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

In The
Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

MINNESOTA,

Respondent.

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writs Of Certiorari To The Supreme Courts Of Minnesota And North Dakota

BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL TRAFFIC LAW CENTER AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The National District Attorneys Association (NDAA) was formed in 1950 and is the oldest and largest organization representing America's state and local prosecutors. NDAA gives a focal point to local prosecutors to advance their causes and issues at the national level. The association presently has approximately 10,000 members, including most of the nation's local prosecutors, in addition to assistant prosecutors, investigators, victim-witness advocates and paralegals. NDAA's members come from the offices of District Attorneys, State's Attorneys, Attorneys General and county and city prosecutors with responsibility for prosecuting criminal violations in every State and territory in the United States. NDAA representatives regularly meet with the Department of Justice, members of Congress and other national associations to represent the views of prosecutors to influence federal and national policies and programs that affect law enforcement and prosecution. In carrying out its mission, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people," NDAA provides professional guidance and support to its members, serves as a resource and education center, and follows

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

public policy issues involving criminal justice and law enforcement.

The National Traffic Law Center (NTLC) is part of NDAA and serves as a nationwide, interdisciplinary resource center for technical assistance, training and publications. It was created in cooperation with the National Highway Traffic Safety Administration (NHTSA) and currently operates under funding received from both NHTSA and the Federal Motor Carrier Safety Administration, both agencies of the United States Department of Transportation.

Because state and local prosecutors handle 95% of the criminal prosecutions nationally, rulings by the Supreme Court have far-reaching, serious impacts upon criminal cases in state courthouses across the country. We practice where the law is truly tested: not in the deliberative atmosphere of an appellate courtroom, but on the streets where police must make split-second choices in dangerous situations and in trial court settings that sometimes give prosecutors and police only a moment to analyze and react. It is important to the National District Attorneys Association, and to the tens of thousands of prosecutors we represent, that the U.S. Supreme Court will be well-advised of the practical applications of the laws it creates.

Every year, impaired drivers are responsible for killing thousands of innocent people on America's highways. Close to 1.5 million impaired driving arrests are made annually, comprising more than ten

percent of the total number of arrests made each year. Impaired driving prosecutions are some of the most highly litigated and contested cases within the criminal justice system.

Given the need for its member prosecutors and law enforcement professionals to preserve all reasonable tools at their disposal to combat the scourge of impaired driving, the *Amicus* respectfully submits this Brief in support of Respondents North Dakota and Minnesota.

SUMMARY OF ARGUMENT

Impaired driving kills and injures thousands of people every year and costs billions of dollars, beyond the loss of human life.

Driving on a public highway is a privilege, not a right. Such privilege is properly conditioned on a driver's agreement to submit to a chemical test to determine the alcohol content of his blood when probable cause exists that he is driving while impaired. While the Constitution protects citizens from unreasonable searches, exceptions exist that may make a warrantless search reasonable and this type of implied consent is such a valid exception. Further, in the situation where probable cause exists that a driver is impaired, it is reasonable to attach a criminal penalty to the withdrawal of a driver's consent to submit to such testing. Criminalizing such behavior (*i.e.*, the withdrawal of consent), is within a states'

reserve powers and is a reasonable exercise of police powers. To require a search warrant in this circumstance does not guarantee that the suspect will cooperate with the blood draw and, thus, force may be necessary to affect the search. Allowing a state to criminalize refusal to submit to a chemical test eliminates unnecessary, and potentially dangerous, forced blood draws. Lastly, upholding criminal refusals is an effective and legal "tool" prosecutors have to enforce impaired driving laws.

ARGUMENT

Thousands of people are injured and killed every year as a result of impaired driving. Despite elevated public awareness of its danger, the number of people who commit this preventable crime continues to rise. In 2014, the last year for which national statistics are available, nearly 10,000 people died in alcohol-impaired driving crashes – the equivalent of one person every 53 minutes. National Highway Traffic Safety Administration, *Traffic Safety Facts, 2014 Data* (DOT HS 812 231), December 2015. In addition to the cost to human life, alcohol-impaired motor vehicle crashes cost more than an estimated $44 billion annually, including costs for lost productivity,

workplace losses, legal and court expenses, medical costs, property damage and other costs. *Id*.[2]

As a result, in an effort to make public roadways safer, states have increased the consequences for those who drive while impaired. For example, some states have established mandatory minimum sentences for drivers convicted of driving with a high blood alcohol level and/or with the presence of certain drugs in their blood.[3] Another example of the negative consequences faced by the impaired driver is licensing sanctions; virtually every state administratively suspends or revokes the driver's license of an impaired driver who refuses to submit to chemical testing when probable cause exists that he was impaired. An overwhelming majority of states also permit evidence of a suspect's refusal to submit to a chemical test to be admissible in a criminal trial. Some states have gone further and criminalized the

[2] These figures are the most recently available statistics and are from 2010.

[3] 47 states and the District of Columbia currently have some sort of enhanced blood alcohol content (BAC) legislation. Many of these states define excessive BAC differently. Some enhance criminal penalties while others are only related to the civil administrative license revocation. Enhanced BAC levels range from .10 grams of alcohol per 100 grams of blood (Iowa, New Jersey, and South Carolina) to .20 and .25 grams of alcohol per 100 grams of blood (Wisconsin and the District of Columbia).

act of refusing to submit to chemical testing after an officer has probable cause to arrest for DUI.[4]

This Court should decide affirmatively that a state may, in fact, make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol and/or drugs when probable cause exists to believe he is driving while impaired. Criminalizing refusals is a "tool" prosecutors and police may use to enforce impaired driving laws. The refusal statutes at issue in these consolidated cases existed when the Court decided *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Additionally, they do not affect the rights of suspects to travel. The Supreme Court should decide that a state may criminalize a suspect's refusal because it is within the reserved powers of the state legislatures, is a reasonable exercise of police powers under the circumstances, and does not unreasonably infringe on a driver's rights. Moreover, if the Court requires an officer to secure a search warrant to obtain blood, that would not guarantee a suspect will cooperate with a blood draw, does not make the search any more reasonable, and may not always be possible. To prohibit states from criminalizing refusals would encourage nonconsensual, forced blood draws on impaired drivers, needlessly expose police officers and medical personnel to the violent or dangerous behavior of impaired drivers who do not wish

[4] Alaska, California, Indiana, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Nevada, Rhode Island, Tennessee, Ohio, Virginia, and Vermont.

to be tested, and may unnecessarily subject the police and medical staff to civil liability. In addition, since the entire legal system is based on resolving disputes in court and not on the street, the proper forum to challenge the reasonableness of a search (or the lack thereof) is the courtroom. For the following reasons, the U.S. Supreme Court should hold that a state may make it a crime for a suspect to refuse to take a chemical test to detect the presence of alcohol and/or drugs in his blood when probable cause exists that he was driving while impaired.

I. BACKGROUND FACTS

In each of the three cases before the Court, the defendant was arrested for impaired driving. Each defendant was provided the implied consent advisory by a police officer.

- Birchfield submitted to a preliminary breath test with a .254 percent alcohol concentration but refused to consent to a chemical test. He later conditionally pled guilty to misdemeanor refusal to submit to a chemical test, reserving his right to appeal the court's denial of his motion to dismiss the charge on constitutional grounds. The North Dakota Supreme Court held that the criminal refusal statute did not violate the Fourth Amendment or the search and seizure provision of the North Dakota Constitution either facially or as applied to Birchfield.

- Beylund agreed to submit to a blood test, the results of which were .25 grams of alcohol per 100 ml of blood. As a result of Beylund's alcohol level, his driver's license was subsequently suspended. He petitioned for reconsideration of the hearing officer's decision to suspend the license arguing that the blood test was an unconstitutional warrantless search and without a valid exception.

- Bernard refused to submit to a chemical test. Bernard was charged with a refusal offense and filed a motion to dismiss, arguing the statute violated due process because the statute makes it a crime to refuse an unreasonable, warrantless search of a driver's breath. The lower court ruled the refusal statute was not on its face unconstitutional but dismissed Bernard's case because the police lacked a lawful basis to search him without a warrant (*i.e.*, that police lacked a legal reason to arrest him for impaired driving). The court of appeals reversed, holding that Bernard's due process rights were not violated by prosecuting him for refusal because the facts of his case established the police officers had probable cause and could have secured a search warrant to conduct a blood draw. The Minnesota Supreme Court held that the search was valid under the search incident to arrest exception to the warrant requirement and

that the refusal statute is a reasonable means to a permissive objective.

II. STATES' POWERS

The U.S. Supreme Court has recognized the power of states to enact laws to aid the police function of protecting the safety of its people. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979); *South Dakota v. Neville*, 459 U.S. 553 (1983). The Court has also recognized society's problem with impaired driving and that it occurs with "tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation. . . . This Court, although not having the daily contact with the problem state courts have, has repeatedly lamented the tragedy." *Neville* at 558. In fact, the Court has "traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Montrym* at 17-18. States "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." *Montrym* at 15.

States have the power to enact laws to protect public health and safety and have considerable interest in promoting and maintaining safe roadways,

especially from the dangers of impaired drivers. States, therefore, may highly regulate the privilege to drive. While vehicles may be safely operated in the ordinary course, when operated recklessly or by an impaired driver, they become lethal weapons. It is reasonable for a legislature to determine that chemical testing of an impaired driver would be helpful to the identification and successful prosecution of him, and that a refusal to submit to testing impedes this objective. Penalizing a refusal, therefore, " . . . serves the legitimate legislative goals of deterring such refusals and ensuring that those who refuse gain no benefit by their refusal." *Jensen v. State*, 667 P.2d 188 (1983).

Under the U.S. Constitution, there is a fundamental right to "liberty," which includes the freedom of movement and interstate travel. *See* Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 BU 6 (2010). Each state, however, may regulate the manner and method of travel on the public roadways. There is no constitutional right to drive, only a privilege bestowed by a state. As a prerequisite to the privilege to drive, every state has enacted an implied consent law which, in essence, conditions an individual's privilege to drive on the fact he has agreed to (*i.e.*, impliedly consented to) submit to chemical testing if and when a police officer has probable cause to believe the driver is impaired by alcohol or drugs.

In the past, the Court has declined to recognize a constitutional right to refuse to take a chemical test. *Schmerber v. California*, 384 U.S. 757 (1966); *see also Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602 (1989) (finding that no Fourth Amendment violation existed when drug testing railroad employees who violated safety regulations or were involved in accidents). The North Dakota Supreme Court also observed that before the criminal refusal statute was enacted, there was "no Federal constitutional right to be entirely free of intoxication tests . . . ," and that there existed only a conditional right to refuse, based on the licensing consequences for a refusal. *State v. Birchfield*, 858 N.W.2d 302, 304-305 (2015) citing *State v. Murphy*, 516 N.W.2d 285, (N.D. 1994). It logically follows that states would condition an individual's privilege to drive upon his agreement to submit to chemical testing if probable cause exists to believe he is driving while impaired. It is also rational to sanction a suspect who later withdraws his consent, or reneges on the agreement, to submit to testing. To refuse testing prevents the state from obtaining evidence to later be used against the driver in a criminal prosecution for impaired driving. Rather than allow the suspect to benefit from that refusal, holding him criminally accountable serves a legitimate state interest in keeping dangerous drivers off the public roads.[5]

[5] The legislature created a statutory right to refuse but attached significant consequences to it so that a driver " . . . may

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III. CONSTITUTIONAL CONSIDERATIONS

A. Fourth Amendment

The Fourth Amendment guarantees the right of people to be free from unreasonable searches. The law requires police to have a warrant to conduct a search unless a valid exception exists. For example, exigent circumstances, search incident to arrest, and consent are three acceptable exceptions.

1. Exigency

The Supreme Court held in *Schmerber v. California* that a warrantless, non-consensual test of an impaired driver's blood did not violate the Fourth Amendment against unreasonable searches. The officer in *Schmerber* " . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'. . . ." *Schmerber* at 770. In other words, the natural dissipation of alcohol from the body created an exigency found acceptable by the *Schmerber* Court.

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not avoid the potential consequences of test submission and gain advantage by simply refusing the test." *Birchfield* at 309, citations omitted. In *Birchfield*, the driver submitted to a PBT with a high result; by refusing further testing, while subject to penalty for the refusal, he " . . . was able to avoid the enhanced penalties for being highly intoxicated." *Birchfield* at 309.

That same exigency, however, was not found in *Missouri v. McNeely*. Factually similar to *Schmerber*, the *McNeely* Court refused to establish a bright line of exigency in all cases based upon the natural dissipation of alcohol in the body. Instead, the *McNeely* Court established a totality of the circumstances test to determine the case-by-case appropriateness of a warrantless search of an impaired driver's blood. Importantly, the *McNeely* Court did not reverse *Schmerber*.

2. Search Incident to Arrest

While the Minnesota Court of Appeals decided that the police could have obtained a search warrant for Bernard (*i.e.*, the police had probable cause), the Minnesota Supreme Court refused to recognize a probable cause exception to the warrant requirement and rejected that rule. *Bernard v. Minnesota*, 859 N.W.2d 762, 766 (2015). Instead, relying on numerous other cases in which warrantless searches of the body were upheld, the Minnesota Supreme Court accepted the argument that it would have been appropriate to search Bernard pursuant to the search incident to arrest exception. As described above, the Minnesota Supreme Court validated the state's ability to take a driver's breath sample as a warrantless search because the search did not violate the Fourth Amendment requirement for a warrant.

3. Consent

Consent is another valid exception to the warrant requirement. As described above, as part of its impaired driving deterrence, every state has an implied consent law. Some courts have not taken the position that implied consent is a valid "per se" exception to the warrant requirement. *Implied Consent: No Exception to the Warrant Requirement*, Between the Lines (National Traffic Law Center, Alexandria, VA), Vol. 23, No. 1. At least one state has determined that in order for consent to be valid, a driver must have the ability to ultimately refuse when requested to submit to a chemical test. *State v. Won*, 2015 WL 7574360 (Nov. 25, 2015). In other words, without the ability to refuse, some states have deemed such consent to be coerced and disallowed the use at trial of subsequent test results, while in other jurisdictions, even the failure to provide proper notice of the consequences of a refusal did not violate due process. *Kanikaynar v. Sisneros*, 190 F.3d 1115 (10th Cir. 1999).

Like many states' implied consent laws, North Dakota's and Minnesota's implied consent laws provide an individual who drives a vehicle is deemed to have given consent to submit to a chemical test after being placed under arrest for driving under the influence. North Dakota Century Code Annotated (NDCC) §39-20-01; Minnesota Statutes Annotated (MSA) §169A.51, subd. 1. Both states also make it a crime to refuse to submit to chemical testing after an arrest for impaired driving. NDCC §39-08-01; MSA §169A.20, subd. 2 and MSA §169A.51, subd. 2. A

police officer is required to advise an individual of the consequences of his refusal to submit to testing. NDCC §39-20-01(3)(a); MSA §169A.51, subd. 2. If a person refuses to submit to testing, however, no test may be given in North Dakota, while a test may still be performed in Minnesota. NDCC §39-20-04; MSA §169A.51, subd. 2. In North Dakota, if an officer has reasonable grounds to arrest a driver, the driver submits to a chemical test, and the results show the driver to have an alcohol concentration in his blood of at least .08% by weight at the time of testing, his license shall be suspended. NDCC §39-20-04.1.

Implied consent laws essentially condition a driver's privilege to drive on the fact he has impliedly consented to submit to chemical testing, if and when a police officer has probable cause to believe the driver is impaired by alcohol or drugs. In fact, the Supreme Court explicitly recognized the benefits of these types of laws in *McNeely*. Specifically, the *McNeely* Court indicated, "[s]tates have a broad range of legal tools to enforce their drunk-driving laws to secure BAC [(blood alcohol concentration)] evidence without undertaking warrantless nonconsensual blood draws. For example, 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. [Citations omitted.] Such laws impose significant consequences when a motorist withdraws consent. . . ." *McNeely* at 1566. Although the *McNeely*

Court identified a driver's license suspension or revocation and the use of the refusal in a subsequent prosecution as "significant consequences" the list of consequences was clearly not exhaustive, and presumably, includes within the "broad range of legal tools," the criminal sanctions for refusing to submit to testing. *McNeely* at 1566.

4. No Search

This Court could resolve the entire constitutional issue of whether a refusal statute violates a driver's Fourth Amendment rights by simply finding that no search occurred. When a driver refuses to be tested, and there is no test administered, then it follows that no search occurred about which the parties need to litigate.[6] Likewise, the Court should focus attention on the constitutionality of the arrest, rather than the imagined unconstitutionality of a non-existent search.[7]

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[6] As the North Dakota Supreme Court recognized in *Birchfield*, that because the driver refused to be tested, as was his right under the statute, and was therefore not tested, no search occurred and no Fourth Amendment violation. *See State v. Birchfield* at 307-308.

[7] In any event, any challenges to the search should be litigated in court. The North Dakota Supreme Court in *Birchfield* quotes from *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1451 (9th Cir. 1986), in which the Ninth Circuit Court of Appeals upheld Alaska's criminal refusal statute against a Fourth Amendment challenge: The driver's " . . . basic argument is that they have been deprived of their right to be free of unreasonable searches. Nothing in the Alaska statutes here at

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B. Fifth Amendment

A suspect's due process rights are also not violated by criminalizing refusal. On more than one occasion, the Supreme Court has found no due process violation when, upon a suspect's refusal to submit to testing, a state suspends a suspect's driver's license prior to holding an evidentiary hearing. *Mackey v. Montrym*, 443 U.S. 1 (1979). Additionally, the Supreme Court has allowed states to force defendants to submit to blood-alcohol tests without violating constitutional rights against self-incrimination. *South Dakota v. Neville*, 459 U.S. 553 (1983) and *Schmerber v. California*, 384 U.S. 757 (1966). As mentioned above, some jurisdictions have found no due process violation even when a police officer fails to provide to a suspect notice of the consequences of his refusal.

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issue deprives them of that right, or otherwise burdens it. A motorist who is stopped DWI and who wishes to vindicate himself has two choices under the law. He may take the test as the state prefers him to do. If he does, and the evidence obtained is favorable to him, he will gain his prompt release with no charge being made for drunk driving. *See Mackey v. Montrym*, 443 U.S. [1, 19, 99 S. Ct. 2612, 61 L.Ed.2d 321 (1979)]. If the evidence is unfavorable, he may challenge the government's use of that evidence by attacking the validity of the arrest. If he does not take the test, he can still challenge the evidence of his refusal by once again attacking the validity of the arrest. Either way, he remains fully capable of asserting the only Fourth Amendment right he possesses: the right to avoid arrest on less than probable cause. Thus, no improper condition has been placed on the exercise of . . . [the driver's] rights under the Fourth Amendment."

Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999).

Other Considerations

If the Court holds that the criminalization of a refusal is unconstitutional, it will likely result in the increase in the number of non-consensual chemical tests, even when an officer obtains a warrant. Increasing the number of non-consensual chemical tests is not the best way to handle refusals and there are other policy reasons why such laws are reasonable. Allowing a driver to refuse to submit to chemical testing may be reasonable but providing consequences for that refusal is also reasonable. Allowing the refusal, and the logical consequences that follow, avoids the volatility of a nonconsensual blood draw which is likely to happen when a warrant is required and the choice to submit to a test is taken away from the suspect. Rather, pursuant to a warrant, the suspect would then be required to provide a blood sample.

There are other justifications supporting arguments for the appropriateness or reasonableness of the criminal refusal statute. One example supporting criminal refusals is based on a destruction of evidence theory. In this regard, a search incident to arrest justifies the warrantless search of an impaired driver in order to avoid the destruction of critical blood-alcohol evidence that supports the impaired driving

charge.[8] Similarly, criminalization of refusal could legitimately be akin to impeding an investigation or concealing evidence. *Jensen v. State*, 667 P.2d 188 (1983). Likewise, it can be analogized that a refusal crime is similar to a crime of obstruction of justice. For example, Minnesota provides for an offense of obstructing legal process when the refusal is also accompanied by actual or threatened force or violence. MSA §609.50. In another jurisdiction, a defendant's refusal to participate in field sobriety tests was enough to support a separate offense of obstruction of justice. *State v. Orr*, 335 P.3d 51 (2014). Lastly, the Court could find that refusing to submit to chemical testing is similar to other "failure to act" crimes. For instance, in one jurisdiction, the crime of failing to identify oneself to the police during a *Terry* stop did not violate the guarantees of the Fourth Amendment. *Hiibel v. Sixth Judicial District Court*, 542 U.S. 117 (2004).

CONCLUSION

With these three consolidated cases, the Supreme Court has the opportunity to provide prosecutors and law enforcement with needed guidance on whether a state may, in the absence of a warrant, criminalize a

[8] Stated differently, the destruction of evidence is an exigent circumstance that would justify a warrantless search. This theory served as the basis for the justification supporting exigency by four Justices in *McNeely*.

driver's refusal to submit to chemical testing when probable cause exists that he is driving while impaired. Refusal laws are no different from other criminal laws created within the purview of the states' legislative power. When the state's interest in keeping public roads safe from impaired drivers is balanced against the privacy interests of the driver, the Court's analysis should recognize the value of implied consent laws and affirm the legitimacy of this legal tool. Invalidating refusal laws would be tantamount to requiring a warrant in every impaired driving case which would be unnecessary and burdensome. Subjecting a driver to a search to determine BAC when probable cause exists that he is driving while impaired is reasonable. Allowing the driver the option to choose his consequence when faced with the offer to submit to chemical testing minimizes the more invasive nonconsensual blood tests.

Respectfully submitted,

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