidence is particularly great because probable cause of intoxication also justifies officers in making the far greater warrantless intrusion of an arrest. At the moment when officers are deciding whether to arrest a person for drunk driving based on this probable-cause standard, a strong interest exists in permitting a far less intrusive accompanying procedure that will enhance

the accuracy of the arrest decision. As this Court has observed, while the test may confirm that a driver was intoxicated, it can also "lead to prompt release of" an unimpaired driver, *Mackey*, 443 U.S. at 19, who would otherwise be subjected to the far more intrusive extended seizure of his person that a criminal charge would occasion, see *King*, 133 S. Ct. at 1978.

On the other side of the balance is an intrusion that is close to de minimis. Because the Fourth Amendment extends at least some protection to "[v]irtually any intrusio[n] into the human body," *King*, 133 S. Ct. at 1969 (citation and internal quotation marks omitted), breath tests indisputably constitute searches, insofar as they require deep exhalations to produce "alveolar or 'deep lung' breath," *Skinner,* 489 U.S. at 616; cf. *King,* 133 S. Ct. at 1969 (noting Fourth Amendment protections are sufficiently broad to extend "even to a breathalyzer test") (citation omitted). The extent of that intrusion, however, is minor along each dimension that this Court has considered. First, breath tests "are not invasive of the body," *Skinner*, 489 U.S. at 626, and unlike blood testing, "do not entail a surgical intrusion," *id.* at 617, or "piercing the skin," *id.* at 625. Second, also unlike blood tests, breath tests "may be conducted safely outside a hospital environment, and with a minimum of inconvenience or embarrassment." *Ibid.* Third, unlike urine tests, breath tests involve no monitoring of excretory or especially sensitive acts. *Id.* at 617. Finally, unlike conventional blood and urine tests, "breath tests reveal the level of alcohol in the * * * bloodstream and nothing more," *id.* at 625—disclosing "no other facts in which the [person tested] has a substantial privacy interest," *id.* at 626; cf. *United States* v. *Jacobsen*, 466

U.S. 109, 123 (1984) (explaining that an individual has no reasonable expectation of privacy with respect to "governmental conduct that can reveal whether a substance is cocaine, and no arguably 'private' fact").

Insofar as state laws shed light on whether breath tests may be required without a warrant, such laws strongly support allowing that procedure. All 50 States provide for warrantless breath tests under their implied-consent provisions. And the prohibitions in many jurisdictions on any type of forcible chemical testing on which Bernard relies (Br. 25-26) have little relevance, because forcible testing is not at issue (and not possible) here. Cf. *McNeely*, 133 S. Ct. at 1566 (assessing the reasonableness of *forcible* blood testing by looking to state rules concerning forcible blood testing). The state laws providing for warrantless breath testing thus reinforce that the intrusion of a breath test is "negligible"—a fact "of central relevance to determining reasonableness" under the Fourth Amendment. *King*, 133 S. Ct. at 1969.

Finally, a warrant system here would fail to serve an important traditional function of warrants—authorizing officers to perform a particular search regardless of consent—because breath tests cannot be performed on non-consenting persons even if a warrant is obtained. Individuals who are drunk and have already refused to comply with demands that are legitimately made under valid licensing conditions are not a promising class to respond to a warrant. A warrant system will therefore lead to delay, but not necessarily evidence.

In sum, States rules that permit warrantless breath testing based upon probable cause of intoxication appropriately account for the strong public inter-

ests and very modest intrusion here. The probable cause standard familiar to law enforcement officers is one this Court has commonly held sufficient to support warrantless intrusions. See, *e.g.*, *Skinner*, 489 U.S. at 624; *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985) (citing cases). Considering all the circumstances, the strong public interests in permitting officers to swiftly obtain evanescent evidence based on probable cause—at the time when they are making an arrest decision based on that same showing—far outweigh the negligible privacy costs of allowing that warrantless procedure.

CONCLUSION

The judgments of the Supreme Court of North Dakota and the Supreme Court of Minnesota should be affirmed.

Respectfully submitted.

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