

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

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City of Jamestown,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 20210049
	)	
vs.	)	
	)	
Bonnie Lynn Nygaard,	)	Stutsman County District
	)	Court No. 47-2020-CR-00126
Defendant/Appellant.	)	

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**BRIEF OF PLAINTIFF/APPELLEE**

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APPEAL FROM CRIMINAL JUDGMENT ENTERED ON  
FEBRUARY 16, 2021 FROM THE DISTRICT COURT,  
FOR THE SOUTHEAST JUDICIAL DISTRICT, STUTSMAN COUNTY,  
NORTH DAKOTA, THE HONORABLE TROY J. LEFEVRE, PRESIDING

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Issue:

I. Does 39-08-01(f) of the North Dakota Century Code require a law enforcement officer to convey to a driver the criminal consequences of refusal to a chemical breath test in order for a driver to be charged with refusal?

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### **STATEMENT OF THE ISSUES**

[¶1] Does 39-08-01(f) of the North Dakota Century Code require a law enforcement officer to convey to a driver the criminal consequences of refusal to a chemical breath test in order for a driver to be charged with refusal?

### **STATEMENT OF THE CASE**

[¶2] The Plaintiff/Appellee adopts the Defendant/Appellant's statement of the case. To clarify, Ms. Nygaard was charged with driving under the influence and refusal to submit to a chemical test under City of Jamestown Municipal Code 21-04-06.

### **STATEMENT OF THE FACTS**

[¶3] Appellee adopts the Appellant's statement of the facts, except as follows: Officer Renfro indicated that he advised Ms. Nygaard of the implied consent advisory, as printed on the back of the most recently issued report and notice form. Tr. on Appeal – Mot. Hr'g (“Transcript”), at 24:06-13. Officer Renfro further clarified that part of the statement he read was as follows: “A minimum of 180 days and up to 3 years” *Id.* at 25:21-24. Ms. Nygaard consented to taking a chemical breath test. See *Id.* at 26:1-3. While administering the test, Officer Renfro observed Ms. Nygaard using her tongue to block the flow of air. He observed that her cheeks would puff up and she would claim she was blowing and there was something wrong with the mouthpiece, which was not the case. *Id.* at 27:1-10. Officer Renfro testified he coached Ms. Nygaard through the breath

test to get a sufficient sample. *Id.* at 27:10-12. Officer Renfro testified Ms. Nygaard was unable to provide a sufficient breath sample for the first test. *Id.* at 28:12-17 and 29:1-11.

[¶4] After the instrument timed out, Officer Renfro informed Ms. Nygaard he would allow her to take the chemical breath test again, and indicated “but if a sufficient sample is not met, then a refusal will be marked on the citation.” *Id.* at 29:12-18. The Honorable Troy LeFevre, in his Order Denying Defendant’s Motion to Suppress Evidence and Dismiss dated February 16, 2021, found that officer Renfro recited the implied consent advisory to Ms. Nygaard. *Id.* at ¶5. The District Court in denying the Defendant’s motion indicated that a law enforcement officer is not required to advise a defendant of the criminal consequences of refusal under N.D.C.C. § 39-08-01(f). *Id.* at ¶¶ 6-8. Notably, the District Court did not make any specific finding that Ms. Nygaard refused the chemical breath test. The District Court also did not address the impact of Officer Renfro’s statements to Ms. Nygaard regarding that “if a sufficient sample is not met, then a refusal will be marked on the citation.” and if this statement would sufficiently describe the consequences of a refusal. Furthermore, the Defendant did not raise nor did the District Court address any issue that Officer Renfro’s actions were unduly coercive.

### **STANDARD OF REVIEW**

[¶5] The interpretation of a statute is a question of law, which is fully reviewable on appeal. See *State v. Long*, 2020 ND 216 ¶5.

## LAW AND ARGUMENT

### **I. 39-08-01(f) OF THE NORTH DAKOTA CENTURY CODE DOES NOT REQUIRE A LAW ENFORCEMENT OFFICER TO CONVEY TO A DRIVER THE CRIMINAL CONSEQUENCES OF REFUSAL TO A CHEMICAL BREATH TEST IN ORDER FOR A DRIVER TO BE CHARGED WITH REFUSAL**

[¶6] In August of 2019, the North Dakota Legislature modified and moved a key part of the refusal definition from N.D.C.C. § 39-08-20 to N.D.C.C. § 39-08-01(f) which states:

Subdivision e [the refusal of a chemical test] 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.

This Court previously reviewed subdivision f in *State v. Long*, 2020 N.D. 216 and *City of Jamestown v. Casarez*, 2021 ND 71. In both cases the Court found that subdivision f was not ambiguous and did not require an officer to advise a defendant of the criminal consequences of a refusal. The Court should follow its prior decisions in *Long* and *Casarez* to again find subdivision f is not ambiguous, and that Officer Renfro was not required to advise Ms. Nygaard of the criminal consequences of a refusal.

*A. This Court has determined N.D.C.C. § 39-08-01(f) is not ambiguous and therefore the court should interpret the statute under its plain meaning*

[¶7] “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.” N.D.C.C. § 1-02-05. When a statute is not ambiguous, “the only duty of the courts is to give effect to the legislative

intent expressed therein” unless it violates the Constitution. *Brenna v. Hjelle*, 161 N.W.2d 356, 359 (N.D. 1968). Furthermore, when the language of a statute is clear, the Court has no need to seek out extrinsic aids such as the legislative history. See *State v. O’Connor*, 2016 ND 72 at ¶13. In both *Long*, 2020 N.D. 216, ¶14 and *Casarez*, 2021 ND 71, ¶11 the Court found that subdivision f is not ambiguous. Therefore, there is no need for this Court to seek out extrinsic aids and give effect to the legislative intent expressed in the law.

[¶8] In *Long*, the Court found that subdivision f does not require law enforcement officers to advise a driver of the driver’s right to refuse a chemical test. *Id.* at ¶¶4, 11. As part of its analysis the Court reviewed a key portion of subdivision f, namely “consistent with the Constitution of the United States and the Constitution of North Dakota”. The Court was asked to find this portion ambiguous to allow the Court to review extrinsic aids to ascertain the legislature’s intent. *Id.* at ¶12. The Court found that this portion did not make subdivision f ambiguous stating that subdivision f read as a whole “established an unambiguous acknowledgement of the presumption that the statute, and the advisory therein, are in compliance with the state and federal constitutions.” *Id.* at ¶14.

[¶9] In *Casarez*, the Court again reviewed subdivision f to address the issue of an apparent conflict with a municipal DUI ordinance. *Id.* at ¶6. In finding that the municipal ordinance was not conflict with subdivision f, the Court again determined subdivision f

was not ambiguous citing to its decision *Long. Id.* at ¶10.<sup>1</sup> The Court in *Casarez* further upheld and expanded its analysis in *Long*'s finding that subdivision f required that any advisory recited to a driver must meet constitutional standards. *Id.* at ¶11. Thus, this Court in both *Long* and *Casarez* found Subdivision f was not ambiguous. The issue presented in this case, to interpret subdivision f, is no different than in *Long* and *Casarez*. The Court here should again find subdivision f is not ambiguous and therefore, there is no need to review extrinsic aids to determine legislative intent. See *O'Connor*, at ¶13.

*B. A plain reading of Subdivision f does not require a law enforcement officer to advise the driver of the criminal consequences of a refusal*

[¶10] Subdivision f prohibits the prosecution of a defendant's refusal when an officer advises a defendant of the consequences of a refusal in a manner that does not conform to Constitutional standards. The key language in this subdivision "consistent with the Constitution of the United States and the Constitution of North Dakota" clarifies what an individual must be advised of, if anything, to prosecute a refusal charge. This key language was analyzed in *Long* and again in *Casarez*. In both cases, the Court focused on this language and noted in *Casarez* that subdivision f "explains coercive implied consent advisories must be measured by constitutional standards rather than under the former statutory exclusionary rule." *Id.* at ¶14. Therefore, the Court must look to constitutional standards to determine if an officer must advise a driver of the consequences of a refusal

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<sup>1</sup> Ms. Nygaard waived the issue of an apparent conflict between the City of Jamestown's ordinance and revisions made to N.D.C.C. § 39-08-01 at the Suppression hearing. While the Court in *Casarez* recognized that the issues of conflict and the interpretation of Subdivision f were intertwined, the issue of conflict is not before this Court.



and what limitations the officer must abide by. The United States Supreme Court, in *Birchfield v. North Dakota*, held that the Fourth Amendment prohibits officers from conveying to a defendant the consequence of a refusal to submit to a blood test without a warrant. 136 S. Ct. 2160, 2186 (2016). However, for breath tests incident to arrests for drunk driving, *Birchfield* did not require anything specific be recited to the defendant, because a defendant does not have a right to refuse. See *Id.* at 2184-85. North Dakota case law prohibits officers from conveying to a defendant the consequences of a refusal to submit to a urine test without a warrant. *State v. Helm*, 2017 ND 207, ¶16. Neither of these cases require a recitation of the criminal consequences of a refusal. Therefore, an officer is not required to recite the criminal consequences of a refusal to a driver. Rather, the officer's action in reciting any advisory must not be considered coercive under federal and state constitutional standards. See *Casarez* at ¶14.

[¶11] Appellant proposes an alternative interpretation of subdivision f in its brief at ¶14. Appellant argues the statutory interpretation in *Long*<sup>2</sup> and *Casarez* is either incorrect or in the alternative that subdivision f is ambiguous and the Court should use extrinsic aids. However, Appellant's arguments fail because they either do not give meaning to "consistent with the Constitution of the United States and the Constitution of North Dakota" or asks this Court to add language into subdivision f which is not present.

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<sup>2</sup> City disputes Appellant's interpretation of *Long* as it does not take into account the Court's analysis in ¶14.

[¶12] Appellant presented an interpretation of subdivision f concluding it requires an officer to advise a defendant of the consequences of a refusal. However, this interpretation does not place the advisory requirement into the entire context of subdivision f. In particular it does not account for the key language addressed by the Court in *Long* and *Casarez*, namely, that any advisory of the consequences of a refusal must conform to the Constitutional requirements. See also, *State v. Welch*, 2019 ND 179, ¶ 7, 930 N.W.2d 615 (“We also consider the actual language, its connection with other clauses, and the words or expressions which obviously are by design omitted. In construing statutes and rules, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of another.”) [internal quotations omitted]. If the Court entertained this interpretation, it would still need to grapple with the key language discussed in *Long* and *Casarez*.

[¶13] The Appellant also asks this Court to utilize extrinsic aids and interpret subdivision f to require an officer’s advisory to a driver to satisfy two prongs: first, that an advisory of the criminal consequences of a refusal be recited to a driver; and second, that the advisory must conform to constitutional standards. Appellant’s Brief at ¶28. In looking solely at the text of the statute, for the legislature to create two separate requirements, the legislature would have needed to create two clauses: “the individual has been advised of the consequences of refusing a chemical test;” *and the advisory is* “consistent with the Constitution of the United States and the Constitution of North Dakota.” The Legislature would have needed to include this additional language to

create two separate requirements. Instead, subdivision f as written makes “consistent with the Constitution of the United States and the Constitution of North Dakota” one clause. Both sections must be read together as the Court did in *Long* and *Casarez*. See also *Welch*, at ¶ 7. There is only one logical interpretation of subdivision f and this Court has a duty to give effect to that interpretation as stated in *Hjelle*, at 359.

[¶14] Here, Officer Renfro recited the North Dakota implied consent advisory found on the back side of the then most recent Report and Notice form, which follows the advisory set forth in N.D.C.C. § 39-20-01(3)(a). This advisory did not include the criminal consequences of a refusal, but Officer Renfro did advise Ms. Nygaard if she continued to fail to give a breath sample, he would mark it as a refusal. Based on the Court’s decision in *Long* and *Casarez*, Officer Renfro was not required to convey to Ms. Nygaard the criminal consequences of refusal nor is it necessary for this Court to determine whether Officer Renfro’s statements to Ms. Nygaard apprised her of the criminal consequences. The District Court did not find nor did the Appellant argue this recitation or any other actions of Officer Renfro were unduly coercive or otherwise did not conform to state or federal constitutional requirements. Therefore, the City of Jamestown may prosecute Ms. Nygaard for refusing to submit to a chemical breath test under subdivision f.

## CONCLUSION

[¶15] The District Court appropriately denied the Defendant/Appellant's motion to suppress because Officer Renfro was not required to advise Ms. Nygaard of the consequences of refusing a chemical breath test.

Respectfully submitted this 8<sup>th</sup> day of June, 2021.

*/s/ Abigail C. Geroux*

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**CERTIFICATE OF PAGE COMPLIANCE**

¶16 I, Abbagail C. Geroux, do hereby certify that the Brief of Petitioner/Appellee is in compliance with Rule 32(a)(8)(A) in that it does not exceed the page limit for a brief.

The Brief is 13 pages long which is under the page limit.

*/s/ Abbagail C. Geroux*

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Bonnie Lynn Nygaard,	)	Stutsman County District
	)	Court No. 47-2020-CR-00126
Respondent/Appellant.	)	

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**AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

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STATE OF NORTH DAKOTA    )  
  )  
COUNTY OF STUTSMAN    )

[¶1] On June 8, 2021, I, Nichole Domke, served the counsel for the Appellant with the document listed below by Electronic Mail at the counsel’s last reasonably ascertainable e-mail address. I am of legal age and not a party to this action:

- a. Brief of Petitioner/Appellee
- b. Certificate of Compliance

[¶2] That a copy of the above document was served via electronic mail on the following:

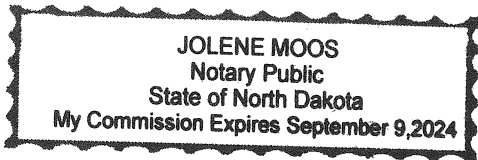
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\_\_\_\_\_  
NICHOLE DOMKE

State of North Dakota )  
  :  
County of Stutsman    )

[¶] On June 8, 2021, before me personally appeared Nichole Domke, known to me to be the same person described in and who executed this instrument and acknowledged to me that she executed the same.



  
\_\_\_\_\_  
Notary Public  
Stutsman County, North Dakota