

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

City of Jamestown, Plaintiff and Appellee, vs. Bonnie Lynn Nygaard, Defendant and Appellant.	SUPREME COURT NO. 20210049 Criminal No. 47-2020-CR-00126 ORAL ARGUMENT REQUESTED
--	---

ON APPEAL FROM FEBRUARY 16, 2021, AMENDED
JUDGMENT OF THE DISTRICT COURT
COUNTY OF STUTSMAN
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE TROY J. LEFEVRE PRESIDING

AMENDED APPELLANT'S BRIEF

Luke T. Heck (#08133)
Drew J. Hushka (#08230)
Vogel Law Firm
Attorneys for Appellant
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: lheck@vogellaw.com
dhushka@vogellaw.com

TABLE OF CONTENTS

	<u>Paragraph(s)</u>
Table of Authorities.....	Pages 3-6
Statement of Issue Presented for Review	1
Statement of the Case	2-3
Request for Oral Argument	4
Statement of the Facts	5-9
Law and Argument	10-29
I. Officer Renfro’s failure to advise Ms. Nygaard of the criminal consequences of refusing his chemical test request precludes the City from prosecuting Ms. Nygaard for Driving Under the Influence – Refusal.....	10-29
A. The plain language of Section 39-08-01(1)(f) prevents the prosecution of an individual for refusing a chemical test request unless the individual is advised of the potential for criminal prosecution.	13-17
B. Legislative history confirms Section 39-08-01(1)(f) prevents the prosecution of an individual for refusing a chemical test request unless the individual is advised of the potential for criminal prosecution	18-29
Conclusion.....	30-31

TABLE OF AUTHORITIES

Paragraph(s)

Cases

<i>Abbey v. State</i> , 202 N.W.2d 844 (N.D. 1972)	31
<i>Bickel v. Jackson</i> , 530 N.W.2d 318 (N.D. 1995)	30
<i>Birchfield v. North Dakota</i> , 136 S.Ct. 2160 (2016).....	23-24, 28
<i>Citizens United v. Federal Election Commission</i> , 558 U.S. 310 (2010).....	31
<i>City of Jamestown v. Casarez</i> , 2021 ND 71.....	18, 19, 27, 29, 31
<i>DeForest v. North Dakota Department of Transportation</i> , 2018 ND 224, 918 N.W.2d 43.....	14
<i>Denault v. State</i> , 2017 ND 167, 898 N.W.2d 452.....	11
<i>Fossum v. North Dakota Department of Transportation</i> , 2014 ND 47, 843 N.W.2d 282.....	19
<i>Guthmiller v. Director, North Dakota Department of Transportation</i> , 2018 ND 9, 906 N.W.2d 73.....	11
<i>McCoy v. North Dakota Department of Transportation</i> , 2014 ND 119, ¶ 13, 848 N.W.2d 659.....	19
<i>O'Laughlin v. Carlson</i> , 30 N.D. 213, 152 N.W. 675 (1915)	30
<i>Schoon v. North Dakota Department of Transportation</i> , 2018 ND 210, 917 N.W.2d 199.....	25
<i>Schulke v. Panos</i> , 2020 ND 53, 940 N.W.2d 303.....	10-11, 18

<i>Shiek v. North Dakota Workers Compensation Bureau,</i> 2001 ND 166, 634 N.W.2d 493	28
<i>State v. Bauer,</i> 2015 ND 132, 863 N.W.2d 534	21, 29
<i>State v. Baxter,</i> 2015 ND 107, 863 N.W.2d 208	21, 29
<i>State v. Bearrunner,</i> 2019 ND 29, 921 N.W.2d 894	27, 29
<i>State v. Birchfield,</i> 2015 ND 6, 858 N.W.2d 302	21, 29
<i>State v. Boehm,</i> 2014 ND 154, 849 N.W.2d 239	21, 29
<i>State v. Comes,</i> 2019 ND 290, 936 N.W.2d 114	11
<i>State v. Dubois,</i> 2019 ND 284, 936 N.W.2d 380	31
<i>State v. Fetch,</i> 2014 ND 195, 855 N.W.2d 389	21, 29
<i>State v. G.C.H.,</i> 2019 ND 256, 934 N.W.2d 857	18
<i>State v. Hafner,</i> 1998 ND 220, 587 N.W.2d 117	18
<i>State v. Helm,</i> 2017 ND 207, 901 N.W.2d 57	23, 28
<i>State v. Kordonowy,</i> 2015 ND 197, 867 N.W.2d 690	21, 29
<i>State v. Long,</i> 2020 ND 216, 950 N.W.2d 178	2, 13, 14, 15, 18, 28, 30, 31
<i>State v. Miller,</i> 129 N.W.2d 356 (N.D. 1964)	30

<i>State v. Morales</i> , 2015 ND 230, 869 N.W.2d 417	21, 29
<i>State v. Nagel</i> , 2014 ND 224, 857 N.W.2d 374	21, 28, 29
<i>State v. O'Connor</i> , 2016 ND 72, 877 N.W.2d 312	22
<i>State v. Packineau</i> , 2015 ND 180, 865 N.W.2d 414	21, 29
<i>State v. Salter</i> , 2008 ND 230, 758 N.W.2d 702	19
<i>State v. Strom</i> , 2019 ND 9, 921 N.W.2d 660	15
<i>State v. Vogel</i> , 467 N.W.2d 86 (N.D. 1991)	29

Statutes

N.D.C.C. § 1-02-05	11
N.D.C.C. § 39-01-01	15
N.D.C.C. § 39-08-01	passim
N.D.C.C. § 39-20-04	13

Other

Background on Senate Bill 2052 (1/20/15), 64th North Dakota Legislative Session	22
<i>Black's Law Dictionary</i> (10th ed. 2014).....	15
<i>Cambridge Online Dictionary</i> , available at https://dictionary.cambridge.org/us/	13
Hearing on House Bill 1534 Before the Senate Judiciary Committee (3/13/19), 66th North Dakota Legislative Session	26, 27

Hearing on House Bill 1534 Before the Senate Judiciary Committee (4/2/19), 66th North Dakota Legislative Session	26
North Dakota Session Laws 2013, ch. 301	20
North Dakota Session Laws 2015, ch. 268	22
North Dakota Session Laws 2017, ch. 268	24
North Dakota Session Laws 2019, ch. 322	25
Senate Standing Committee Minutes (2/1/17), 65th North Dakota Legislative Session	24

STATEMENT OF ISSUE PRESENTED FOR REVIEW

[¶1] Statute directs the criminal prohibition against refusing a chemical test request does not apply unless a motorist “has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota.” Despite law enforcement’s failure to advise Appellant of the criminal consequences of her refusal of the chemical test request, Appellee criminally prosecuted Appellant’s refusal. Does law enforcement’s failure to advise Appellant of the criminal consequences of refusing a chemical test request invalidate Appellant’s conviction?

STATEMENT OF THE CASE

[¶2] Law enforcement cited Appellant, Bonnie Lynn Nygaard (“Ms. Nygaard”), with Driving Under the Influence – Refusal. Doc. ID #1. Because law enforcement failed to advise her that refusal constituted a criminal offense, Ms. Nygaard moved to dismiss the charge. Doc. ID #17. The district court denied the motion, holding law enforcement’s failure to advise Ms. Nygaard of the criminal consequences of refusing a chemical test request did not prevent prosecution. *See* Appellant’s App’x, at 34-37.¹

[¶3] Ms. Nygaard conditionally pleaded guilty, preserving the above-outlined issue. *Id.* at 38-40. The district court accepted the conditional guilty plea, finding

¹ Ms. Nygaard sought reconsideration of the denial following this Court’s decision in *State v. Long*, 2020 ND 216, 950 N.W.2d 178. *See generally* Doc. ID #42. The district court also denied the reconsideration motion. *See generally* Doc. ID #47.

Ms. Nygaard guilty. *Id.* at 42-45. Ms. Nygaard then appealed to this Court. *Id.* at 46-48.

REQUEST FOR ORAL ARGUMENT

[¶4] Ms. Nygaard requests oral argument in accordance with Rule 28(h) of the North Dakota Rules of Appellate Procedure. The permissibility of prosecution for Driving Under the Influence – Refusal when law enforcement fails to inform motorists of the criminal consequences of refusing a chemical test request remains an issue of first impression following the Legislature’s 2019 amendments to the implied consent statutes. Oral argument would allow for full exploration of this novel issue.

STATEMENT OF THE FACTS

[¶5] In the early morning hours of March 8, 2020, Stutsman County Sheriff’s Deputy Brian Davis (“Deputy Davis”) conducted a traffic stop of a vehicle driven by Appellant, Bonnie Nygaard (“Ms. Nygaard”). *Tr. on Appeal – Mot. Hr’g (“Transcript”)*, at 13:24-15:4. Deputy Davis informed dispatch of the stop, and approached the vehicle, making contact with Ms. Nygaard. *Id.* at 15:5-14.

[¶6] Jamestown Police Department Officer Chance Renfro (“Officer Renfro”) then arrived on the scene. *Id.* at 17:1-4. Deputy Davis informed Officer Renfro he believed Ms. Nygaard was intoxicated, and Officer Renfro assumed the investigation. *Id.* at 17:13-17; *id.* at 20:5-15.

[¶7] After forming a belief Ms. Nygaard may be under the influence of alcohol, Office Renfro asked her to perform field sobriety testing. *Id.* at 20:20-22:19. Based

on her performance, Officer Renfro arrested Ms. Nygaard for driving under the influence, and transported her to the Stutsman County Correctional Center. *Id.* at 22:20-24:2.

[¶8] At the Stutsman County Correctional Center, Officer Renfro advised Ms. Nygaard:

For the chemical test the law enforcement officer shall inform the individual North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs. A refusal of the individual to submit to a test directed by [sic] law enforcement officer may result in revocation of the individuals [sic] driving privileges for a minimum of 180 days or up to 3 years.

Id. at 25:11-19. While Ms. Nygaard initially responded she would submit to chemical breath testing, *id.* at 25:25-26:3, she ultimately refused. *Id.* at 26:4-32:2. Officer Renfro never advised Ms. Nygaard refusing to submit to chemical testing was a crime. *Id.* at 32:19-23.

[¶9] Officer Renfro issued Ms. Nygaard a citation for Driving Under the Influence – Refusal. *See* Doc. ID #1. Following the rejection of her motion to dismiss or suppress evidence, Ms. Nygaard conditionally pleaded guilty, reserving the below-outlined issue. Appellant’s App’x, at 38-40. The district court accepted the conditional plea. *Id.* at 41. Ms. Nygaard then filed this appeal. *Id.* at 46-48.

LAW AND ARGUMENT

I. Officer Renfro’s failure to advise Ms. Nygaard of the criminal consequences of refusing his chemical test request precludes the City from prosecuting Ms. Nygaard for Driving Under the Influence – Refusal.

[¶10] A motorist who refuses a lawful chemical test request commits a crime. *See* N.D.C.C. §§ 39-08-01(1)(e) & (3). But this criminal prohibition “does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota.” N.D.C.C. § 39-08-01(1)(f). This appeal requires this Court to determine whether the City can prosecute Ms. Nygaard with Driving Under the Influence – Refusal, when Officer Renfro failed to advise her of the criminal consequences of refusing his chemical test request. This question of statutory construction presents an issue of law, fully reviewable on appeal. *Schulke v. Panos*, 2020 ND 53, ¶ 8, 940 N.W.2d 303 (citation omitted).

[¶11] When interpreting a statute, this Court primarily seeks to ascertain the intent of the Legislature by looking at the plain language of the statute, giving each word, phrase, and sentence its ordinary meaning. *Id.* (citations omitted). If unambiguous, this Court looks only to the plain language of the statute to ascertain its meaning. *State v. Comes*, 2019 ND 290, ¶ 7, 936 N.W.2d 114 (citation omitted); *see also* N.D.C.C. § 1-02-05 (“When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). But, if a statute is ambiguous, this Court may reference extrinsic aids, such

as legislative history, to interpret the statutory text. *Denault v. State*, 2017 ND 167, ¶ 10, 898 N.W.2d 452. “A statute is ambiguous when it is susceptible to different, but rational meanings.” *Schulke*, 2020 ND 53, ¶ 8 (quoting *Guthmiller v. Director, N.D. Dep’t of Transp.*, 2018 ND 9, ¶ 8, 906 N.W.2d 73).

[¶12] In totality, Section 39-08-01(1)(f) reads: “Subdivision e [of Section 39-08-01(1)] does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota.” N.D.C.C. § 39-08-01(1)(f). The plain language is unambiguous, foreclosing the prosecution of a motorist for refusing a chemical test request unless law enforcement advised the motorist of the criminal consequences of refusing. And even if Section 39-08-01(1)(f) was ambiguous, the legislative history confirms a motorist cannot be prosecuted for refusing a chemical test unless advised of the criminal consequences of refusing.

A. The plain language of Section 39-08-01(1)(f) prevents the prosecution of an individual for refusing a chemical test request unless the individual is advised of the potential for criminal prosecution.

[¶13] Section “39-08-01(1)(f) is not ambiguous[.]” *Long*, 2020 ND 216, ¶ 1. By its plain language, Section 39-08-01(1)(f) consists of an “conditional clause,” and an “operative clause.” The word “unless” connotes the beginning of the conditional clause. *See* Cambridge Dictionary (“Conditional clauses can begin with unless. Unless means something similar to ‘if . . . not’ or ‘except if’.” (ellipsis in original)), available at <https://dictionary.cambridge.org/us/dictionary/english/unless> (last visited May 4, 2021). Accordingly, in Section 39-08-01(1)(f), the phrase “unless

the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota[.]” serves as the conditional clause, and the phrase “Subdivision e [of Section 39-08-01(1)] does not apply” serves as the operational clause.

[¶14] When construing statutes containing both a conditional and operative clause, satisfaction of the conditional clause controls the potential effect of the operational clause. *See DeForest v. N.D. Dep’t of Transp.*, 2018 ND 224, ¶ 13, 918 N.W.2d 43. Applying this framework to the plain language of Section 39-08-01(1)(f) directs that “unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota[.]” then “Subdivision e [of Section 39-08-01(1)] does not apply[.]” N.D.C.C. § 39-08-01(1)(f). In other words, “[t]he plain language of [Section] 39-08-01(1)(f) requires a driver to be advised of the consequences for refusing to submit to a chemical test before” before an individual can be subject to criminal charges under Section “39-08-01(1)(e).” *Long*, 2020 ND 216, ¶ 10.²

² In *Long*, this Court opined Section 39-08-01(1)(f) prevents the State from taking action against a motorist’s driving privileges unless advised of the consequences of refusing a chemical test. *See Long*, 2020 ND 216, ¶ 10 (“The plain language of N.D.C.C. § 39-08-01(1)(f) requires a driver be advised of the consequences for refusing to submit to a chemical test before the individual’s driving privileges are subject to restrictions under N.D.C.C. § 39-08-01(1)(e).” (emphasis added)). But Section 39-08-01(1)(e) addresses criminal consequences, not a motorist’s driving privileges. *See* N.D.C.C. § 39-08-01(1)(e). Instead, Chapter 39-20 controls the circumstances whereby the State may revoke a motorist’s driving privileges for refusing a chemical test. *See* N.D.C.C. § 39-20-04 (outlining civil consequences for refusing lawful chemical test request). Accordingly, while Ms. Nygaard agrees with the Court that Section 39-08-01(1)(f) is unambiguous, the Court’s statement in *Long*

[¶15] Statute does not define the word “consequences.” *Cf.* N.D.C.C. § 39-01-01 (providing the definitions applicable to Title 39). Accordingly, as used in Section 39-08-01(1)(f), this Court affords the word “consequences” its commonly understood meaning. *See, e.g., State v. Strom*, 2019 ND 9, ¶ 6, 921 N.W.2d 660 (“Absent an applicable definition, words enacted in statutes carry the plain, ordinary, and commonly understood meaning as of the time of enactment.” (citation omitted)). A “consequence” is commonly understood as meaning “a result that follows as an effect of something that came before.” *Black’s Law Dictionary* 369 (10th ed. 2014), *accord Long*, 2020 ND 216, ¶ 10. Criminal prosecution is a consequence of refusing a valid chemical test request—criminal prosecution in accordance with Section 39-08-01(1)(e) is a result that follows as an effect the refusal of a valid chemical test request.

[¶16] In this case, the City impermissibly subjected Ms. Nygaard to criminal charges for refusing when Officer Renfro never advising her of the consequences of refusing a chemical test request. Officer Renfro only advised Ms. Nygaard:

For the chemical test the law enforcement officer shall inform the individual North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs. A refusal of the individual to submit to a test directed by [sic] law enforcement officer may result in revocation of the individuals [sic] driving privileges for a minimum of 180 days or up to 3 years.

misstates the limitation imposed by the plain language of Section 39-08-01(1)(f).

Tr., at 25:11-19. Officer Renfro never advised Ms. Nygaard refusing the chemical test request might result in criminal prosecution for Driving Under the Influence – Refusal. *Id.* at 32:19-23.

[¶17] North Dakota law criminalizes a motorist’s refusal to lawful chemical test request. N.D.C.C. §§ 39-08-01(1)(e) & (3). But, by the plain language of Section 39-08-01(1)(f), this criminal prohibition does not apply “unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota.” N.D.C.C. § 39-08-01(1)(f). Because Officer Renfro failed to advise Ms. Nygaard of the criminal consequences of refusing a chemical test, the district court erred in allowing the City to prosecute Ms. Nygaard for Driving Under the Influence – Refusal. This Court should reverse.

B. Legislative history confirms Section 39-08-01(1)(f) prevents the prosecution of an individual for refusing a chemical test request unless the individual is advised of the potential for criminal prosecution

[¶18] Despite declaring Section “39-08-01(1)(f) is not ambiguous[,]” *Long*, 2020 ND 216, ¶ 1, this Court’s prior holdings have read Section 39-08-01(1)(f) in two different ways. In *Long*, this Court held “[t]he plain language of [Section] 39-08-01(1)(f) requires a driver to be advised of the consequences for refusing to submit to a chemical test before” before an individual can be subject to criminal charges under Section “39-08-01(1)(e).” 2020 ND 216, ¶ 10.³ But in *City of Jamestown v.*

³ Again, Ms. Nygaard avers this is the correct reading of this Court’s holding in

Casarez, 2021 ND 71, this Court held Section 39-08-01(1)(f) does “not serve as a prohibition of any particular thing. Instead, the modification explains that claims of coercive consent advisories must be measured by constitutional standards rather than under the former statutory exclusionary rule.” *Id.* at ¶ 14. While Ms. Nygaard agrees the holding in *Long* is the proper reading of Section 39-08-01(1)(f), *see* Sec. 1(A), *supra*, to the extent *Long* and *Casarez* both present different, but rational, readings, then Section 39-08-01(1)(f) is ambiguous. *See Schulke*, 2020 ND 53, ¶ 8. This ambiguity requires this Court to consult legislative history to ascertain the Legislature’s true intent. *See State v. Hafner*, 1998 ND 220, 587 N.W.2d 117 (“When a statute is not clear on its face, ‘we look to extrinsic aids, such as legislative history, to determine the legislature’s intent.’” (citation omitted)); *cf. also State v. G.C.H.*, 2019 ND 256, ¶¶ 15-17, 934 N.W.2d 857 (finding statute unambiguous, yet nevertheless looking to legislative history to confirm interpretation). Legislative history confirms Ms. Nygaard’s reading of Section 39-08-01(1)(f).

[¶19] Understanding the meaning of Section 39-08-01(1)(f) requires a review of the evolution of North Dakota DUI law since the 2013. *See Casarez*, 2021 ND 71, ¶¶ 12-14 (looking to the “full statutory history” to determine the effect of the enactment of Subdivision f). Before the 2013 Legislative Session, implied consent law did “not apply when a person voluntarily consents to chemical testing.” *McCoy v. North Dakota Dep’t of Transp.*, 2014 ND 119, ¶ 13, 848 N.W.2d 659. Instead, if

Long. *See* ¶ 14, n.2, *supra*.

a motorist submitted to a test request, courts would evaluate the voluntariness of the submission, only excluding test results if law enforcement coerced a motorist. *See Fossum v. North Dakota Dep't of Transp.*, 2014 ND 47, ¶ 13, 843 N.W.2d 282. If law enforcement failed to read a motorist a complete implied consent advisory before the motorist submitted, courts would determine if the failure prevented the motorist from voluntarily giving “actual consent” under the Fourth Amendment. *See State v. Salter*, 2008 ND 230, ¶¶ 6, 7, 10, 758 N.W.2d 702. Additionally, if a motorist refused to submit to a chemical test, then ““none may be given,” but the person’s license may be administratively revoked for up to four years.” *McCoy*, 2014 ND 119, ¶ 11 (citation omitted).

[¶20] A sea change occurred during the 2013 Legislative Session, however, with the Legislature creating criminal penalties for a motorist’s refusal of a valid chemical test request. *See* 2013 N.D. Sess. Law, ch. 301, § 7. The new law criminalized the refusal of any valid chemical test request, regardless of a request for breath, blood, or urine. *Id.* In light of the novel consequence of criminal prosecution, the Legislature also modified the implied consent advisory to require a warning regarding the criminality of refusing a chemical test request. *Id.* at § 11.

[¶21] Following the criminalization of chemical test refusals, this Court still focused on voluntariness of chemical test submissions. Specifically, this Court held it was not *per se* coercive to advise motorists of the criminality of refusing a chemical test request. *See, e.g., State v. Nagel*, 2014 ND 224, ¶ 12, 857 N.W.2d 374. However, this Court never opined as to the consequences of law enforcement’s

violation of the law—the permissibility of initiating criminal charges when law enforcement failed to advise a motorist of the potential criminal consequences as required by statute. *See, e.g., State v. Morales*, 2015 ND 230, 869 N.W.2d 417; *State v. Kordonowy*, 2015 ND 197, 867 N.W.2d 690; *State v. Packineau*, 2015 ND 180, 865 N.W.2d 414; *State v. Bauer*, 2015 ND 132, 863 N.W.2d 534; *State v. Baxter*, 2015 ND 107, 863 N.W.2d 208; *State v. Birchfield*, 2015 ND 6, 858 N.W.2d 302; *Nagel*, 2014 ND 224; *State v. Fetch*, 2014 ND 195, 855 N.W.2d 389; *State v. Boehm*, 2014 ND 154, 849 N.W.2d 239.

[¶22] Before this Court addressed this open issue, during the 2015 Legislative Session, the Legislature passed Senate Bill 2052, creating a “statutory exclusionary rule.” *See generally* 2015 N.D. Sess. Law, ch. 268. In accordance with the statutory exclusionary rule, chemical test results would “not be admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or [Chapter 39-20] if the law enforcement officer fail[ed] to inform the individual as required under subdivision a [of Section 39-20-01(3)].” *Id.* at § 9. The Legislature enacted this rule because, “in light of the severity of the consequences for refusing to submit to testing, it is important to ensure implied consent warnings are being read to offenders.” Background on Senate Bill 2052, 64th N.D. Legis. Sess. (Jan. 20, 2015) (except from 2013-2014 Interim Judiciary Committee DUI Offense Study), at 4. The Legislature found it necessary to ensure complete advisories because “the warning becomes even more important now that refusal is a criminal offense.” *Id.* This Court thereafter applied the plain text of the law, holding law enforcement’s

failure to provide the statutorily mandated implied consent advisory prevented criminal prosecutions for refusing a chemical test. *See, e.g., State v. O'Connor*, 2016 ND 72, ¶ 14, 877 N.W.2d 312.

[¶23] Following the Legislature's enactment of the statutory exclusionary rule, in 2016, the United States Supreme Court held states can criminalize a motorist's refusal to submit to warrantless breath tests, but cannot criminalize a motorist's refusal to submit to a warrantless blood test. *See Birchfield v. North Dakota*, 136 S.Ct. 2160, 2185-86 (2016); *see also State v. Helm*, 2017 ND 207, ¶ 16, 901 N.W.2d 57 (likening requests for urine submissions to requests for blood samples, explaining warrantless urine tests are not reasonable searches incident to valid arrests of suspected impaired drivers, and concluding the district court did not err in dismissing charges against defendant who refused to submit to warrantless urine test).

[¶24] In Response to the United States Supreme Court's *Birchfield* decision, *see generally* 2017 Senate Standing Committee Minutes, 65th Legis. Sess. (Feb. 1, 2017) (committee work on SB 2176), during the 2017 Legislative Session, the Legislature amended the language of the implied consent advisory to comply with the newly elucidated constitutional limitations on charging criminal refusals. *See generally* N.D. Sess. Law, ch. 268. The Legislature, however, left in place the statutory exclusionary rule. *Id.*

[¶25] Despite the Legislature's decision to leave in place the statutory exclusionary rule, members of this Court subsequently questioned its continued wisdom and

efficacy. *See, e.g., Schoon v. North Dakota Dep't of Transp.*, 2018 ND 210, ¶ 35, 917 N.W.2d 199 (Crothers, J., specially concurring). Then, during the 2019 Legislative Session, the Legislature further modified North Dakota's implied consent scheme, rendering the statutory exclusionary rule facially inapplicable to criminal cases. *See* 2019 N.D. Sess. Law, ch. 322, § 3. But the Legislature also added subdivision f to Section 39-08-01(1), dictating the criminal prohibition against refusing chemical tests requests "does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota." 2019 N.D. Sess. Law, ch. 322, § 1.

[¶26] As to the meaning of this prohibition, on behalf of the North Dakota Association of Counties and the North Dakota State's Attorney's Association, Aaron Birst testified in support of the bill, explaining the interplay of removing criminal cases from the statutory exclusionary rule, while adding Subdivision f:

Subsection f was inserted as an amendment that says you cannot be charged with criminal refusal unless you have been advised that it's a crime to refuse. This is providing the protection. . . . [W]e agree that you should never be charged with criminal refusal unless you've been told that's a crime[.]

See Appellant's App'x at 19. Senator Dwyer, Senate sponsor of the legislation, carried this understanding forward, explaining to the Senate Judiciary Committee before it unanimously voted to recommend passage:

Once you are taken to jail, the officer has to advise you of two separate things. One is that they can refuse an evidentiary test, but it's a crime

to refuse- a class b misdemeanor. If an officer fails to provide that advisory, then this bill cleans that up a bit.

Id. at 24. In other words, in enacting Subdivision f of Section 39-08-01, the Legislature understood it was requiring law enforcement to affirmatively advise motorists that refusing a chemical test request constituted a crime before allowing criminal prosecution for refusing a test request.

[¶27] Nevertheless, in *Casarez*, this Court held “subdivision f [does] not serve as a prohibition or authorization of any particular thing. Instead, the modification explains that claims of coercive implied consent advisories must be measured by constitutional standards rather than under the former statutory exclusionary rule.” 2021 ND 71, ¶ 14. This reading of “Consistent with the Constitution of the United States and the Constitution of North Dakota[,]” however, ignores the Legislature’s clear intent in enacting Section 39-08-01(1)(f): that motorists “cannot be charged with criminal refusal unless [they] have been advised that it’s a crime to refuse.” Appellant’s App’x at 19. Because “[t]he primary purpose of statutory interpretation is to determine legislative intent[,]” *State v. Bearrunner*, 2019 ND 29, ¶ 5, 921 N.W.2d 894 (citation omitted), this Court should reject the holding of *Casarez*, which improperly ignores legislative intent.

[¶28] The other benefit of the reading of Section 39-08-01(1)(f) advanced by Ms. Nygaard is if affords meaning to all provisions of Section 39-08-01(1)(f). *Cf. Shiek v. N.D. Workers Compensation Bureau*, 2001 ND 166, ¶ 17, 634 N.W.2d 493 (If possible, courts construe statutes “to give meaning to all provisions of a statutory

scheme.” (citation omitted)). Specifically, when law enforcement advises a motorist of the criminal consequences in order to allow criminal prosecution for refusal, the advisory cannot be coercive under the Fourth Amendment. *See Nagel*, 2014 ND 224, ¶ 12. Additionally, law enforcement cannot mislead motorist regarding the potentiality of criminal consequences. *See Birchfield*, 136 S.Ct. 2160; *Helm*, 2017 ND 207, ¶ 16. In other words, Ms. Nygaard’s reading synthesis Section 39-08-01(1)(f) with this Court’s prior jurisprudence—finding the Legislature enacted a statutory bar to prosecution if a motorist is not advised of the criminal consequences for refusing, but the propriety of any particular criminal advisory is assessed in according with this Court’s prior coercion jurisprudence. *But cf. Long*, 2020 ND 216, ¶ 14 (Section 39-08-01(1)(f) merely “establishes an unambiguous acknowledgement of the presumption that the statute and the advisory therein, are in compliance with the state and federal constitutions.”).

[¶29] Contrary to this Court’s holding in *Casarez*, Subdivision f does serve to prohibit or authorize a particular thing—Subdivision f statutorily fills the hole remaining in this Court’s jurisprudence regarding whether North Dakota law tolerates criminally charging a motorist for refusing a chemical test request when not advised of the criminal consequences of the refusal. *See Morales*, 2015 ND 230; *Kordonowy*, 2015 ND 197; *Packineau*, 2015 ND 180; *Bauer*, 2015 ND 132; *Baxter*, 2015 ND 107; *Birchfield*, 2015 ND 6; *Nagel*, 2014 ND 224; *Fetch*, 2014 ND 195; *Boehm*, 2014 ND 154. Subdivision f answers this question in the negative—prohibiting criminal charges for refusing a chemical test request unless told the

refusal constitutes a crime. *See* N.D.C.C. § 39-08-01(1)(f). This Court should enforce the Legislature’s intent in enacting Subdivision f, *Bearrunner*, 2019 ND 29, ¶ 5 (“The primary purpose of statutory interpretation is to determine legislative intent.” (citation omitted)), and respect the Legislature’s authority to declare and define the limits of criminal law. *See State v. Vogel*, 467 N.W.2d 86, 90 (N.D. 1991) (“The legislature has the authority to define and punish crimes by enacting statutes.” (citations omitted)).

CONCLUSION

[¶30] In *Long*, this Court held Section 39-08-01(1)(f) merely “establishes an unambiguous acknowledgement of the presumption that the statute and the advisory therein, are in compliance with the state and federal constitutions.” 2020 ND 216, ¶ 14. But it is well-established that North Dakota law already presumes the constitutionality of enacted statutes. *See, e.g., State v. Miller*, 129 N.W.2d 356, 360 (N.D. 1964) (“It is a well-settled principle of constitutional law that a law enacted by the Legislature is presumed to be constitutional, unless it is shown that it is manifestly violative of the organic law.” (quoting *O’Laughlin v. Carlson*, 30 N.D. 213, 152 N.W. 675, 678 (1915))). If the inclusion of “Consistent with the Constitution of the United States and the Constitution of North Dakota[.]” in Section 39-08-01(1)(f) only repeated this presumption, its inclusion would effectively be an idle act, and this Court presumes the Legislature does not perform idle acts. *See Bickel v. Jackson*, 530 N.W.2d 318, 320 (N.D. 1995).

[¶31] This Court should rightly find Subdivision f does serve as a prohibition or authorization, and not cling to erroneous dicta of *Long*, and holding of *Casarez*. “*Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones.” *State v. Dubois*, 2019 ND 284, ¶ 24, 936 N.W.2d 380 (Jensen, J., concurring specially) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 384 (2010)). *Stare decisis* does not require this Court to continue to compound its error in concluding Section 39-08-01(1)(f) provides mere surplusage. *Cf. Dubois*, 2019 ND 284, ¶ 23 (Jensen, J., concurring specially) (“[T]he doctrine of *stare decisis* is diminished ‘when the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.’” (quoting *Citizens United*, 558 U.S. at 379)); *see also Abbey v. State*, 202 N.W.2d 844, 852 (N.D. 1972) (“[T]he [*stare decisis*] rule is not sacrosanct.”). Instead, this Court should accept the inescapable truth—as shown by plain language and legislative history—that before prosecuting a motorist with Driving Under the Influence – Refusal, Section 39-08-01(1)(f) requires law enforcement to inform the motorist of the criminal consequences of refusing. N.D.C.C. § 39-08-01(1)(f); *cf. also Dubois*, 2019 ND 284, ¶ 29 (Jensen, J., concurring specially) (“The statute at issue is unambiguous and contrary to our prior decisions. We should not continue to compound our error in the face of such overwhelming justification for taking action.”). Because Officer

Renfro never advised Ms. Nygaard of the potential criminal consequences of her refusal, this Court should reverse Ms. Nygaard's conviction.

Respectfully submitted this 7th day of May, 2021.

VOGEL LAW FIRM

/s/ Luke T. Heck

BY: Luke T. Heck (#08133)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: lheck@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure,
this brief complies with the page limitation and consists of 24 pages.

Dated this 7th day of May, 2021.

VOGEL LAW FIRM

/s/ Luke T. Heck

BY: Luke T. Heck (#08133)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: lheck@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLANT

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

CITY OF JAMESTOWN, APPELLEE, vs. BONNIE LYNN NYGAARD, APPELLANT.	SUPREME COURT NO. 20210049 Civil No. 47-2020-CR-00126
--	---

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on May 7, 2021, the following documents:

AMENDED Appellant’s Brief and AMENDED Appellant’s Appendix

were e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

Abbigail Geroux, Jamestown City Prosecutor
dalstedandryan@dakotalaw.net

VOGEL LAW FIRM

By: /s/ Luke T. Heck

Luke T. Heck (#08133)
lheck@vogellaw.com
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
ATTORNEYS FOR APPELLANT