

BLOOD AND BREATH TESTS—CONSTITUTIONAL LAW:
CONSTITUTIONALITY OF WARRANTLESS BLOOD AND
BREATH TESTS INCIDENT TO DUI ARREST: IMPACT ON
DRUNK DRIVING IN NORTH DAKOTA

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)

ABSTRACT

In *Birchfield v. North Dakota*, the United States Supreme Court *held* the Fourth Amendment does not allow states to conduct warrantless blood tests incident to an arrest for drunk driving. Additionally, the Court limited the consequences of implied consent statutes and determined such consent only applies to conditions that are reasonable. Therefore, the Court explained that motorists cannot be presumed to have consented to submit to an unconstitutional warrantless blood test, and their refusal cannot be criminalized. The Court analyzed the totality of the circumstances in two basic categories to determine whether warrantless blood and breath tests are constitutional incident to a lawful arrest: (1) the privacy of the individual and (2) legitimate government concerns. *Birchfield* significantly impacts North Dakota and its efforts in recent years to combat drunk driving because the legislature is now tasked with exploring effective new strategies that comport with the Fourth Amendment.

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I. FACTS

Each year, intoxicated motorists cause massive property destruction and injuries, many of which are fatal.¹ In an effort to combat this nationwide epidemic, each state prohibits drunk driving when a driver’s blood alcohol concentration (“BAC”) exceeds a certain level.² To measure this BAC level, authorities must administer a test, usually using a driver’s breath or blood.³ To ensure drivers suspected of drunk driving do not simply refuse to take the test, hindering law enforcement’s ability to impose penalties for breaking the law, all states have adopted implied consent laws.⁴ These laws penalize drivers who refuse testing when authorities have sufficient reason to believe they were driving under the influence.⁵ Some states imposed civil penalties, evidentiary consequences, or both upon a driver’s refusal to comply with the testing procedures.⁶ Other states,

1. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016).

2. *Id.*

3. *Id.* at 2167.

4. *Id.* at 2166.

5. *Id.*

6. *Id.* at 2169.

including North Dakota, Minnesota, and eleven others, criminalized a driver's refusal to submit to BAC testing after being lawfully arrested for drunk driving.⁷

Three petitioners, Danny Birchfield, William Robert Bernard, Jr., and Steve Michael Beylund, challenged the constitutionality of such criminal refusal statutes.⁸ All three petitioners were arrested for driving while impaired and advised of their state's implied consent statutes.⁹ In addition, each petitioner was informed that failure to comply with BAC testing would result in criminal penalties.¹⁰

The first petitioner, Birchfield, refused to submit to a blood test.¹¹ Consequently, Birchfield was charged with a misdemeanor for violating the North Dakota refusal statute.¹² Although he entered a conditional guilty plea, Birchfield argued that criminalizing refusal to submit to a warrantless blood test was prohibited by the Fourth Amendment.¹³ The state district court rejected the argument, and the North Dakota Supreme Court affirmed.¹⁴

Similarly, the second petitioner, Bernard, refused to take a breath test and was charged with first degree test refusal, a violation of Minnesota law.¹⁵ The Minnesota District Court determined warrantless breath tests were not permitted under the Fourth Amendment, and dismissed the charges accordingly.¹⁶ The Minnesota Court of Appeals reversed the decision, and the Minnesota Supreme Court affirmed.¹⁷

The final petitioner, Beylund, agreed to have his blood drawn after he was informed that he would be charged with a crime upon refusal.¹⁸ Law

7. *Birchfield*, 136 S. Ct. at 2166; Brief for Petitioner at *3 n.1, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (No. 14-1468), 2016 WL 447640. The eleven other states with similar statutes include: (1) Alaska (Alaska Stat. §28.35.032); (2) Florida (Fla. Stat. §316.1932); (3) Hawaii (Haw. Rev. Stat. § 291e-68); (4) Indiana (Ind. Code. § 9-30-7-5); (5) Kansas (Kan. Stat. Ann. § 8-1025); (6) Louisiana (La. Stat. Ann. § 14:98.7); (7) Nebraska (Neb. Rev. Stat. §§ 60-6,197,60-6,211.02); (8) Rhode Island (R.I. Gen. Laws § 31-27-2.1); (9) Tennessee (Tenn. Code Ann. § 55-10-406); (10) Vermont (Vt. Stat. Ann. tit. 23, § 1201(b), (c)); and (11) Virginia (Va. Code Ann. § 18.2-268.3). The Supreme Court of Hawaii recently held Hawaii's compelled-consent statute unconstitutional. *State v. Won*, 361 P.3d 1195, 1198-99 (Haw. 2015).

8. *Id.* at 2170-73.

9. *Id.*

10. *Id.*

11. *Id.* at 2170.

12. *Id.*

13. *Birchfield*, 136 S. Ct. at 2170-71.

14. *Id.* at 2171.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 2171-72.

enforcement officers conducted a chemical test, which identified his BAC was over three times the legal limit.¹⁹ As a result, at the administrative hearing, the Hearing Officer chose to suspend Beylund's driver's license for two years.²⁰ The state district court rejected Beylund's argument that his consent was coerced by the officer's warning, and the North Dakota Supreme Court affirmed.²¹

While the individual circumstances of the petitioners are different, each petitioner's case hinged on resolving a common issue.²² On appeal, the common issue was the constitutionality of warrantless blood and breath tests incident to a drunk driving arrest.²³ If such warrantless tests are to be deemed constitutional, the subsequent criminalization of refusals to comply would be allowed.²⁴ Alternatively, if warrantless tests are prohibited under the Fourth Amendment, a state may not criminalize refusals to submit to unconstitutional warrantless searches.²⁵ Accordingly, the *Birchfield* Court analyzed the constitutionality of warrantless blood and breath tests incident to drunk driving arrest to determine if states are able to impose criminal penalties for BAC test refusal.

II. LEGAL BACKGROUND

Over the past century, the United States Supreme Court has delineated the contours of the Fourth Amendment to the United States Constitution's protection against unreasonable searches and seizures.²⁶ The Fourth Amendment reads:

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁷

The Supreme Court has determined that a blood or breath test to determine an individual's BAC is a search governed by the Fourth

19. *Birchfield*, 136 S. Ct. at 2172.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Birchfield*, 136 S. Ct. at 2172.

26. *Id.*

27. U.S. CONST. amend. IV.

Amendment and must adhere to the reasonableness requirement therein.²⁸ Generally, a warrant must be secured to conduct searches, but this requirement is subject to a number of exceptions.²⁹ Relevant here are the exigent circumstances and search incident to arrest exceptions.³⁰

A. EXIGENT CIRCUMSTANCES EXCEPTION

The United States Supreme Court has established an exception to the warrant requirement for exigent circumstances.³¹ This exception allows authorities to conduct a warrantless search when circumstances surrounding an emergency leave insufficient time to obtain a valid warrant and prompt action is required.³² Prior to *Birchfield*, the Supreme Court contemplated the application of this exception in two drunk driving cases, *Schmerber v. California* and *Missouri v. McNeely*.³³

In *Schmerber*, the Supreme Court determined an exigent circumstance was presented when law enforcement officers sought to obtain the BAC of a driver who was receiving treatment for car accident injuries.³⁴ The Court reasoned the circumstances constituted an emergency suitable for a warrantless search because “the percentage of alcohol in the blood begins to diminish shortly after drinking stops.”³⁵ More recently, the *McNeely* Court narrowed the application of the exigent circumstances exception in drunk driving cases.³⁶ The Court did not allow the ruling in *Schmerber* to extend to all drunk driving cases.³⁷ Accordingly, it mandated a case-by-case application of the exception based on the totality of the circumstances, holding that a categorical application of this exception is inappropriate.³⁸

B. SEARCH INCIDENT TO LAWFUL ARREST EXCEPTION

The second relevant exception to the reasonableness requirement is the search incident to arrest exception.³⁹ Even before the adoption of the

28. *Birchfield*, 136 S. Ct. at 2173 (citing *Skinner v. Ry. Labor Execs.’ Ass’n.*, 489 U.S. 602, 616-17 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966)).

29. *Birchfield*, 136 S. Ct. at 2173 (citing *Kentucky v. King*, 563 U.S. 452, 459 (2011)).

30. *Id.* at 2173-74.

31. *Id.* at 2173 (citing *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

32. *Id.*

33. *Id.* (discussing *Schmerber*, 384 U.S. at 758, 770-72; *Missouri v. McNeely*, 133 S. Ct. 1552, 1560-61 (2013)).

34. *Id.* (citing *Schmerber*, 384 U.S. at 758, 770-72).

35. *Birchfield*, 136 S. Ct. at 2173-74 (quoting *Schmerber*, 384 U.S. at 770).

36. *Id.* at 2174 (citing *McNeely*, 133 S. Ct. at 1560-61).

37. *Id.*

38. *Id.*

39. *Id.* (citing *McNeely*, 133 S. Ct. at 1559 n.3).

Fourth Amendment, this exception was recognized.⁴⁰ The Supreme Court finally addressed the exception in dicta and confirmed the right “to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime.”⁴¹ In subsequent years, the Court attempted to delineate the contours of this exception until it provided some clarity in *Chimel v. California*.⁴² *Chimel* provided a general rule allowing arresting officers to search both “the person arrested” and “the area ‘within his immediate control.’”⁴³ The purpose of this type of search is two-fold: first, it promotes the safety of the officer by preventing the arrestee from accessing a weapon, and second, it prevents the destruction of evidence.⁴⁴

This exception was further clarified by the Court in *United States v. Robinson*, authorizing a categorical application of the exception to all lawful custodial arrests.⁴⁵ Recently in *Riley v. California*, the Court reaffirmed the categorical application of the rule and considered its use in situations that were not envisioned when the Fourth Amendment was adopted.⁴⁶ Further, the Court provided an analytical framework to address these new situations: a court must analyze “the degree to which [breath and blood tests] intrud[e] upon an individual’s privacy and . . . the degree to which [breath and blood tests are] needed for the promotion of legitimate governmental interests.”⁴⁷ The *Birchfield* Court proceeded to analyze the reasonableness of warrantless breath and blood tests under this standard because the technology used to conduct such tests was not envisioned when the Fourth Amendment was adopted.⁴⁸

III. ANALYSIS

In *Birchfield*, the United States Supreme Court, with Justice Alito writing for the majority,⁴⁹ ruled the Fourth Amendment’s reasonableness requirement for warrantless searches was satisfied in warrantless breath tests incident to drunk driving arrests, but not in warrantless blood tests

40. *Id.* at 2174-75.

41. *Birchfield*, 136 S. Ct. at 2175 (quoting *Weeks v. United States*, 232 U.S. 383, 392 (1914)).

42. *Id.* at 2175.

43. *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 754 (1969)).

44. *Id.*; *Chimel*, 395 U.S. at 763.

45. *Birchfield*, 136 S. Ct. at 2175-76 (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

46. *Id.* at 2176.

47. *Id.* (quoting *Riley v. California*, 134 S. Ct. 2480, 2484 (2014)).

48. *Id.*

49. *Id.* at 2166.

incident to the same.⁵⁰ The Court employed the *Riley* test to balance individual privacy concerns with the degree to which the government needs warrantless searches to promote its legitimate interests.⁵¹ The Court noted breath tests were minimally invasive, unlikely to cause great embarrassment, and give limited information; therefore, the privacy concerns did not outweigh the need to preserve public highway safety.⁵² The Court, however, noted blood tests were significantly more intrusive and allowed for a plethora of information beyond a mere BAC calculation to be gleaned from the blood sample.⁵³ In light of a less intrusive, alternative way of measuring BAC, the privacy concerns were greater than the need to preserve public highway safety; thus, warrantless blood tests were found unconstitutional.⁵⁴ Accordingly, states cannot criminalize refusal to submit to an unconstitutional warrantless search.⁵⁵

A. THE MAJORITY OPINION

Under the Fourth Amendment, warrantless searches are prohibited except in cases where an exception applies.⁵⁶ The Court followed prior case law and did not categorically apply the exigent circumstances exception.⁵⁷ Rather, the *Birchfield* majority analyzed the constitutionality of warrantless breath and blood tests separately under the search incident to arrest exception to the Fourth Amendment warrant requirement.⁵⁸

1. *Constitutionality of Warrantless Breath Tests*

The Court began by analyzing the impact of a warrantless breath test on individual privacy interests.⁵⁹ Prior Supreme Court caselaw has determined breath tests do not “implicat[e] significant privacy concerns.”⁶⁰ Moreover, the Court pointed to three reasons this determination remains accurate.⁶¹

50. *Id.* at 2185.

51. *Birchfield*, 136 S. Ct. at 2176.

52. *Id.* at 2176-78.

53. *Id.* at 1278.

54. *Id.* at 2184.

55. *Id.* at 2186.

56. *Id.* at 2173.

57. *Birchfield*, 136 S. Ct. at 2174 (citing *McNeely v. Missouri*, 133 S. Ct. 1521, 1556 (2013)).

58. *Id.* at 2176.

59. *Id.*

60. *Id.*

61. *Id.* at 2176-77.

First, the Court described the physical intrusion of a breath test as “almost negligible.”⁶² The process of a breath test entails no more effort than it would take to blow up a party balloon.⁶³ More specifically, the process requires one to blow continuously for four to fifteen seconds into a mouthpiece similar to a straw connected to the testing machine.⁶⁴ The Court likened this process to the common usage of straws in today’s society.⁶⁵ Additionally, the Court did not entertain an argument concerning a possessory interest or emotional attachment to air exhalation from the body.⁶⁶ Finally, the Court looked to prior decisions and determined a breath test was no more intrusive than the “negligible” intrusion of a buccal swab to collect DNA or the “very limited intrusion” of scraping under a suspect’s fingernails to obtain evidence.⁶⁷ Accordingly, the procedure is not excessively intrusive.⁶⁸

Second, the breath test allows authorities to get one, and only one, piece of information, the arrestee’s BAC level.⁶⁹ Once the level is read, authorities no longer possess anything that may be used to get further information about the arrestee.⁷⁰ The Court noted that this contrasts from the DNA swabs mentioned before, because the DNA obtained via a buccal swab had the potential to give the authorities a plethora of “highly personal information” far beyond a mere calculation of the level of alcohol on one’s breath.⁷¹

Finally, submitting to a breath test is not likely to exacerbate embarrassment beyond what is inherent in any arrest.⁷² The Court noted the test in itself is not inherently embarrassing.⁷³ Additionally, the Court recognized the tests are usually conducted outside the public view.⁷⁴ Although there is not an increased amount of embarrassment, the Court concluded by mentioning when a person is under arrest, the expectation of privacy is diminished.⁷⁵ Accordingly, the Court echoed prior caselaw and

62. *Id.* at 2176.

63. *Birchfield*, 136 S. Ct. at 2177.

64. *Id.* at 2176.

65. *Id.* at 2177.

66. *Id.*

67. *Id.* (citing *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013); *Cupp v. Murphy*, 412 U.S. 291, 296 (1973)).

68. *Id.*

69. *Birchfield*, 136 S. Ct. at 2177.

70. *Id.*

71. *Id.* (discussing *King*, 133 S. Ct. at 1969).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Birchfield*, 136 S. Ct. at 2177.

agreed that breath testing still does not “implicat[e] significant privacy concerns.”⁷⁶

Next, the Court analyzed the degree to which the government needs the BAC reading of individuals arrested for drunk driving to promote legitimate government interests.⁷⁷ Two reasons were discussed regarding the government’s interest in obtaining the BAC reading.⁷⁸ The Court discussed the importance of public highway safety and the need to deter individuals from driving under the influence.⁷⁹

First, the Court recognized the government’s continued “paramount interest . . . in preserving the safety . . . of public highways.”⁸⁰ Additionally, alcohol consumption is the leading cause of traffic fatalities and injuries.⁸¹ Thus, the Court reasoned the government has an interest in obtaining BAC levels in an effort to combat the “carnage” and “slaughter” caused by drunk drivers.⁸² Second, the Court discussed the government’s interest in creating a deterrent effect on drivers to combat the threat of drunk driving before it ever happens.⁸³

Today, the Court’s determination that breath tests do not implicate significant privacy concerns has not strayed.⁸⁴ Moreover, the government continues to have a paramount interest in implementing legal consequences for drunk driving to protect public roadways.⁸⁵ Therefore, because the government’s need for BAC testing outweighs the slight impact of breath tests on privacy, the Fourth Amendment permits warrantless breath tests incident to lawful drunk driving arrests.⁸⁶

2. *Constitutionality of Warrantless Blood Tests*

The Court used the same framework to analyze the constitutionality of warrantless blood tests.⁸⁷ Accordingly, the Court began by clearly differentiating blood tests from breath tests for two reasons.⁸⁸ First, a blood test involves extracting a part of an arrestee’s body through piercing his or

76. *Id.* at 2178.

77. *Id.*

78. *Id.*

79. *Id.* at 2178-79.

80. *Id.* (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)).

81. *Birchfield*, 136 S. Ct. at 2178.

82. *Id.*

83. *Id.* at 2179.

84. *Id.*

85. *Id.* at 2178.

86. *Id.* at 2184.

87. *Birchfield*, 136 S. Ct. at 2178.

88. *Id.*

her skin; therefore, it is significantly more intrusive than blowing into a tube.⁸⁹ Second, a blood sample extraction would allow authorities to access a wealth of information beyond a mere BAC calculation.⁹⁰ In addition, the Court even noted that if authorities limited the use of the blood sample to just BAC calculation, the extraction alone may result in increased anxiety of potential information being disclosed.⁹¹ For these reasons, there are more privacy concerns in blood testing than breath testing.⁹²

The Court pointed to the same asserted need to obtain BAC readings as in the above breath test constitutionality discussion.⁹³ The Court noted there was no additional reasoning asserted for the significantly more intrusive blood testing to ascertain BAC readings.⁹⁴ Thus, in light of a less intrusive, alternative method, the Court determined the privacy concerns were sufficient to render warrantless blood tests unreasonable, and therefore unconstitutional.⁹⁵

3. *Majority Conclusion*

Accordingly, the Court determined warrantless breath tests, but not blood tests, incident to drunk driving arrests are reasonable.⁹⁶ This determination affects the states' ability to criminalize refusal to comply with such testing.⁹⁷ The Court borrows from Fifth Amendment precedent to determine motorists can only consent to reasonable conditions.⁹⁸ Thus, because warrantless blood tests are found unreasonable, motorists cannot be presumed to have consented to a blood test and criminalized for refusal of the same.⁹⁹

The following paragraph explains the application of the Court's legal conclusions to the facts at hand. Law enforcement officers threatened the first petitioner, Birchfield, with an unlawful search.¹⁰⁰ Based on that search, Birchfield was unlawfully convicted for refusing to submit to the blood test; therefore, the Court reversed and remanded to the North Dakota

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Birchfield*, 136 S. Ct. at 2178-79.

94. *Id.* at 2184.

95. *Id.* at 2185.

96. *Id.*

97. *Id.* at 2185-86.

98. *Id.* at 2186.

99. *Birchfield*, 136 S. Ct. at 2186

100. *Id.*

Supreme Court.¹⁰¹ The second petitioner, Bernard, had no right to refuse the warrantless breath test because the test is permissible incident to a drunk driving arrest; therefore, the Court affirmed the Minnesota Supreme Court's decision.¹⁰² Finally, the third petitioner, Beylund, submitted to a blood test after police told him that the law required his submission.¹⁰³ The North Dakota Supreme Court based its conclusion of Beylund's voluntary consent on the incorrect assumption that the state could compel blood tests; therefore, the United States Supreme Court vacated the decision and remanded to the North Dakota Supreme Court.¹⁰⁴

B. THE DISSENTING OPINIONS

Justices Sotomayor¹⁰⁵ and Thomas¹⁰⁶ wrote partial dissents in *Birchfield*. Both dissents rested on the appropriate application, categorical or case-by-case, of the relevant exceptions to the Fourth Amendment warrant requirement.¹⁰⁷ Justice Sotomayor advocated for a case-by-case approach, requiring a warrant in all cases except when exigent circumstances provide an exception to the requirement.¹⁰⁸ Alternatively, Justice Thomas advocated for a categorical application of the exigent circumstances exception to the warrant requirement for all BAC tests, blood and breath tests alike.¹⁰⁹

1. *Justice Sotomayor's Partial Dissent*

In the first *Birchfield* partial dissent, Justice Sotomayor, in which Justice Ginsburg joined, disagreed with the majority's categorical exemption of breath tests from the warrant requirement under the search incident to arrest doctrine, calling its application a "considerable overgeneralization."¹¹⁰ Rather, she argued that the search incident to arrest exception should be applied on a case-by-case basis to determine reasonableness.¹¹¹ She reasoned that law enforcement officers are not authorized to conduct unreasonable searches based solely on the arrest of a

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 2186-87.

105. *Birchfield*, 136 S. Ct. at 2187.

106. *Id.* at 2196.

107. *Id.* at 2187-98.

108. *Id.* at 2188-89.

109. *Id.* at 2197-98.

110. *Id.* at 2191, 2195 & n. 3.

111. *Birchfield*, 136 S. Ct. at 2195.

suspect.¹¹² Therefore, Justice Sotomayor advocated that all blood and breath tests incident to drunk driving arrests be subjected to the warrant requirement.

She supported her argument by pointing to the timeline of administration of breath tests and law enforcement's common practice allowing plenty of time to obtain a warrant.¹¹³ More specifically, breath tests are usually conducted after the driver is arrested and taken to a police station, observed for fifteen to twenty minutes, given a certain amount of time to contact his or her attorney, and, in some cases, up to thirty minutes to prepare the testing machine.¹¹⁴ In total, Minnesota and North Dakota allow the police a two-hour period of time from the traffic stop until the administration of the breath test, which is sufficient to obtain a search warrant.¹¹⁵

In addition to the time available to secure a warrant, Justice Sotomayor shed light on the "advances in technology that now permit 'the more expeditious processing of warrant applications.'"¹¹⁶ She also stressed that the warrant requirement would apply only to those arrestees who refuse breath tests.¹¹⁷ Moreover, this burden would not be excessive on government officials, estimating the increased burden on the magistrates in North Dakota and Minnesota would be no more than one warrant per week.¹¹⁸ Justice Sotomayor made clear there are other judicial tools available to force compliance even with a warrant requirement, such as imposing criminal punishment due to obstructing justice by not adhering to a lawfully obtained search warrant.¹¹⁹

Overall, when applying the search incident to arrest doctrine to blood and breath tests, Justice Sotomayor contends the best way to evaluate which exception is proper to apply is to "ask whether the exception best addresses the nature of the postarrest search and the needs it fulfills."¹²⁰ The purpose of the search incident to arrest exception is to preserve evidence that may be destroyed before procuring a warrant.¹²¹ Given the usual timeline allotted between the stop and the breath test, the purpose of the exception is usually

112. *Id.* at 2195-96.

113. *Id.* at 2192.

114. *Id.*

115. *Id.* at 2192-93.

116. *Id.* at 2192 (quoting *McNeely v. Missouri*, 133 S. Ct. 1521, 1562 (2013)).

117. *Birchfield*, 136 S. Ct. at 2193.

118. *Id.* at 2193-94.

119. *Id.* at 2194.

120. *Id.* at 2196.

121. *Id.*

not fulfilled in the case of breath tests.¹²² Thus, it is inappropriate to categorically apply this exception to all breath tests because it does not comport with the exception's purpose.¹²³ In conclusion, Justice Sotomayor expressed her concern that if the Court continues down the current path, the warrant requirement of the Fourth Amendment will be a mere suggestion rather than a constitutional requirement.¹²⁴

2. Justice Thomas' Partial Dissent

In the second *Birchfield* partial dissent, Justice Thomas disagreed with the majority's nitpicking regarding where to draw a distinction between blood and breath tests.¹²⁵ He referred to the distinction as "an arbitrary line in the sand" and argued what should have been resolved was whether "the search-incident-to-arrest exception permits bodily searches to prevent the destruction of BAC evidence."¹²⁶ Justice Thomas finds little support in the Court's precedent for the compromise of allowing warrantless breath tests but not warrantless blood tests.¹²⁷

Justice Thomas finds the exigent circumstances exception to the warrant requirement more appropriate in this situation.¹²⁸ He contends, as he also proposed in *McNeely*, that "the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk" and it follows that both warrantless blood and breath tests are constitutional.¹²⁹ Justice Thomas continues by expressing concern that the *Birchfield* majority drew a distinction between types of BAC evidence when analyzing the search incident to arrest exception, but did not allow such a distinction in *McNeely* when the Court found inappropriate a categorical application of the exigency exception for all BAC calculations.¹³⁰

In conclusion, Justice Thomas suggested the *McNeely* Court was wrong in its determination that the natural dissipation over time of BAC evidence could not categorically create an exigency in every drunk driving case.¹³¹ Thus, in this case, he argues both warrantless blood and breath tests should

122. *Id.*

123. *Birchfield*, 136 S. Ct. at 2197.

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.* at 2198.

129. *Birchfield*, 136 S. Ct. at 2198; *see* *McNeely v. Missouri*, 133 S. Ct. 1521, 1576 (2013) (Thomas, J., dissenting).

130. *Birchfield*, 136 S. Ct. at 2198.

131. *See generally id.*

be constitutional via the exigent circumstances exception to the warrant requirement.¹³²

IV. IMPACT

In 2013, North Dakota passed legislation making an initial refusal to take a BAC test a misdemeanor offense punishable in the same manner as driving under the influence.¹³³ Such penalties apply to refusals of blood, breath, and urine testing.¹³⁴ Penalties include mandatory addiction treatment and sentences ranging from a mandatory fine of \$500 to imprisonment of at least one year and one day.¹³⁵

The clear application of this case to North Dakota law will be a change in the current law and an effect on pending and future cases that present these issues. Prosecutors will be required to advise law enforcement officers on new law-abiding procedures that deviate from what the statute currently dictates and law enforcement's previous practices. This advisement will ensure the state is successful in deterring drunk driving through the prosecution of these offenses and in enhancing public policy regarding safety on the roads, ultimately preventing the loss of innocent lives due to drunk driving.

Moving forward, the North Dakota legislature needs to consider the pros and cons of blood testing. If the legislature determines blood testing is the best option for obtaining evidence in drunk driving prosecutions, it will likely need to develop a system that allows for prompt and effective issuance of search warrants for arrestees who refuse to submit to blood testing. Alternatively, if the legislature determines breath testing is an adequate way to calculate BAC for drunk driving prosecutions, it can likely continue to inform drivers that their refusal to submit to a breath test is a crime punishable in the same manner as driving under the influence. Either way, the *Birchfield* Court paved the way for the commencement of the legislative process in North Dakota. The state is now tasked with implementing creative and effective solutions to the ongoing issue of drunk driving while remaining within the bounds of the Constitution. *Birchfield* provides a platform for the North Dakota legislature to step in and take over. The legislature must balance North Dakota's interest in

132. *Id.*

133. *Id.* at 2170; *see also* N.D. CENT. CODE § 39-20-01, 39-08-01 (2016).

134. *Birchfield*, 136 S. Ct. at 2170; *see also* N.D. CENT. CODE §§ 39-08-01(2), 39-20-01, 39-20-14 (2016).

135. *Birchfield*, 136 S. Ct. at 2170.

protecting its public roads with the privacy interests of North Dakota citizens to create an effective strategy for all.

V. CONCLUSION

In *Birchfield*, the United States Supreme Court held warrantless breath tests, but not blood tests, incident to lawful drunk driving arrests are constitutional under the search incident to arrest doctrine.¹³⁶ The Court reasoned because breath tests are significantly less intrusive than blood tests and provide law enforcement with information necessary to serve their interests in promoting public road safety,¹³⁷ warrantless breath tests are reasonable, and, therefore, constitutional.¹³⁸ Because the Court found warrantless blood tests unconstitutional, it subsequently determined states cannot criminalize an arrestee's refusal to comply with the same.¹³⁹ This determination directly impacts North Dakota's criminal refusal statute, and in turn, may affect the impact of drunk driving in North Dakota. In response to this decision, the North Dakota legislature is tasked with determining how to proceed to effectuate new strategies that both protect the public roadways and comport with the Fourth Amendment.

*Megan Gordon**

136. *Id.* at 2185.

137. *Id.* at 2178.

138. *Id.* at 2185.

139. *Id.*

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