IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	
Plaintiff/Appellant,	)	
	)	Supreme Court No.: 20140154
v.	)	
	)	
JAYDEN RAE WASHBURN,	)	Burleigh Co. No. 2013-CR-02849
	)	
Defendant/Appellee,	)	
	)	

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Bruce B. Haskell

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE

[¶ 1] Amicus curiae the National College for DUI Defense, Inc. (NCDD) is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its extensive educational programs, its website, and its email list, NCDD trains lawyers to more effectively represent persons accused of drunk driving.

[¶ 2] Counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief.

STATEMENT OF PRIOR PROCEEDINGS AND FACTS

[¶ 3] Amicus Curiae National College for DUI Defense adopts the Statement of the Case and Statement of the Facts of the parties to this proceeding.

STATEMENT OF ISSUE PRESENTED

[¶ 4] Whether North Dakota's statute that criminalizes the refusal to consent to a warrantless search of a person's breath or bodily substances is unconstitutional under the Fourth Amendment to the United States Constitution as well as art. I, § 8 of the North Dakota State Constitution?

LAW AND ARGUMENT

I. THE CRIMINALIZATION OF NORTH DAKOTA'S IMPLIED CONSENT STATUTES VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ART. I, § 8 OF THE NORTH DAKOTA STATE CONSTITUTION BY PUNISHING THE EXERCISE OF THOSE RIGHTS.

[¶ 5] In 2013 the North Dakota legislature amended N.D.C.C. § 39-08-01 to criminalize the refusal to submit to:

> 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.

N.D.C.C. § 39-08-01(1)(e)(2). Refusal is an offense of the same level as that of Driving Under the Influence. *See* N.D.C.C.§ 39-08-01(3).

[¶ 6] Unreasonable searches and seizures are prohibited under U.S. Const. amend. IV and N.D. Const. art. I, § 8. *State v. Smith*, 2014 ND 152, ¶ 7, –N.W.2d –. It is well-settled that administration of a breath test to determine alcohol consumption is a search. *Id.* at ¶ 7; *City of Fargo v. Wonder*, 2002 ND 142, 651 N.W.2d 665. Warrantless searches are unreasonable unless they fall within one of the recognized exceptions to the warrant requirement. *Smith, supra* at ¶ 7. Indeed, this Court recently held in *State v. Stewart*, 2014 ND 65, ¶ 18, –N.W.2d --:

> The gist of the State's argument appears to be the warrantless search is legal because the officer had probable cause to obtain a warrant. This rationale turns the warrant requirement on its head. The inevitable discovery doctrine does not apply when the warrant requirement is simply bypassed without exigent circumstances.

[¶ 7] In *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) the Supreme Court of the United States held that nonconsensual, warrantless blood alcohol testing was presumptively unconstitutional. North Dakota has enacted a set of statutes that compels a driver to waive his right to demand the production of a warrant issued by an independent judicial officer, by mandating that the driver consent to a search or face being charged with a crime.

[¶ 8] Further, the North Dakota statute misinforms the driver of their constitutional and statutory[1] rights by telling them that they "shall consent" to a search, when in truth the driver has the right to refuse. See N.D.C.C. § 39–20–01(3):

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges.

[¶ 9] Indisputably, statutes that threaten criminal prosecution unless someone consents to a warrantless search of their house are unconstitutional on their face. Even more indisputable is the fact that a person's body is entitled to equal or greater protections than would a person's house under the Fourth Amendment. As stated in *Katz v. United States*, 389 U.S. 347, 351 (1967), "the Fourth Amendment protects people, not places." There, the Supreme Court found a violation of the Fourth Amendment simply by the attachment of an eavesdropping device to a public telephone booth. Later cases applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," *Id.*, at 360. *See, e.g., Bond v. United States*, 529 U.S. 334 (2000); *California v. Ciraolo*, 476 U.S. 207 (1986); *Smith v. Maryland*, 442 U.S. 735 (1979).

[¶ 10] In *Schmerber v. California*, the Supreme Court wrote that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." 384 U.S. 757, 767 (1966). A person has a reasonable expectation of privacy in the fluids

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The North Dakota Legislative Assembly created a statutory right to refuse. *State v. Smith*, 2014 ND 152, ¶ 9, –N.W.2d –, citing N.D.C.C. § 39- 20- 04 ("If a person refuses to submit to testing under section 39–20–01 ... none may be given....").

contained in their body, and a breath test designed to determine just what is inside that body is just as violative of the person's bodily integrity as is a blood draw or a urinary catheterization. *See Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989).

[¶ 11] Government compulsion of a citizen to produce any sample from their body, whether it be breath, blood, urine, semen, feces, membrane or cells falls under the protections of the Fourth Amendment. The amount of information that can be discovered about a person from an analysis of even the smallest cells of their body is only limited by the extent of scientific progress to date. It matters little whether the intrusion is painless or brief. As the Supreme Court recently stated in *Maryland v. King*, 133 S.Ct. 1958, 1968-1969 (2013):

> The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body," *Schmerber v. California*, 384 U.S. 757, 770 (1966), will work an invasion of " 'cherished personal security' that is subject to constitutional scrutiny," *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (*quoting Terry v. Ohio*, 392 U.S. 1 (1968)). The Court has applied the Fourth Amendment to police efforts to draw blood, *see Schmerber, supra* ; *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), scraping an arrestee' fingernails to obtain trace evidence, *see Cupp, supra*, and even to "a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis," *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616 (1989).
>
> (*citations condensed*).

[¶ 12] In *Missouri v. McNeely, supra*, the police drew blood against the free will of the driver. The Court in *McNeely* reiterated that "the importance of requiring authorization by a neutral and detached magistrate before allowing a law enforcement officer to invade another's body in search of evidence of guilt is indisputable and great." 133 S.Ct at 1558, *quoting Johnson v. United States*, 333 U.S. 10, 13–14 (1948)(*quotation marks removed*). The fact that there was an "implied consent" law that authorized such testing in Missouri did not stop the Supreme Court from suppressing the result in

violation of the Fourth Amendment.

[¶ 13] Precedent has held that laws which criminalize refusals to consent to warrantless searches are in and of themselves unconstitutional. The United States Supreme Court has previously invalidated convictions or laws where warrantless searches were authorized by regulatory schemes similar to what North Dakota employs here. In *Camara v. Municipal Court of City and County of San Francisco*, a property owner faced criminal charges for refusing to allow an inspection of his property without a search warrant. Under the challenged scheme, refusal to permit an inspection was itself a crime, punishable by fine or even by jail sentence. 387 U.S. 523 (1967). The Supreme Court noted that these laws were then commonplace, *Id.* at 531, and concluded that a criminal conviction for refusing to consent to a warrantless search was unlawful:

> "In this case, appellants has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. * * * * Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."
>
> 387 U.S. 523, 540 (1967).

[¶ 14] The ordinance in *Camara* was hedged with various safeguards, including multiple prior notices, and a standard of reasonableness before an inspector could make a decision to enter. *Id.* at 531-533. The government claimed that those safeguards rendered the warrant requirement unnecessary. The Supreme Court disagreed, stating:

> "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment."

Id. at 523. Under the auspices of *Camara*, that portion of the implied consent law herein which both compels and criminalizes a refusal is violative of the United States Constitution and must

be stricken, no matter how many other safeguards are claimed.

[¶ 15] The Court in *Camara* also noted the psychological pressures placed on an individual who dares to refuse a government's demand to search, and reaffirmed the need for the individualized review process that only a warrant process provides:

> "Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty."

Id. (citations omitted). Would the addition of an "implied consent law for renters" have changed the outcome of the case in *Camara*? It is doubtful that the Court would have reached a different result in *Camara* simply because the San Francisco County Board of Supervisors enacted a law that stated that all renters "impliedly shall consent" to an entry and search of their property or go to jail.

[¶ 16] In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Supreme Court held that the Occupational Safety and Health Act (OSHA), which empowered the Secretary of Labor's agents to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations, was unconstitutional insofar as it purported to authorize inspections of commercial property without a search warrant or its equivalent. It was unconstitutional even though the purpose of the law was to increase workplace safety and reduce deaths and accidents to workers. It was held unconstitutional even though commercial entities have an admittedly lower expectation of privacy than the ordinary citizens who are subject to search under the North Dakota law challenged here. It

is doubtful that the Court would have reached a different result in Marshall simply had the OSHA law included a phrase that all businesses "impliedly consented" to these types of searches.

[¶ 17] In *See v. City of Seattle*, 387 U.S. 541 (1967) the Supreme Court dealt with a statutory scheme that authorized warrantless searches of commercial warehouses for compliance with the Seattle Fire Code. The defendant was convicted for refusing to allow the fire marshal access without a search warrant. The Court held that, under Fourth and Fourteenth Amendments, a state defendant could not be prosecuted for exercising his constitutional right to insist that fire inspector obtain warrant authorizing entry upon defendant's locked warehouse. The Court did not suggest that the search would have been lawful if there was an implied consent law. Rather, the Court stated:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may *only* be compelled through prosecution or physical force within the framework of a warrant procedure."
>
> *Id.* at 545-546 (emphasis added).

[¶ 18] Even firemen entering privately owned premises to battle fire are subject to the restraints imposed by the Fourth Amendment. *See Michigan v. Tyler*, 436 U.S. 499, 506 (1978). Laws that condition a benefit on the waiver of the Fourth Amendment or other constitutional rights are unconstitutional. It is well established that public employers generally cannot condition employment on an employee's waiver of constitutional rights. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Vance v. Barrett*, 345 F.3d 1083, 1092 (9th Cir.2003); *see also McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987)(holding that the state may not require, as a condition of employment, waiver of the Fourth Amendment right to be free from unreasonable searches).

[¶ 19] Some may argue that driving is a privilege that is bestowed on citizens through the graces of the supreme legislature. Continuing, these persons will then argue that such a privilege can be

granted with conditions, such as the condition of an implied consent to a search of their bodies and breath for the presence of alcohol, drugs, cannabis, or controlled substances. But such a theory has been soundly rejected by the Supreme Court, and such a theory has been cast as illegal pursuant to the "unconstitutional-conditions doctrine." As stated:

> "In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights. The phrase, for example, appears in Justice Bradley's dissent in *Doyle v. Continental Insurance Co.*, 94 U.S. 535 (1876): 'Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.' *Id.* at 543 (Bradley, J., dissenting). An earlier hint of the doctrine is found in *Lafayette Insurance Co. v. French*, 59 U.S. (18 How.) 404 (1856): 'This consent [to do business as a foreign corporation] may be accompanied by such conditions as Ohio may think fit to impose; . . . provided they are not repugnant to the Constitution or laws of the United States . . ..' *Id.* at 407. The condition involved in French, to accept service of process in order to do business in the state, was sustained. Thus, in the context of individual rights, the doctrine provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution. In other instances, the doctrine prevents the government from asking the individual to surrender by agreement rights that the government could not take by direct action.
>
> Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L.Rev. 4, 6–7 (1988)(footnotes included in text and/or omitted for brevity).

[¶20] Requiring a person to give up the constitutional right to be free from warrantless searches and seizures, in order to gain a regulated, governmental benefit is of itself unconstitutional. Indeed, the Supreme Court has held that coercion may be found where one is given a choice between one's employment and one's constitutional rights. *See Garrity v. New Jersey*, 385 U.S. 493, 496 (1967)("The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession ... can be mental as well as physical; the blood of the accused is not the only hallmark of an unconstitutional inquisition. Subtle pressures may be as telling as coarse and vulgar ones.")(internal quotation marks and citation omitted). As stated by Professor LaFave,

"That this is so can be seen from looking at the situation in which the consent in question was expressly required as a condition of engaging in the activity.." Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(l) (5th ed. 2013).

[¶21] A search warrant is the constitutional method for obtaining bodily samples for police testing. The government does not have the power to waive or weaken the mandated search warrant process by fiat, edict, or statute. As written in *Schmerber v. California*:

> "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, 333 U.S. 10 (1948); *see also Aguilar v. State of Texas*, 378 U.S. 108, 110—111 (1964). The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."
>
> *Schmerber, supra* at 770 (citations condensed).

[¶ 22] In summary, an implied consent statute or legislative scheme that criminalizes a citizen's refusal and thereby coerces consent, is not a suitable replacement for the Constitutional dictates of a search warrant application and review by a detached and neutral magistrate. Requiring a person to give up any part of their Fourth Amendment right to be free from a warrantless search or seizure, is invalid under the unconstitutional-conditions doctrine. Since its very design is to shrink the constitutional protections of citizens, and to encourage constitutional violations by law enforcement, the law is invalid on its face as well as applied to any citizen.

[¶ 23] It is often argued by the government that the criminalization of implied consent laws is a needed and effective tool to combat drunk driving. Such arguments are theoretical and unsupported by real data. Contrary to such an argument, a National Highway Traffic Safety Administration study of all fifty states' implied consent laws suggested that the criminalization of implied consent laws

had very little impact overall. Indeed, this study found that many other factors (other than criminalization) had a greater effect on reducing the number of refusals, such as increasing the length of the license suspension, and along with informing the public of the license sanctions for refusal, as substantially more effective::

> There is evidence that license suspension alone will not prevent refusal for many "hard core" refusers with a past history of DWI, test refusal, and other serious traffic offenses. Strong criminal sanctions (including jail terms) for refusal may help deter these individuals. *However, we doubt that such sanctions alone will prevent many of this group of high-risk refusers from future refusals*, and suspect that a large percentage will require treatment for other dysfunctional behaviors (including alcoholism) that are no doubt related to DWI and implied consent violations.
>
> United States Dep't of Transportation, National Highway Traffic Safety Administration, *Implied Consent Refusal Impact* DOT HS 807 765 (September 1991, Final Report)(emphasis added).

[¶24] Recently, in *State v. Smith, supra*, this Court held that, under the totality of the circumstances, the defendant's actual submission to the breath test was consensual despite the threat of criminal prosecution for refusing, but did not address whether the amended statute making refusal to submit to chemical testing a crime was itself unconstitutional. This case now squarely presents that question.

[¶25] Amicus now argues that North Dakota's amended "implied consent" warning is in fact a misleading statement as to the constitutional rights of a United States citizen, a question unaddressed in *Smith*. While *Smith* relied upon *South Dakota v. Neville*, 459 U.S. 553, 563-564 (1983), *Neville* actually dealt with a "true-choice" statute that specifically excepted from its holding any statute where the State "subtly coerced respondent into choosing the option it had no right to compel." Specifically, the *Neville* Court held:

> "The warnings challenged here, by contrast, contained no such misleading implicit assurances as to the relative consequences of his choice."

Id. at 565.

[¶ 26] North Dakota's statute that now criminalizes refusals is not a true-choice statute and is the "subtle coercion" that *Neville* stated that its opinion did not reach. Moreover, the *Neville* Court held that the South Dakota non-criminalized implied consent statute was not the sort of statute that would "unfairly 'trick' respondent if the evidence were later offered against him at trial." *Id.* at 566. Here, amicus argues that the North Dakota refusal statute's false claim that a person can be criminally prosecuted for refusing to consent to a warrantless search "tricks" the driver into submitting and forgoing their constitutional rights.

[¶ 27] This Court is now faced with whether the statutory practice of threatening a person with criminal prosecution for refusing to submit to a chemical test is an illegal and unconstitutional tactic on its face, whether informing someone that it is a crime to refuse is a legally accurate statement, and ultimately, whether the State of North Dakota can criminally punish someone who exercises their constitutional, and statutory, right to refuse chemical testing.

CONCLUSION AND PRAYER OF RELIEF

[¶ 28] It is urged by amicus curiae National College for DUI Defense, Inc. that this honorable Court find that criminal refusal statute at issue herein is in violation of the Fourth Amendment to the United States Constitution as well as art. I, § 8 of the North Dakota State Constitution, because it criminalizes a citizen's exercise of their right to refuse to consent to chemical testing in the absence of a search warrant, and illegally legislates consent where one is given a choice between being criminally prosecuted and exercising one's constitutional rights.

[¶ 29] For all of the foregoing reasons, the judgment of the trial court should be affirmed.

Dated this 11th day of August, 2014.

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CERTIFICATE OF SERVICE

[¶ 30] A true and correct copy of the foregoing document was sent by electronic transmission on this 11th day of August, 2014, to the following:

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