No. 14-1507

In the Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR PETITIONER

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QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the motorist's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize refusal by a motorist to submit to such a test, even if a warrant has not been obtained. Here, petitioner submitted to a test after being informed that refusal is a criminal offense; North Dakota suspended petitioner's drivers' license when the test returned an alcohol concentration over 0.08. The question presented is:

Whether consent to a search is valid for Fourth Amendment purposes when the State obtains consent by informing the person who is subject to the search that failure to submit will result in criminal prosecution.

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The opinion of the Supreme Court of North Dakota (*Beylund* Pet. App. 1a-22a) is reported at 859 N.W.2d 403. The decision of the North Dakota district court (Pet. App. 23a-37a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on February 12, 2015. *Beylund* Pet. App. 22a. That court denied petitioner's motion for rehearing on March 24, 2015. *Id.* at 44a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

North Dakota law, N.D. Cent. Code § 39-08-01, provides in relevant part:

1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply: * * *

   e. That individual refuses to submit to any of the following:

(1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or

(3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

* * *

2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

North Dakota law, N.D. Code § 39-20-04.1(1), provides in relevant part:

> After the receipt of the certified report of a law enforcement officer and * * * if that hearing is requested and the findings, conclusion, and decision from the hearing confirm that the law enforcement officer had reasonable grounds to arrest the person and test results show that the arrested person was driving or in physical control of a vehicle while having an alcohol concentration of at least eight one-hundredths of one percent by weight * * * at the time of the performance of a test within two hours after driving or being in physical control of a motor vehicle, the director shall suspend the person's driving privileges as follows:
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> * * *
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> d. For two years if the person's driving record shows that within the seven years preceding the date of the arrest, the person's operator's license has once been suspended, revoked, or issuance denied under this chapter, or for a violation of section 39-08-01 or equivalent ordinance, with the last violation or suspension for an alcohol concentration of at least eighteen one-hundredths of one percent by weight or if the person's driving record shows that within the seven years preceding the date of arrest, the person's operator's license has at least twice previously been suspended, revoked, or issuance denied under this chapter, or for a violation of section 39-08-01 or equivalent ordinance, or any combination thereof, and the suspensions, revocations, or denials resulted from at least two separate

> arrests with the last violation or suspension for an alcohol concentration of under eighteen one-hundredths of one percent by weight.

STATEMENT

Like its companion cases, *Birchfield* v. *North Dakota*, No. 14-1468 (cert. granted Dec. 11, 2015), and *Bernard* v. *Minnesota*, No. 14-1470 (cert. granted Dec. 11, 2015), this case presents the question whether a State may penalize a motorist's refusal to consent to a warrantless chemical test of the motorist's blood, breath, or urine to detect the presence of alcohol. The court below upheld the constitutionality of North Dakota's compelled-consent law, relying on its holding in *Birchfield* that the State may deem all drivers on its roads to have consented to a warrantless chemical test if they are arrested on suspicion of driving while intoxicated. The Minnesota Supreme Court gave the same answer, but rested it on a different rationale, in *Bernard*.

This case involves a civil sanction—the suspension of petitioner's driver's license—rather than a criminal penalty. It also involves an arrestee who *submitted* to a warrantless chemical test upon being told that refusal to submit would lead to the imposition of criminal penalties, rather than an arrestee (as in *Birchfield* and *Bernard*) who refused to submit to the test. Despite these differences from *Bernard* and *Birchfield*, the proper outcome here is affected by the answer that is central to those cases: whether a State may make it a crime for a person to assert the Fourth Amendment right to resist a search in the absence of a warrant or an exception to the warrant requirement.

To avoid duplication, we address issues that are common to the cases in petitioner's brief in *Birchfield*. In this brief, we focus on questions that are unique to this case—and show, in particular, that consent to a search is not voluntary, and therefore is not constitutionally effective, when the consent is obtained by informing the person to be searched that refusal to consent will be punished by the imposition of criminal penalties. The North Dakota Supreme Court's contrary holding should be set aside.

1. North Dakota, like twelve other States, has criminalized the refusal of a motorist who has been arrested for driving under the influence to submit to a warrantless chemical test designed to detect the presence of alcohol in the driver's blood. See N.D. Cent. Code § 39-08-01(1). A first refusal to consent to a chemical test qualifies as a misdemeanor, while subsequent offenses trigger escalating penalties; a "fourth or subsequent offense within a fifteen-year period" qualifies as a felony. *Id.* § 39-08-01(3). If the arrestee submits to a chemical test and the test reveals a blood-alcohol concentration above a certain threshold, the arrestee is subject to the administrative sanction of driver's-license suspension; the suspension lasts from ninety-one days to three years, depending on whether the arrestee has "previously violated section 39-08-01 or equivalent ordinance." *Id.* § 39-20-04.1(1).

2. On August 10, 2013, a police officer stopped petitioner on suspicion of driving while intoxicated. *Beylund* Pet. App. 2a-3a. After being transported to a hospital, petitioner agreed to a blood test after receiving an advisory informing him that, under section 39-20-01(3)(a), "North Dakota law require[d] [him] to take the test" and "refusal * * * [was] a crime punishable in the same manner as driving under the influence * * *."

Beylund Pet. App. 3a. Petitioner subsequently contended that, because he agreed to be tested upon threat of criminal penalties, the test was compelled in violation of his Fourth Amendment rights. *Id.* at 7a.

3. At an administrative hearing, a hearing officer from the North Dakota Department of Transportation found that the arresting police officer had "reasonable grounds to believe" that petitioner had been driving a vehicle "while under the influence of intoxicating liquor," in violation of N.D. Cent. Code § 39-08-01, and that the officer lawfully arrested petitioner and lawfully administered a warrantless blood test, in accordance with N.D. Cent. Code §§ 39-20-01 & -02. *Beylund* Pet. App. 3a, 41a. Because the test results showed "an alcohol concentration of at least eighteen one-hundredths of one percent by weight," the hearing officer suspended petitioner's driving privileges for two years. *Id.* at 3a, 41a.

Petitioner appealed his license suspension to the North Dakota district court, which affirmed the suspension. *Beylund* Pet. App. 23a-39a. That court found that "no bright line rule" applied and that the reading to petitioner of the compelled-consent advisory "in and of itself does not indicate automatic coercion regarding consent to a chemical test." *Id.* at 35. Therefore, the court proceeded to "[a]ssess[] the totality of the circumstances" and pronounced itself "not persuaded that [petitioner] was coerced into consenting to the chemical tests of his breath and blood." *Id.* at 36a.

4. The North Dakota Supreme Court also affirmed. *Beylund* Pet. App. 1a-22a.

Addressing petitioner's argument that his consent to the blood test had been "involuntary because he was coerced by the statut[ory] penalties, which criminalize

refusal," the court cited its decision in *Birchfield* for the proposition that North Dakota's criminal penalties for refusing a warrantless chemical test are not unconstitutionally coercive. *Beylund* Pet. App. 7a-8a. The court therefore found that petitioner "voluntarily consented to the blood test." *Id.* at 8a.

The court next considered petitioner's argument 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 searches and seizures." *Beylund* Pet. App. 9a. "As a preliminary matter," the court expressed doubt whether the unconstitutional-conditions doctrine "applies to a constitutional challenge based on the Fourth Amendment." *Id.* at 13a. The court also observed that "consent is an exception to the [Fourth Amendment's] warrant requirement" and that, "if [petitioner] had refused the test, no search would have occurred." *Id.* at 16a.

Even if petitioner had a "constitutional right to refuse" a warrantless test, the court continued, it could still uphold the statute if it determined that "the State's interest in regulating intoxicated drivers is related to the privilege of driving in such a way that the implied-consent statutes are reasonable." *Beylund* Pet. App. 17a-19a. And the court did, in fact, find the law reasonable: it held that "North Dakota's implied consent laws * * * 'confer[] on drivers the privilege of *soberly* operating inherently dangerous motorized vehicles on the state's roadways * * * and, in exchange, each driver accepts a statutory choice.'" *Id.* at 19a (quoting *State* v. *Chasingbear*, No. A14-0301, 2014 WL 3802616, at *7 (Minn. Ct. App. 2014)). Because, "[a]s noted in *Birchfield*, a licensed driver has a diminished

expectation of privacy with respect to the enforcement of drunk-driving laws," the court concluded that petitioner's unconstitutional-conditions argument could not succeed. *Id.* at 19a-20a.

SUMMARY OF ARGUMENT

The North Dakota Supreme Court held that petitioner consented to the search in this case. For that decision to be correct, the State must show that the consent was "the product of an essentially free and unconstrained choice" and "not the result of duress or coercion."

Such a showing could not possibly be made in this case. To the contrary, the officer who arrested petitioner induced him to submit to the search by informing him that refusal to consent was a crime that was punishable in the same manner as driving under the influence. Consent offered on these terms cannot be regarded as voluntary; as this and other courts have held, action produced by the threat of punitive government sanctions necessarily is coerced. The point is not fairly debatable: North Dakota's law is *intended* to compel consent, and in this case that is just what it did. Consent to search obtained in such circumstances is not constitutionally effective, and the evidence gathered in the resulting search was obtained in violation of the Fourth Amendment.

Because the court below erred in holding that petitioner consented to the search that produced the evidence used to suspend his license, this Court should reverse that decision and remand the case for consideration of the proper remedy as a matter of state law.

ARGUMENT

As we show in petitioners' briefs in *Birchfield* and *Bernard*, a State must obtain a warrant to compel a motorist to submit to a blood test in the circumstances of this case. That being so, as we also show in those briefs, it is fundamental that a State may not impose criminal punishment on a motorist for the constitutionally protected act of refusing to submit to an unwarranted—and therefore unconstitutional—blood test. *Birchfield* Br. 31-33. Yet in this case, the North Dakota Supreme Court held that constitutionally effective consent to a search was provided by a motorist who granted that consent only because he was informed that failure to consent would lead to the imposition of criminal penalties for test refusal.

It is rare that a holding of a state supreme court can fairly be described as utterly indefensible, but this is such a case. "Consent" that is provided in response to the threat of criminal punishment is the very definition of consent that is coerced, involuntary, and *in*effective to excuse the State's failure to obtain a warrant. Because, as we show in petitioner's brief in *Birchfield* (at 25-30), the State's alternative theory of "deemed consent" also is flawed, the decision below should be reversed.

A. The search of petitioner's blood was not consensual.

1. As we show in more detail in petitioner's brief in *Birchfield* (at 12-13), "the most basic constitutional rule in [the Fourth Amendment context] is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable[,] * * * subject only to a few specifically established and well delineated exceptions." *Coolidge*

v. *New Hampshire*, 403 U.S. 443, 454-455 (1971). One "'jealously and carefully drawn' exception recognizes the validity of searches [undertaken] with the voluntary consent of an individual possessing authority" to give it. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (citations omitted).

A valid consent to search is given when the totality of the circumstances indicate that the acquiescence was "the product of an essentially free and unconstrained choice." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Thus, when "the State attempts to justify a search [of a person] on the basis of [the person's] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id*. at 248. "The burden is on [the State] seeking the exemption to show the need for it. *Coolidge*, 403 U.S. at 455.

2. The State has not come close to meeting its burden of showing that petitioner's consent to the search of his blood in this case was consensual.

After petitioner was taken in police custody to a hospital, "the [arresting] police officer read the implied consent advisory to [him]." *Beylund* Pet. App. 3a. That advisory directed the officer to inform petitioner that "North Dakota law requires the individual [charged] to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal * * * to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of [his] driving privileges." N.D. Code. § 39-20-01(3)(a).

That is a patently coercive advisory. Self-evidently, a suspect's agreement to a chemical search of his blood is not "free and unconstrained" (*Schneckloth*, 412 U.S. at 225) when he is told that the only alternative is criminal prosecution and possible imprisonment. Thus, this Court has said that when a "witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt," the resulting statements are "the essence of coerced testimony." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). And other courts, following that lead, have not hesitated to hold—in circumstances far more ambiguous than those at issue here—that when a statement by a police officer "indicates that there are punitive ramifications to the exercise of the constitutional right to refuse consent," those actions are coercive. *Eidson* v. *Owens*, 515 F.3d 1139, 1147 (10th Cir. 2008) (citing *United States* v. *Sebetich*, 776 F.2d 412, 425 n.21 (3d Cir. 1985); *United States* v. *Haynes*, 301 F.3d 669, 687 (6th Cir. 2002) (Boggs, J., concurring in part).

Ignoring these precedents and common sense alike, the court below held that petitioner "voluntarily consented to the blood test." *Beylund* Pet. App. 8a. Without meaningful explanation, it took the position that "a [chemical blood] test is not coerced simply because" the suspect is told that "refusal to take [the] test [is] a crime." *Ibid*. And "[b]ecause [petitioner] allege[s] no other coercive circumstances, other than the penalties" under the criminal consent statute, the court "conclude[d] he voluntarily consented to the blood test." *Ibid*.

That assertion, however, may fairly be described as bewildering. *Of course* the threat of criminal sanctions is coercive; fundamentally, "[d]uress consists in actual or threatened violence or imprisonment." *Black's Law Dictionary* (10th ed. 2014). Indeed, it is a basic princi-

pal of ordered society that laws, and the criminal sanctions that apply when they are broken, are *meant* to compel citizens to do some required acts (like paying taxes) and to refrain from doing other forbidden acts (like stealing property). Plainly enough, "the coercion of the law is by criminal punishment." *District of Columbia* v. *Brooke*, 214 U.S. 138, 151 (1909). That observation is beyond cavil. See, *e.g.*, *Madeira* v. *Affordable Hous. Found.*, 469 F.3d 219, 239 (2d Cir. 2006) (observing that the law's threat of "punishment for a criminal act" is a "coercive measure"); *Albright* v. *Oliver*, 975 F.2d 343, 347 (7th Cir. 1992) (the threat of "criminal punishment" is a "form of public coercion") aff'd, 510 U.S. 266 (1994).

It is no answer to say, as did the court below (*Beylund* Pet. App. 16a) that "[l]aw enforcement is not authorized to force a test" under the criminal consent statute, and that petitioner could have "refused the test." The question here is whether the threatened *consequences* of refusal were coercive. As we have shown—and as simple common sense suggests—they were. And "[w]here there is coercion, there cannot be consent." *Bumper* v. *North Carolina,* 391 U.S. 543, 550 (1968).

3. Having said that, it is possible that the analysis might be different if the State actually had the constitutional authority to punish motorists for the crime of test refusal, even in the absence of a warrant or an exception to the warrant requirement. It is a truism that an act is not coerced simply because a person is put to a "difficult choice[]" (*South Dakota* v. *Neville*, 459 U.S. 553, 564 (1983)), and perhaps such a choice would be presented were the consequences of test refusal *accurately* described to a motorist. But the choice whether to permit a search is not only hard but

unconstitutionally coerced when consent to the search is the product of a threatened prosecution that would itself violate the Constitution.

B. The unconstitutional nature of the search requires remand.

The court below, having found that petitioner consented to the test of his blood, had no occasion to address the proper remedy if petitioner actually had been unconstitutionally coerced into submitting to the search that yielded the incriminating evidence used to suspend his license. Because that issue was not addressed below, and because state law is likely dispositive on the point, the question is best reserved for consideration in the first instance on remand. See, *e.g.*, *Missouri* v. *Frye*, 132 S. Ct. 1399, 1411 (2012); *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2540 (2011).

1. As a matter of state law, the answer to the remedial question appears clear: the North Dakota Department of Transportation may use chemical test results when "the sample was *properly obtained*." N.D. Cent. Code § 39-20-07(5) (emphasis added).[1] This provision governs the circumstances in which chemical test results may be introduced as evidence in license suspension proceedings. See *Filkowski* v. *Dir., N.D. Dep't of Transp.*, 862 N.W.2d 785, 790 (N.D. 2015).

When a blood sample is obtained by means of an unconstitutionally coerced "consent" the sample was not "properly obtained," as that phrase is understood in North Dakota. Rather, for a sample to be "properly ob-

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[1] In *Bernard*, the Minnesota trial court understood Minnesota's compelled-consent statute similarly to impose criminal penalties only for refusal of a *lawful* demand to be tested. *Bernard* Pet. App. 54a-55a.

tained," its collection must comply with governing constitutional principles. That is, "the test" must have been "the result of a valid arrest or other precondition for its administration" in order to be "properly obtained." *State* v. *Jordheim*, 508 N.W.2d 878, 882 (N.D. 1993). See also *State* v. *Friedt*, 735 N.W.2d 848, 854 (N.D. 2007) (crux of argument was that improperly obtained evidence was inadmissible). Thus, as a matter of North Dakota law, the Department of Transportation may not rely on blood tests performed on a sample taken in violation of an individual's constitutional rights.

2. In addition, federal constitutional law suggests the same result. Similar to asset forfeiture, a license suspension "is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution" itself. *One 1958 Plymouth Sedan* v. *Com. of Pa.*, 380 U.S. 693, 701 (1965). Indeed, as we have shown in the *Birchfield* petitioner's brief (at 23), because the ability to drive is fundamental to the economic, social, and familial well-being of a vast number of Americans, suspension of an individual's driver's license for a period of years can be an extremely burdensome penalty. In these circumstances, the prospect that illegally obtained evidence would be excluded from use in license-suspension proceedings could be expected to have a significant deterrent effect on unconstitutional law enforcement conduct. Compare *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 367 (1998) ("application of the exclusionary rule to parole revocation proceedings would have little deterrent effect upon an officer who is unaware that the subject of his search is a parolee"); *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976) ("deterrence" value of excluding wrongfully-obtained evidence from civil tax proceedings is "marginal").

For present purposes, however, the dispositive point is that the North Dakota Supreme Court erred in holding that petitioner's consent to be tested was voluntary. Because that consent was coerced and therefore was constitutionally ineffective, the decision below should be reversed and the case remanded for further proceedings.

CONCLUSION

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

Respectfully submitted.

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