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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steve Michael Beylund, Appellant, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee.	Supreme Court Case No. 20140133 District Court Case No. 06-2013-CV-00095 **APPELLANT'S REPLY BRIEF** **APPEAL FROM THE JUDGMENT OF THE BOWMAN COUNTY DISTRICT COURT, THE HONORABLE WILLIAM HERAUF, AFFIRMING AN ADMINISTRATIVE DECISION OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

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1.TABLE OF CONTENTS

By paragraph

2.TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

FIFTH CIRCUIT

ELEVENTH CIRCUIT

NINTH CIRCUIT

UNITED STATES DISTRICT COURT, FLORIDA

UNITED STATES DISTRICT COURT, TEXAS

MINNESOTA SUPREME COURT

UNITED STATES CONSTITUTION

NORTH DAKOTA CONSTITUTION

3.LAW AND ARGUMENT

North Dakota's implied consent laws violate the doctrine of unconstitutional conditions.

4.Mr. Beylund argues that he has a constitutional right to refuse to consent to a warrantless search and that he therefore has a constitutional right to refuse to consent to a warrantless request to take a breath test. Mr. Beylund argued in his initial brief that North Dakota's implied consent laws are designed to circumvent the warrant requirement and coerce a driver to provide consent to a warrantless search. To pursue its purpose, to compel drivers to consent to a chemical test, the North Dakota legislature has violated the doctrine of unconstitutional conditions by drafting laws that require drivers to consent to warrantless searches in order to obtain the privilege to drive and by making it a crime to refuse a warrantless search.

5. Mr. Beylund had a constitutional right to refuse to consent to a warrantless request to take a breath test. The United States Supreme Court has repeatedly recognized that the Fourth Amendment protects a person's right to refuse to consent to a warrantless search under various circumstances. For example, in District of Columbia v. Little, 339 U.S. 1 (1950), the Court held that refusing to unlock the door to one's home does not constitute misdemeanor interference with a health inspection. The Court observed that a prohibition against "interfering with or preventing any inspection" to determine a home's sanitary condition "cannot fairly be interpreted to encompass" a person's mere failure to unlock a door and permit a warrantless entry. Id. at 5, 7. The Court reasoned that "[t]he right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more

than" refuse to unlock a door. Id. at 7. Similarly, in Camara v. Municipal Court, 387 U.S. 523, 540 (1967), the Court recognized an individual's constitutional right to resist a warrantless housing inspection, noting that the appellant may not be constitutionally convicted for refusing to consent to a warrantless inspection. Likewise, in See v. City of Seattle, 387 U.S. 541, 546 (1967), the Court recognized a person's constitutional right to resist a warrantless fire inspection, observing that the "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse."

6.Reversing a conviction for harboring a fugitive in United States v. Prescott, 581F.2d 1343, 1351 (9th Cir. 1978), the Ninth Circuit held that "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered evidence of criminal wrongdoing." The Prescott court supported its holding with this reasoning:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." When, on the other hand, the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime.

Id. at 1350-51 (citations omitted).

7.Article I, Section 20 of North Dakota's Constitution states that "[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." This concept embedded in our State Constitution is basically the doctrine of

unconstitutional conditions that was articulated by the United States Supreme Court in Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94 (1926) where the Court stated that

> as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

In North Dakota therefore the doctrine of unconstitutional conditions applies not only as applied through the fourteenth amendment of the U.S. Constitution but also as a mandate of the State Constitution. As such the search warrant requirement found in the Fourth Amendment and Article I Section 8 and the right to refuse a warrantless search cannot be excepted by North Dakota's implied consent law that conditions the privilege to drive on the surrender of the right to refuse a warrantless search.

8.Because North Dakota's implied consent law requires that a driver relinquish their constitutional rights by consenting to a search in return for the privilege to drive, thereby forcing the exchange of a mere privilege for a constitutional right, North Dakota's implied consent law is unconstitutional. See Frost at 593 ("It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."); Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004)("The City may

contend that the searches are permissible because they are entirely voluntary. No protestors are compelled to submit to searches; they must do so only if they choose to participate in the protest . . .. This is a classic "unconstitutional condition," in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."); Hillcrest Prop., LLP v. Pasco Cnty., 939 F.Supp.2d 1240, 1255 (M.D. Fla. 2013)("A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the prohibition against unreasonable search and seizure of the citizen's automobile."). The United States Supreme Court

> has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . ..

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

9.The Department argues that Mr. Beylund must demonstrate an "unconstitutional search" for application of the doctrine of unconstitutional conditions to apply. See Appellee's Brief page 18. The case cited by the Department, Council of Independent Tobacco Manufacturers of America v. State, 713 N.W.2d 300 (Minn. 2006), however does not support the Department's claim. In the Tobacco case the Minnesota Supreme Court only indicated that "to invoke this "unconstitutional conditions" doctrine, appellants must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their First Amendment rights." Id. at 306. The Tobacco

case does not require that the statute be unconstitutional by itself to apply the doctrine only that the statute requires the surrender of a constitutional right in return for a privilege that could not be obtained any other way. In Tobacco the Court found that the statute did not prevent the plaintiff's from exercising their first amendment rights. Id. at 307 ("[T]the focus of the unconstitutional conditions doctrine is on whether a governmental entity is denying a benefit to Plaintiffs that they could obtain by giving up their freedom of speech, or is penalizing them for refusing to give up their First Amendment rights."). Compared to Mr. Beylund's situation however the North Dakota law does condition his driving on the surrender of a constitutional right, specifically requiring him to consent to a warrantless search and making it a crime if he does not. Mr. Beylund could not otherwise obtain the privilege to drive except by following North Dakota law.

10.It is well settled that the unconstitutional conditions doctrine provides that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .." Perry at 597. If it could, the "exercise of those [interests] would in effect be penalized and inhibited." Id. An example of a comparative application of the doctrine of unconstitutional conditions to rights under the fourth amendment can be found in Dearmore v. City of Garland, 400 F. Supp. 2d 894 (N.D. Tex. 2005). In Dearmore, the City of Garland, imposed an ordinance that provided that owners of residential property must obtain a license in order to rent the property. Id. As a condition of the license, owners were to consent to an inspection of the property from the City once a year, and failure to do so was an offense. Id. The ordinance, however, also provided authorization for the City to obtain a search warrant if consent to the

inspection was refused or could not be obtained. Id. The court stated:

> [T]he property owner is being penalized for his failure to consent in advance to a warrantless search of unoccupied property. The property owner's consent thus is not voluntary at all. A valid consent involves a waiver of constitutional rights and must be voluntary and uncoerced. The alternatives presented to the property owner are to consent in advance to a warrantless inspection, or to face criminal penalties; thus consent is involuntary. On the other hand, if the owner does not consent to the warrantless search, he does not receive a permit. The whole purpose of receiving a permit is to rent the property for commercial purposes. Without a permit, the owner cannot engage in lawful commercial activity. The owner is thus faced with equally unavailing situations.

Id. at 902-03 (internal citations omitted). Subsequently, the district court enjoined the City from enforcing any provision of the ordinance that required a person renting property to allow inspection of the property as a condition of issuing a permit, or penalized a person for refusing an inspection. Id. at 906. The City subsequently amended the ordinance, removing the provisions related to consent and clarifying the circumstances under which the City of Garland may seek a warrant. Dearmore v. City of Garland, 519 F.3d 517, 520 (5th Cir. 2008). As in Dearmore, just as an owner's failure to consent is an offense, a driver's failure to consent in North Dakota is an offense making the application of the law unconstitutional as it violates the doctrine of unconstitutional conditions.

11.CONCLUSION

12.Although the government may have a compelling interest to investigate drinking and driving scenarios, North Dakota's current implied consent laws that condition the privilege to drive on the waiver of a constitutional right and further criminalize the exercise of that right are not the least restrictive means to accomplish that goal. The situation could be easily remedied by incorporation of a warrant requirement. Instead of

trying to circumvent the warrant requirement North Dakota law should embrace it.

13.Because North Dakota's implied consent laws are unconstitutional as applied to the facts of Mr. Beylund's case he respectfully requests that the decision to suspend his driving privileges for 2 years be reversed.

Dated: July 7, 2014

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[¶1] Thomas F. Murtha IV is an attorney licensed in good standing in the State of North Dakota, Attorney ID 06984, and states that on July 7, 2014 he electronically served the following on Douglas Anderson, Assistant North Dakota Attorney General representing the North Dakota Department of Transportation:

APPELLANT'S REPLY BRIEF

by sending an electronic copy to the email address dbanders@nd.gov.

Dated: July 7, 2014

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