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JANUARY 3, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alan Lee Jessop, Appellant/Petitioner, v. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	Supreme Court Case No. 20160387 District Court Case No. 13-2016-CV-00041 **APPELLANT'S BRIEF** **APPEAL FROM THE JUDGMENT OF THE DUNN COUNTY DISTRICT COURT, THE HONORABLE WILLIAM A. 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

NORTH DAKOTA

UNITED STATES CONSTITUTION

NORTH DAKOTA CONSTITUTION

NORTH DAKOTA CENTURY CODE

NORTH DAKOTA RULES OF APPELLATE PROCEDURE

[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI § 8, N.D.C.C. § 27-05-06(4) and N.D.C.C. § 39-20-06. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 28-27-01 and N.D.C.C. § 28-27-02. This appeal is timely under N.D.R.App.P. 4(a)(1).

[¶5] **STATEMENT OF THE ISSUES ON APPEAL**

I. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because the blood test Mr. Jessop was asked to submit to was a warrantless search and law enforcement did not have a valid exception to the warrant requirement to search him.

II. North Dakota's implied consent and test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional.

III. Mr. Jessop has a constitutional right to refuse to consent to a warrantless search and he therefore has a constitutional right to refuse to consent to a warrantless request to take a blood test. 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 and Article 1 Section 20 of North Dakota's Constitution by drafting laws that require drivers to consent to warrantless searches in order to obtain the privilege to drive.

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant, Alan Lee Jessop, appeals to the Supreme Court of North Dakota from the Judgment of the Dunn County District Court filed September 21, 2016, and from each and every part thereof, including the Memorandum Opinion and Order filed by the Honorable William A. Herauf, District Judge, filed September 20, 2016, and the decisions of the North Dakota Department of Transportation issued by Hearing Officer Sarah Huber dated February 13, 2016 revoking his North Dakota driving privileges for 180 days and the letter from Hearing Officer Sarah Huber dated April, 4 2016 informing

Mr. Jessop that his petition for reconsideration was granted but his prayer for relief to rescind the revocation of his driving privileges for 180 days was denied.

[¶8] **STATEMENT OF THE FACTS**

[¶9] On January 14, 2016 law enforcement made contact with Mr. Jessop. Transcript page 3, line 15 to line 20 (T. 3:15-20). The law enforcement officer who testified at the hearing (Trooper Cummins) stopped Mr. Jessop for failing to obey a stop sign. T. 4:6-15.

[¶10] The Trooper investigated Mr. Jessop for DUI and administered a screening test after invoking North Dakota's implied consent advisory. T. 5:3-17:2. After receiving a result on the screening test the Trooper arrested Mr. Jessop. T. 17:3-10.

[¶11] After arresting Mr. Jessop the Trooper read a Miranda warning, the North Dakota implied consent advisory, and then requested a blood sample from Mr. Jessop. T. 17:14-18. The North Dakota implied consent advisory includes that refusal to submit as directed by law enforcement is a crime. T. 22:18-23:13. Mr. Jessop refused to give a blood sample. T. 17:19-23.

[¶12] The Trooper did not attempt to get a search warrant. T. 23:16-17.

[¶13] **LAW AND ARGUMENT**

[¶14] **Standard of Review**

[¶15] "[R]eview of an administrative agency's suspension of a driver's license is governed by the Administrative Agencies Practice Act, N.D.C.C. ch. 28–32." Richter v. N.D. Dep't of Transp., 2010 ND 150, ¶ 6, 786 N.W.2d 716.

[¶16] N.D.C.C. § 28-32-46 states the standard of review for this matter.

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the

agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

[¶17] **I. The Administrative Hearing Officer erred in the Findings of Fact and Conclusions of Law because the blood test Mr. Jessop was asked to submit to was a warrantless search and law enforcement did not have a valid exception to the warrant requirement to search him.**

[¶18] Mr. Jessop argues the blood test he was asked to submit to was a warrantless search and law enforcement did not have a valid exception to the warrant requirement to search him. Compare State v. Trahan, 870 N.W.2d 396, 399 (Minn. Ct. App. 2015)("Because we conclude that conducting a warrantless blood test would have been unconstitutional, charging appellant with a crime based on his refusal to submit to the test implicates his fundamental right to be free from unconstitutional searches. And because the test-refusal statute as applied is not narrowly tailored to serve a compelling government interest, it fails strict scrutiny and violates appellant's right to due process

under the United States and Minnesota Constitutions."); Compare State v. Ryce, 303 Kan. 899, 368 P.3d 342 (2016)(Holding that (1) despite implied consent laws, a breath, blood, or urine test remains a search under the Fourth Amendment; (2) under the Fourth Amendment, a consent implied through the implied consent law can be withdrawn; and (3) statute criminalizing a driver's refusal to submit to an unconstitutional search was not narrowly tailored to compelling State interests, and thus violated due process.); Compare State v. Yong Shik Won, 137 Haw. 330, 359, 372 P.3d 1065, 1094 (2015), as corrected (Dec. 9, 2015)("The Majority holds that the criminal sanctions for refusing to submit to a breath or blood alcohol test provided by Hawai'i Revised Statutes (HRS) § 291E–68 (Supp. 2012) are inherently coercive, thus rendering Defendant Yong Shik Won's (Won) otherwise voluntary consent invalid.").

[¶19] The background Fourth Amendment principles that govern here are settled and not in dispute. It is fundamental that, as a general matter, law enforcement officers must, "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio, 392 U.S. 1, 20 (1968). Thus, the Court's decisions consistently "have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant.'" Riley v. California, 134 S. Ct. 2473, 2482 (2014) (ellipses omitted) (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)). "Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Ibid. (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). Accord Schmerber v.

California, 384 U.S. 757, 770 (1966).

[¶20] **II. North Dakota's implied consent and test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional.**

[¶21] North Dakota's test refusal law penalizes the constitutional right to withhold consent to a warrantless search, rendering the law unconstitutional. North Dakota's implied consent law provides that drivers consent to have their blood, breath or urine chemically tested for the presence of alcohol and that a police officer may require a driver to submit to chemical testing if the officer has reason to believe that the individual committed a moving traffic violation and in conjunction with the violation the officer has formulated an opinion that the individual's body contains alcohol. A person who refuses to submit to a properly requested test is subject to both civil license revocation and criminal prosecution. The legislature, therefore, has made it a crime to exercise one's constitutional right to withhold consent to a search - violating the constitutional prohibition against unreasonable searches and seizures.

[¶22] The State may be entitled to collect evidence, either pursuant to a warrant or an exception to the warrant requirement but that does not mean a citizen can be compelled to "voluntarily" participate in the accuser's investigation, or punished for his or her refusal to do so. With the refusal to test statutes, the North Dakota Legislature has criminalized and penalized an individual's assertion of the right to be secure against unreasonable searches and seizures by making it a crime and administratively punishing a refusal to submit to a properly requested chemical test. In other words, the statutes have eliminated what has been recognized as the constitutionally protected right to say "no." See State v. Odom, 2006 ND 209, ¶15, 722 N.W.2d 370 ("At no time before or during Olson's search

did Odom withdraw or limit his consent to search the hotel room. Odom could have prevented Olson from searching the safe by indicating to Olson consent did not extend to the safe."); see also United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (stating that "[o]nce given, consent to search may be withdrawn").

[¶23] Mr. Jessop argues that by criminalizing and penalizing refusal the North Dakota law has unconstitutionally authorized a warrantless search. See City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443, 2447 (2015) ("Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for precompliance review.").

[¶24] **III. Mr. Jessop has a constitutional right to refuse to consent to a warrantless search and he therefore has a constitutional right to refuse to consent to a warrantless request to take a blood test. 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 and Article 1 Section 20 of North Dakota's Constitution by drafting laws that require drivers to consent to warrantless searches in order to obtain the privilege to drive.**

[¶25] Mr. Jessop 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 blood test. See Birchfield v. N. Dakota, 136 S. Ct. 2160 (2016). Mr. Jessop argues 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 and Article 1 Section 20 of North Dakota's Constitution 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.

[¶26] The concept expressed in Article 1 Section 20 of North Dakota's Constitution 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" should prevent the North Dakota legislature from drafting a law to circumvent (except) the warrant requirement of Article 1 Section 8. Mr. Jessop's reasoning is that the warrant requirement is part of Article 1 Section 8 and that Article 1 Section 20 plainly states that everything in Article 1 is excepted and that would include everything in Article 1 Section 8 and its warrant requirement. The concept is similar to the doctrine of unconstitutional conditions because it limits the legislature's ability to prevent people from exercising constitutional rights therefore preventing the legislature from drafting a law that makes it a crime to exercise a constitutional right. See State ex rel. Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 123-24 (1933)("To make more certain that these inalienable rights are secured to everyone, under all circumstances and under all crises, the people of this state said in section 21, "The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise," and in section 24, "To 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." It is clear from this recital that there are some things which the people of this state have specifically forbidden the Legislature of this state to do. No matter what the emergency may be, the people, in their wisdom, have deliberately limited the power of its agents

known as the Legislature. Whether this be wise or unwise, whether it may now be said that the people at the time of the adoption of the Constitution could not foresee the emergency which exists, are matters of judgment for the people themselves to determine in any movement to alter or change these provisions. Until so changed, they are constitutional limitations on the power of the Legislature, the members of which took an oath to support this Constitution, with all of its provisions, as well as to support the Constitution of the United States.").

[¶27] In Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) the United States Supreme Court articulated what has become known as the "special needs balancing test" that was originally born out of the Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 619 (1989) and New Jersey v. T.L.O., 469 U.S. 325 (1985) line of cases. Those cases however articulate that such an analysis is only appropriate for cases "outside the normal needs of law enforcement." In other words, if law enforcement is presently engaged in the "competitive enterprise of ferreting out crime," the rule is to get a warrant or prove an exception. If the search is being performed for some other reason, the court can balance the intrusion against the State's compelling interest. See Maryland v. King, 133 S. Ct. 1 (2012). Accordingly, the first step in any Fourth Amendment analysis is not to look at the "nature of the intrusion," but rather the "purpose of the intrusion." And if that purpose is to ferret out crime, no balancing test is used, the State needs to get a warrant or prove an exception.

[¶28] Regarding law enforcement's contact with Mr. Jessop the purpose of the intrusion was to ferret out crime. Therefore, this is not a "special needs" case, but rather a case involving the competitive enterprise of ferreting out crime, no balancing is permitted.

The United States Supreme Court in Ferguson v. City of Charleston, 532 U.S. 67 (2001) explains that the court cannot "balance needs" for law enforcement engaged in a primary criminal investigation. The question presented in Ferguson was "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." Ferguson, 532 U.S. 67, 70. To reach a determination of this question the Ferguson court explained why a special needs balancing test was not appropriate

> [b]ecause law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment. Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs."

Id. at 84 (footnotes omitted).

[¶29] Because the circumstances of Mr. Jessop's case involve law enforcement engaged in the competitive enterprise of ferreting out crime an analysis of the constitutionality of North Dakota's implied consent and refusal law regarding the fourth amendment and article one section eight should not entail use of the "special needs" balancing test and instead law enforcement must obtain a warrant or prove an exception.

[¶30] By administratively penalizing and criminalizing refusal the North Dakota law has unconstitutionally authorized a warrantless search. See City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443, 2447 (2015) ("Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it

penalizes them for declining to turn over their records without affording them any opportunity for precompliance review."); See also Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 540 (1967)("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."); See v. City of Seattle, 387 US 541, 546 ("Therefore, 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."); compare New Jersey v. Portash, 440 U.S. 450, 459 (1979); compare Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

[¶31] Mr. Jessop has a constitutional right to refuse to consent to a warrantless search and he therefore has a constitutional right to refuse to consent to a warrantless request to take a blood test. North Dakota's implied consent laws are designed to circumvent the warrant requirement and coerce a driver to provide consent to a warrantless search which as argued above contradicts the opinions in Portash and Bumper. To pursue its purpose, to compel drivers to consent to a chemical test, the North Dakota legislature has violated the doctrine of unconstitutional conditions and Article 1 Section 20 of North Dakota's Constitution by drafting laws that require drivers to consent to warrantless searches in order to obtain the privilege to drive and by penalizing and making it a crime to refuse a warrantless search.

[¶32] The United States Supreme Court in Speiser v. Randall Prince v. City and County of San Francisco, California, 357 U.S. 513, 526 (1958) reiterated that "'[i]t is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a

statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' Bailey v. State of Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191." The concept of "implied consent" as articulated in North Dakota's DUI laws is that very type of statutory presumption that has been prohibited by the United States Supreme Court and it should be apparent that it cannot be used to transgress Mr. Jessop's constitutional right to refuse a warrantless request by law enforcement to search him. Compare State v. Hayes, 2012 ND 9, ¶39, 809 N.W.2d 309 ("Hayes had two choices when confronted by the officers asking whether they could search her residence: consent to a warrantless search or violate her release conditions and be subject to an arrest warrant for failing to comply with the district court's order. Consent based upon duress or coercion is not voluntary. Id. Under the circumstances, Hayes did not provide voluntary consent to search 210 Adams Street.").

[¶33] Mr. Jessop argues that the North Dakota refusal and implied consent laws are unconstitutional as applied to him because the facts of the case demonstrate that law enforcement did not have a search warrant to search him at the time they asked to search him nor did law enforcement ever apply for a search warrant. The North Dakota law penalizing a refusal to consent to a warrantless blood test is unconstitutional as applied to the circumstances and facts of this case. See Camara, at 540 ("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."); See also McNeely v. Missouri, 133, S.Ct. 1552, 1561 (2013) ("In those drunk-driving investigations where police officers can reasonably obtain a warrant before

a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.").

[¶34] In Schneckloth, the United States Supreme Court warned us about the consequences of attempting to bypass constitutional commands by creating or relying on a legal fiction when it wrote that

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

Schneckloth v. Bustamonte, 412 U.S. at 228 – 29. North Dakota's Constitution forbids the North Dakota legislature or a North Dakota agency to draft a law or rule to circumvent the warrant requirement found in Article I Section 8. Article I, Section 20 explicitly 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." As such Article I Section 8 cannot be excepted by the Department and the search warrant requirement cannot be excepted by North Dakota's implied consent law.

[¶35] 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. Emphasizing that the defendant "neither used nor threatened force of any kind," 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, the Court recognized an individual's constitutional right to resist a warrantless housing inspection, noting that the "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." Likewise, in See, 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." And recently in Patel the Court determined that a law "that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for precompliance review." Id. at 2447.

[¶36] 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).

[¶37] 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. Railroad Comm'n, 271 U.S. 583, 596 (1926). 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. See also State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996) ("Unlike the United States Constitution, which "is an instrument of grants of authority" to enact legislation (see Art. I, § 8, U.S. Const.), our North Dakota Constitution "is an instrument of limitations of authority" to enact legislation (see Art. IV, § 13, N.D. Const.). State v. Anderson, 427 N.W.2d 316, 318 (N.D.), cert. denied, 488 U.S. 965 (1988). "The North Dakota Legislature thus has plenary powers except as limited by the state constitution, federal constitution, and congressional acts, [ ], and treaties of the United States." Id.").

[¶38] Because North Dakota's implied consent law requires that a driver relinquish their Article I Section 8 and Fourth Amendment 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).

[¶39] 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, Texas, 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 of Garland once a year, and failure to do so was an offense. Id. The ordinance, however, also provided authorization for the City of Garland 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 of Garland 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 was penalized a driver's failure to consent in North Dakota is penalized making the application of the law unconstitutional as it violates the doctrine of unconstitutional conditions.

[¶40] **CONCLUSION**

[¶41] Because Mr. Jessop had a constitutional right to refuse to submit a blood sample upon the warrantless request for the same from law enforcement the Department's revocation of Mr. Jessop's driving privileges and the Hearing Officer's Order are in violation of Mr. Jessop's constitutional rights and accordingly pursuant to N.D.C.C. § 28-32-46 the court cannot affirm the hearing officer's order. Compare Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886) (finding that the seizure or compulsory production of a man's private papers to be used in evidence against him is

equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the prohibition of the fifth amendment).

[¶42] Based on the foregoing arguments and law Ms. Jessop respectfully requests that the hearing officer's decision be reversed.

Dated: January 3, 2017

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Alan Lee Jessop,

Appellant/Petitioner,

v.

Grant Levi, Director of the North Dakota Department of Transportation,

Appellee/Respondent.

Supreme Court Case No. 20160387
District Court Case No. 13-2016-CV-00041

CERTIFICATE OF SERVICE FOR APPELLANT'S BRIEF AND APPENDIX

[¶1] On January 3, 2017 a true and correct copy of the following was electronically served:

APPELLANT'S BRIEF and APPENDIX

on the following:

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