No. 14-1507

IN THE

Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF RESPONDENT

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QUESTION PRESENTED

North Dakota law makes it an offense for a motorist arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol.

The question presented is:

Whether a motorist can voluntarily consent to a chemical test after an officer reads an implied consent advisory informing him that he could be charged with a crime if he refuses to submit to such a test.

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INTRODUCTION

Although stemming from the same state law as its companion case, *Birchfield v. North Dakota*, No. 14-1468, this case differs from *Birchfield* because Petitioner Steve Michael Beylund consented to a blood test after being read the implied-consent advisory. He now objects to the State's use of the test results in subsequent civil enforcement proceedings. Beylund's claim necessarily fails if the Court agrees with North Dakota in *Birchfield* that a State may require consent to a chemical test, upon arrest for drunk driving, as a condition for driving within the State. So far as we can tell, Beylund does not dispute this. *See* Pet. Br. 4, 12. His entire brief is premised on Birchfield prevailing in his case.

If the State does not prevail in *Birchfield*, the issue becomes whether Beylund's consent to a blood test was still voluntary and therefore was constitutional. This Court has long held that the voluntariness of consent must be determined by assessing the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). To be sure, the implied-consent advisory—informing Beylund that refusal to take a chemical test is a crime—is a factor in that analysis. In many cases, it will be dispositive. But it will not *always* be dispositive. For example, some individuals will wish to prove their innocence by submitting to a chemical test. If this Court reverses in *Birchfield*, it should remand here to allow the North Dakota courts to assess the totality of the circumstances in the first instance.

STATEMENT

To avoid duplication, the State does not address in this brief issues common to *Birchfield* and *Bernard v. Minnesota*, No. 14-1470. This brief addresses only matters directly connected to the North Dakota Supreme Court's affirmance of the hearing officer's finding that Beylund voluntarily consented to the blood test.

1. North Dakota conditions the privilege of driving on its roads on the driver's consenting to submit to a chemical test of his blood, breath, or urine to detect the presence of alcohol or drugs. N.D. Cent. Code § 39-20-01(1). Under North Dakota's implied-consent law, a law enforcement officer may request a chemical test only if the driver has been arrested on probable cause for driving under the influence (DUI). *Id.* § 39-20-01(2). If, following his arrest, the driver withdraws his implied consent, he will not be subject to a "warrantless nonconsensual" chemical test. *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013); *see also* N.D. Cent. Code § 39-20-04(1); Brief of Respondent at 54 n.12, *Birchfield v. North Dakota*, 14-1468 (Mar. 15, 2016). But there are penalties for withdrawing consent when properly requested by a law enforcement officer, including prosecution for a criminal offense that, in almost all cases, is a misdemeanor. N.D. Cent. Code §§ 39-08-01(1)(e), 39-08-01(3).

At the time the officer requests a test of the DUI suspect, the officer is required to read the implied-consent advisory. N.D. Cent. Code § 39-20-01(3). The advisory informs the driver that "North Dakota law requires [him] to take the test to determine whether [he] is under the influence of alcohol or drugs; that refusal to take the test … is a crime punishable in the same manner as

driving under the influence; and that refusal … to submit to the test … may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges." *Id.* The driver also has a limited right to consult with an attorney before deciding whether to submit to testing. *City of Mandan v. Leno*, 618 N.W.2d 161, 163 (N.D. 2000) (citing *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285, 290 (N.D. 1987)).

When a person arrested for DUI refuses to submit to chemical testing, the law enforcement officer takes possession of his license and issues the driver a temporary operator's permit, which "serves as the [Director of the Department of Transportation's] official notification … of the director's intent to revoke driving privileges." N.D. Cent. Code § 39-20-04(1). The driver may request administrative review, *id.* § 39-20-05(1); any revocation of driving privileges does not then occur unless and until the hearing officer rules against the motorist. *Id.* § 39-20-04.1(1).

2. On August 10, 2013, at around 9:00 p.m., Bowman Police Officer Shawn Brien responded to a report of a suspicious vehicle in an individual's yard. Pet. App. 2a, 27a, 40a; Tr. of Testimony of Admin. Hrg. at 6, *In the Matter of the Suspension of the Driving Privileges of Steve Michael Beylund*, No. 06-2013-CV-00095 (Sept. 18, 2013) ("Tr."). Near the home, Officer Brien spotted a car matching the reported description and saw it nearly hit a stop sign while turning into a driveway. The car then stopped, partially in the roadway. Pet. App. 27a; Tr. 7.

Officer Brien pulled up behind the car, walked up to the driver's side, and observed an empty wine glass in the

center console and the odor of alcohol coming from inside the vehicle. Pet. App. 40a; Tr. 8. Beylund "stumbled" when exiting the car, and "grabbed the door for support." Pet. App. 40a; Tr. 9. After he could not complete a field sobriety test because he could not follow instructions to keep his head still, Officer Brien gave Beylund the implied-consent advisory and asked him to agree to an on-site screening breath test. Pet. App. 41a; Tr. 13. Beylund agreed to take the on-site breath test, but he failed to give a proper air sample after three attempts. Pet. App. 41a; Tr. 14.

At this point, Officer Brien arrested Beylund for DUI, and drove him to a local hospital. Pet. App. 41a; Tr. 14-15. At the hospital, Officer Brien again read Beylund the implied-consent advisory, including the provision that he would be charged with a crime if he refused. Pet. App. 41a; Tr. 16. Beylund agreed to submit to a chemical test, which established that he had a blood alcohol concentration of 0.25% by weight. Pet. App. 41a.

3. Beylund requested an administrative hearing under N.D. Cent. Code § 39-20-05, to contest the State's intent to revoke his driving privileges. The hearing officer found that Officer Brien had reasonable grounds to believe Beylund had been driving a vehicle under the influence of intoxicating liquor, that Officer Brien lawfully arrested Beylund, that the blood test was administered in accordance with state law, and that the test results showed Beylund had an alcohol concentration of at least eighteen one-hundredths of one percent by weight. Pet. App. 41a; Tr. 43. Based on her findings, the hearing officer suspended Beylund's driving privileges for two years. Pet. App. 41a; Tr. 43. Beylund did not testify at the hearing.

4. Beylund appealed his license suspension to the state district court, which affirmed the hearing officer's decision. The district court observed that this Court, in *McNeely*, "recognized the continued vitality of implied consent laws." Pet. App. 29a. It then rejected Beylund's contention that his consent was coerced, holding that "[t]he reading of an implied consent/refusal statute in and of itself does not indicate automatic coercion regarding consent to a chemical test." Pet. App. 35a. Assessing the totality of the circumstances, the district court found that Beylund had voluntarily consented to the blood test. Pet. App. 36a.

5. The North Dakota Supreme Court affirmed. Pet. App. 1a-20a. The court relied on its decision in *McCoy v. N.D. Department of Transportation*, 848 N.W.2d 659 (N.D. 2014), which—operating from the premise that the State's implied consent law does not impose an unconstitutional condition—held that "'a driver's decision to agree to take a test is not coerced simply because an administrative penalty has been attached to refusing the test.'" Pet. App. 8a (quoting *McCoy*, 848 N.W.2d at 667). The court then pointed to its decision in *State v. Smith*, 849 N.W.2d 599 (N.D. 2014), which held that the same is true even after the legislature increased the penalty for refusing to take the test to a misdemeanor. Pet. App. 8a. On the strength of those precedents, the Court held that Beylund had "voluntarily consented to the blood test." *Id.*

The remainder of the North Dakota Supreme Court's decision addressed and rejected Beylund's contention that "North Dakota's implied consent law violates the unconstitutional conditions doctrine because it conditions the privilege of driving on the relinquishment of the

constitutional right to be free of unreasonable search and seizures." Pet. App. 9a; *see id.* at 9a-20a. The State addresses that issue in its brief in *Birchfield* and will not otherwise address it here, except as relevant to the voluntariness issue.

SUMMARY OF ARGUMENT

As Beylund effectively concedes, a ruling for the State in *Birchfield* would defeat his challenge to the State's implied consent statute. Pet. Br. 4, 13. Simply put, if a State may make it a misdemeanor for a drunk-driving arrestee to refuse a chemical test, it can surely inform the arrestee of that consequence.

On the other hand, if the Court were to rule against the State in *Birchfield*, then the Court should remand this case to allow the North Dakota courts to determine in the first instance whether—on the totality of the circumstances—Beylund's consent was voluntary. Indeed, Beylund agrees that a remand would be warranted. Pet. Br. 13-15.

ARGUMENT

I. If this Court rules for the State in *Birchfield,* Beylund's contention that his consent to submit to a blood test was coerced must fail.

Beylund does not dispute that his claim fails if this Court rules for the State in *Birchfield* and holds that a State may impose criminal penalties on a motorist who, after being arrested for driving under the influence, refuses to submit to a chemical test. *See* Pet. Br. 12 (acknowledging

that "[i]t is a truism that an act is not coerced simply because a person is put to a 'difficult choice[],' and perhaps such a choice would be presented were the consequences of test refusal *accurately* described to a motorist") (quoting *South Dakota v. Neville*, 459 U.S. 553, 564 (1983)). The only affirmative argument he makes, Pet. Br. 9-13, is premised on the petitioner prevailing in *Birchfield*. This is for good reason.

If a State may make it a misdemeanor for a drunken driver to refuse a chemical test upon arrest, it can surely inform the driver of that consequence. As the Oregon Supreme Court explained, "accurately advising a defendant of a lawful penalty that could be imposed may well play a role in a defendant's decision to engage in a particular behavior, but that does not mean that the defendant's decision was 'involuntary.'" *State v. Moore*, 318 P.3d 1133, 1138 (Or. 2013); *see also McCoy*, 848 N.W.2d at 666 (relying on *Moore*). Any other result would mean that a State can condition the privilege of using its roads on the driver's consenting to submit to a chemical test, yet cannot use the results of that test when the driver submits to it—a nonsensical proposition.

Accordingly, the Court should affirm here for the same reasons it should affirm in *Birchfield*, as set forth in the State's brief in that case.

II. If this Court rules for the defendant in *Birchfield*, it should remand this case to allow the North Dakota state courts to assess whether, under the totality of the circumstances, Beylund's consent was voluntary.

In its decisions in this case, and in *McCoy* and *Smith*, the North Dakota Supreme Court rejected challenges to the State's implied-consent law or assumed that law's validity. *See* Pet. App. 9a-20a; *Smith*, 849 N.W.2d at 603-06; *McCoy*, 848 N.W.2d at 669 (declining to address whether the State's implied-consent law imposes an unconstitutional condition because the parties did not adequately brief the issue). The North Dakota Supreme Court has therefore not addressed whether and when a person arrested for drunk driving can voluntarily consent to a chemical test after being read an implied-consent advisory that is later found to have inaccurately informed him that he may be subject to criminal penalties for revoking consent. As explained below, the answer is that the totality-of-the-circumstances test applies and may show that consent was voluntary, even where the officer read to an arrestee an advisory later found by this Court to have included an unconstitutional condition.

1. The starting point is that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). And this Court has long recognized that searches undertaken with valid consent are reasonable and, thus, "constitutionally permissible." *Schneckloth*, 412 U.S. at 222 (collecting cases).

Consent is valid if it is "freely and voluntarily given." *Id.* (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). In *Schneckloth*, and in every other case cited by Beylund, this Court emphasized that the validity of consent is determined by examining the "totality of the circumstances." *Id.* at 226-27; *see also United States v. Drayton,* 536 U.S. 194, 206-07 (2002) (rejecting claim that individuals must be told affirmatively that they have a right to refuse a request to search; "[i]nstead, the Court has repeated that the totality of the circumstances must control"); *United States v. Watson*, 423 U.S. 411, 424 (1976) (assessing whether, "in the totality of the circumstances, [defendant]'s consent was not his own 'essentially free and unconstrained choice'" (citation omitted)). The ultimate question is whether, taking into account the totality of the circumstances, an individual's "will ha[d] been overborne and his capacity for self-determination critically impaired." *Schneckloth*, 412 U.S. at 225.

When assessing Fourth Amendment claims, the North Dakota Supreme Court has therefore applied the totality-of-the-circumstances test to determine the validity of suspects' consent. *See*, *e.g.*, *Smith*, 849 N.W.2d at 604-05; *McCoy*, 848 N.W.2d at 664-65.

2. The issue here is whether a driver's consent to a blood test can ever be voluntary when he is told that it is a crime to refuse to submit to the test, but (as we are assuming for purposes of this section of the brief) that criminal penalty is an unconstitutional condition. Beylund appears to argue that the answer is always no and that, as a categorical matter, consent is coerced if the implied-consent advisory is read before consent being given. *See* Pet. Br. 11. Categorical rules, however, are inconsistent

with the totality-of-the-circumstances test. *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (rejecting proposed *per se* rule regarding consents to search and stating that, "[i]n applying [the totality-of-the-circumstances] test, we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"). As the Court recently stated, when a totality-of-the-circumstances inquiry applies, "[w]e have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (assessing whether State established probable cause to support a search warrant).

The situation presented here is no exception. An officer's telling a driver that refusal to take a chemical test is a crime is an important circumstance, one that (if the State may not make refusal a crime) will often mean that consent was coerced under the totality test. But there are many scenarios where a driver's consent to chemical testing may be voluntary even though an officer informed him that refusal to take a test is a crime punishable in the same manner as DUI. For example, a driver may consent to chemical testing because he believes the test results will prove his innocence. A driver might also consent because he does not want his license suspended as a result of a civil proceeding (as occurred here), irrespective of any possible criminal charge. Numerous drivers arrested for DUI consented to chemical testing before enactment of N.D. Cent. Code § 39-08-01(3), which now makes refusal to consent a misdemeanor in nearly all instances. *See e.g.*, *City of Bismarck v. Hoffner*, 379 N.W.2d 797, 800 (N.D. 1985) ("[D]espite Hoffner's testimony that it was the threat of losing his license for a year that caused him to

submit to the blood test, Hoffner consented to the taking of the blood voluntarily."); *Wolf v. N.D. Dep't of Transp.*, 523 N.W.2d 545, 546 (N.D. 1994) (Wolf consented to the test). Or a driver might have indicated his willingness to take a chemical test before the officer began reading the implied-consent advisory.

In the end, it is for state trial courts and administrative tribunals to assess all the circumstances and determine whether, in fact, the implied-consent advisory was the sole or predominant reason the driver consented. And it is for state appellate courts to review those totality-of-the-circumstances determinations.

3. In ruling that Beylund's consent was voluntary, the North Dakota courts rejected constitutional challenges to the State's implied-consent law or operated on the premise that the law was constitutional. *See* Pet. App. 9a-20a (North Dakota Supreme Court); Pet. App. 31a-36a (North Dakota District Court). None of those tribunals assessed whether Beylund's consent was voluntary if the State may *not* make revocation of consent to take the test a crime. For multiple reasons, they should be given the first opportunity to do so should this Court rule against the State in *Birchfield*.

First, this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Its usual practice when it rejects a lower court's legal rule, therefore, is to remand the case to allow the lower court to apply the correct legal rule to the facts. *See*, *e.g.*, *Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 662 (2016) (remanding to allow lower courts to apply correct interpretation of ERISA to the funds at issue).

Second, should this Court change the legal backdrop of Beylund's waiver and invalidate this aspect of North Dakota's implied-consent law, the parties may wish to introduce additional evidence that would bear on voluntariness. Where, as here, an administrative agency makes the initial factual determination, N.D. Cent. Code Ann. § 39-20-05; Pet. App. 40a-42a, North Dakota's Administrative Agencies Practices Act allows a court to remand the matter back to the agency hearing officer for the consideration of additional evidence. *See* N.D. Cent. Code § 28-32-45. A decision by this Court holding that Beylund's consent was or was not voluntary would preclude that procedural option.

As things stand, the evidence surrounding Beylund's consent is skimpy—mainly due to his refusal to testify or otherwise present evidence at the administrative hearing he requested. We know from Officer Brien's testimony that Beylund verbalized his consent to provide a blood sample, Tr. 16, and that he cooperated in the testing process, Tr. 17. Beylund did not state that he felt coerced to take the test or that the advisory motivated him to agree to the test against his better judgment. He instead argued solely that, as a matter of law, his consent was coerced because Officer Brien read the advisory to him. Pet. App. 7a ("[Beylund] claims his consent to take the test was involuntary because he was coerced by the statute's penalties, which criminalize refusal. Beylund does not allege any coercive circumstances, other than the penalties."); Pet. App. 28a ("Petitioner's … final argument is that he was coerced into consenting to the chemical tests because refusal of the tests is a crime in North Dakota.").

But whether or not an individual's consent to a search was coerced is a matter of *fact*, not of law. By presenting no facts regarding the impact the implied-consent advisory actually had on him, *see* Pet. App. 36a ("Beylund has failed to allege any other factors that might suggest his consent was coerced, aside from reading of the Implied Consent/Refusal law itself."), he gave the hearing officer and state courts ample basis to conclude that his consent was voluntary. Perhaps the North Dakota tribunals would reach a different conclusion based on the (assumed) changed legal landscape; perhaps not. They are entitled to the first crack at it, and the opportunity to decide whether to allow the parties to introduce additional evidence.

Third, as Beylund acknowledges, even if a court ultimately concludes that his consent was involuntary, the proper remedy is an open question as a matter of both state and federal law. Pet. Br. 13-15. Indeed, he agrees that the question of remedy, at least, "is best reserved for consideration in the first instance on remand." Pet. Br. 13. Quite so, *if* there is a constitutional violation to remedy—an issue also "best reserved for consideration in the first instance on remand."

Beylund nonetheless goes on to argue that both North Dakota and federal constitutional law support the remedy of exclusion here. That is doubtful. As a state law matter, the North Dakota Supreme Court has refused to extend the exclusionary rule to include chemical test results in civil administrative proceedings. *See Fasching v. Backes*, 452 N.W.2d 324, 325 (N.D. 1990) ("[T]his court [has] recognized that constitutional protections afforded in criminal proceedings are not applicable in administrative license-suspension proceedings."); *Holte v. N.D. State*

Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989) ("The benefit of using reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings, outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.") (quotation omitted)).

As a federal constitutional matter, this Court has been extremely reluctant to order the remedy of exclusion in civil contexts. *See Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) ("[W]e have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials."). For example, the Court has held that the exclusionary rule does not apply to parole revocation proceedings, to grand jury proceedings, in civil tax proceedings, and in civil deportation proceedings. *Id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974)). Given those precedents, it seems unlikely that this Court will one day command the States to exclude unlawfully obtained evidence from civil proceedings devoted to whether a person's driver's license should temporarily be suspended. In any event, as all parties agree, now is not the time to decide that issue.

CONCLUSION

The judgment of the North Dakota Supreme Court should be affirmed.

Respectfully submitted,

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