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STATE OF NORTH DAKOTA

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

[¶1] The City prosecuted Ms. Nygaard[1] for refusing a chemical breath test because, in the City's own words, "Officer Renfro was not required to advice [sic] Ms. Nygaard of the consequences of refusing a chemical test." Appellee's Br., ¶ 15. The City advances this argument despite Section 39-08-01(1)(f) specifically proscribing prosecutions for refusing a chemical test request "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) (emphasis added). The City cannot square its argument with the plain text of Section 39-08-01(1)(f)—Section 39-08-01(1)(f) plainly requires that law enforcement advise a motorist of the criminal consequences of refusing a chemical test before prosecuting the refusal. This Court should reverse.

LAW AND ARGUMENT

[¶2] Ms. Nygaard and the City agree this case presents a question of statutory interpretation, an issue this Court reviews *de novo*. *Compare* Amended Appellant's Br., ¶ 10, *with* Appellee's Br., ¶ 5. The statute at issue, Section 39-08-01(1)(f), reads: "[The criminal prohibition against refusing a lawful chemical test request] 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).

[1] Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in Amended Appellant's Brief.

Section 39-08-01(1)(f) is unambiguous—only Ms. Nygaard presents a rational reading. *Cf. Schulke v. Panos*, 2020 ND 53, ¶ 8, 940 N.W.2d 303 ("A statute is ambiguous when it is susceptible to different, but rational meanings." (citation omitted). But even if the City's reading offered was also rational, legislative history confirms Ms. Nygaard's reading. *Cf. Denault v. State*, 2017 ND 167, ¶ 10, 898 N.W.2d 452 (if a statute is ambiguous, courts refer to extrinsic aids, such as legislative history, to enforce legislative intent). Because the district court adopted the City's irrational reading of Section 39-08-01(1)(f), this Court should reverse.

I. Ms. Nygaard's reading of Section 39-08-01(1)(f) rationally gives the ordinary meaning to all parts of the statute.

[¶3] Ms. Nygaard presents the rational reading of Section 39-08-01(1)(f). Ms. Nygaard reads Section 39-08-01(1)(f) to mean a motorist cannot be prosecuted for refusing a chemical test request unless, consistent with constitutional principles, law enforcement advises the motorist of the consequences of refusing. *See* Amended Appellant's Br., ¶¶ 13-17. As used in Section 39-08-01(1)(f), a "consequence" means "a result that follows as an effect of something that came before." *State v. Long*, 2020 ND 216, ¶ 10, 950 N.W.2d 178 (citing *Black's Law Dictionary* 369 (10th ed. 2014)). Criminal prosecution is plainly a "consequence" of refusing a chemical test request—prosecution follows as an effect of refusing the test request. Accordingly, Ms. Nygaard reads Section 39-08-01(1)(f) to mean a motorist cannot be prosecuted for refusing a chemical test request unless, consistent with constitutional principles, law enforcement advises the motorist that refusing is a

crime. *See also Long*, 2020 ND 216, ¶ 10 (Section 39-08-01(1)(f) "requires a driver be advised of the consequences for refusing to submit to a chemical test" before an action may be taken "under Section 39-08-01(1)(e).").

[¶4] The City argues Ms. Nygaard's reading of Section 39-08-01(1)(f) is irrational because it does "not give meaning to 'consistent with the Constitution of the United States and the Constitution of North Dakota[.]'" Appellee's Br., ¶ 11. But Ms. Nygaard's reading does give meaning to the phrase. Specifically, when law enforcement advises a motorist that refusing a chemical test is a crime, the advisory must comply with constitutional principles. In application, law enforcement can advise a motorist it is a crime to refuse a warrantless chemical breath test request. *See Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). Conversely, law enforcement cannot advise a motorist refusing a warrantless chemical blood or urine test request is a crime. *See id.*; *State v. Helm*, 2017 ND 207, 901 N.W.2d 57. To advise a motorist that refusing a chemical blood or urine test request is a crime, law enforcement must first obtain a warrant. *Birchfield*, 136 S.Ct. 2160; *Helm*, 2017 ND 207. Ms. Nygaard's reading gives effect to all clauses of Section 39-08-01(1)(f).

[¶5] Nevertheless, the City argues this effect would improperly "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.'" Appellee's Br., ¶ 13 (emphasis in original). But the ordinary meaning of the term "consistent with" requires this result. The

word "consistent" means "marked by agreement: COMPATIBLE—usually used with *with*[.]" *Merriam-Webster Online Dictionary* (defining "consistent") (emphasis in original), *available at* https://www.merriam-webster.com/dictionary/consistent (last visited June 14, 2021); *see also Roanoke Mem'l Hosps. v. Kenley*, 352 S.E.2d 525, 529 (Va. Ct. App. 1987) (holding, as used in the Virginia Code, "'consistent with'" means "'compatible with' . . . or 'in general agreement with'"). Accordingly, the phrase "advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota" plainly means, when advising a motorist of the consequences of refusing, the officer's advisory must be compatible with the Unites States and North Dakota Constitutions. Ms. Nygaard offers a rational—the only rational—reading of Section 39-08-01(1)(f).

II. The City's reading of Section 39-08-01(1)(f) irrationally ignores the ordinary meaning of "consequences," and imports coercion jurisprudence to chemical test refusal cases.

[¶6] Conversely, the City's reading of Section 39-08-01(1)(f) is irrational. The City reads Section 39-08-01(1)(f) to mean "an officer is not required to recite the criminal consequences of a refusal to a driver." Appellee's Br., ¶ 10. Instead, the City reads Section 39-08-01(1)(f) to only prohibit "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." Appellee's Br., ¶ 10. The City's reading of Section 39-08-01(1)(f) is irrational for two reasons.

[¶7] First, the City's reading ignores the ordinary meaning of the word "consequences." *Cf. 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)). The City's reading fails to explain how criminal prosecution for refusing a chemical test request is not "a result that follows as an effect of" refusing a chemical test request. *Cf. Long*, 2020 ND 216, ¶ 10 (a "consequence" is "a result that follows as an effect of something that came before." (citing *Black's Law Dictionary* 369)). Accordingly, the City's reading of Section 39-08-01(1)(f) improperly fails to afford the word "consequences" its plain meaning.

[¶8] Second, the City's reading misapplies coercion law. When a motorist submits to a chemical test request, the motorist can challenge the results by arguing law enforcement coerced the motorist into submitting to the test. Courts then review "the totality of the circumstances which surround the giving of consent to see whether it is the product of an essentially free and unconstrained choice or the product of coercion." *State v. Anderson*, 336 N.W.2d 634, 639 (N.D. 1983) (citation omitted). But coercion law does not apply when a motorist refuses to submit to a chemical test request because—as a result of the refusal—there is no submission that can be the product of coercion. Coercion is a *non sequitur* in refusal cases.

[¶9] Despite these fundamental flaws, the City argues *Long* and *City of Jamestown v. Casarez*, 2021 ND 71, 958 N.W.2d 467, compel its reading of Section 39-08-01(1)(f). *See* Appellee's Br., ¶ 9. Neither *Long* nor *Casarez* demands the

City's reading. In *Long*, a motorist argued she could not be prosecuted for refusing a chemical test request when law enforcement did not advise her of the right to refuse. 2020 ND 216, ¶ 2. This Court found Section 39-08-01(1)(f) "requires a driver be advised of the consequences for refusing to submit to a chemical test" before an action may be taken "under Section 39-08-01(1)(e)." 2020 ND 216, ¶ 10. But, applying the plain meaning of the word "consequences," *id.*, this Court found "[a] right to refuse is not a consequence of refusal." *Id.* at ¶ 11 (emphasis added). Accordingly, Section 39-08-01(1)(f) "does not extend to informing drivers of a right to refuse." 2020 ND 216, ¶ 11. This holding does not support the State's reading—that criminal prosecution is not a "consequence" of refusing a chemical test request.

[¶10] In *Casarez*, a motorist argued municipal ordinance conflicted with state statute. *See* 2021 ND 71, ¶ 6. This Court held the municipal ordinance did not conflict with state statute because, "[e]ven before the Legislature's addition of subdivision f in 2019, this Court recognized a prohibition on prosecutions involving unconstitutionally coercive advisories." *Id.* at ¶ 11. But the prohibition against prosecutions when a law enforcement provides a coercive advisory applies when a motorist submits to a chemical test request, not when a motorist refuses. *See Anderson*, 336 N.W.2d at 639. Because Ms. Nygaard did not submit in this case, *Casarez* also does not support the State's reading—that by enacting Section 39-08-01(1)(f), the Legislature imported coercion law to refusal cases.

[¶11] The City's reading of Section 39-08-01(1)(f) is irrational. Its reading ignores the plain meaning of the word "consequences." Its reading, without basis, imports

coercion jurisprudence to refusal cases. Because the City's reading is irrational, this Court should reverse.

III. Even if the City's reading was rational, legislative history confirms Section 39-08-01(1)(f) prohibits refusal prosecutions unless law enforcement advises the motorist refusing is a crime.

[¶12] Even if this Court concludes the City's reading is rational, because Ms. Nygaard's reading is also rational, Section 39-08-01(1)(f) would be ambiguous. *Schulke*, 2020 ND 53, ¶ 8 ("A statute is ambiguous when it is susceptible to different, but rational meanings." (citation omitted)). Legislative history resolves any ambiguity, confirming Ms. Nygaard's reading.

[¶13] The City does not actually argue legislative history, and instead simply beseeches the Court to pay no attention to legislative history. *See* Appellee's Br., ¶ 7. But the City cannot hide from the legislative history because—minimally—Ms. Nygaard advances a rational reading of Section 39-08-01(1)(f). *Long* confirms as much. *See* 2020 ND 216, ¶ 10 (Section 39-08-01(1)(f) "requires a driver be advised of the consequences for refusing to submit to a chemical test" before an action may be taken "under Section 39-08-01(1)(e).").

[¶14] With history at issue, the legislative history confirms, in enacting Section 39-08-01(1)(f), the Legislature intended to insert "an amendment that says you cannot be charged with criminal refusal unless you have been advised that it's a crime to refuse." Appellant's App'x, at 19. Indeed, in enacting Section 39-08-01(1)(f), the Legislature intended "that you should never be charged with criminal refusal unless you've been told that it's a crime[.]" *Id.* Accordingly, even if this Court finds the

City advances a rational reading, because Ms. Nygaard's reading is also rational, the legislative history confirms Ms. Nygaard's reading.

CONCLUSION

[¶15] The City concedes Officer Renfro never advised Ms. Nygaard of the criminal consequences of refusing a chemical breath test. *See* Appellee's Br., ¶ 14 (Officer Renfro's "advisory did not include the criminal consequences of a refusal[.]"). As outlined above, and previously, Section 39-08-01(1)(f) only permits prosecuting a motorist for refusing a chemical test request if law enforcement advises the motorist of the "consequences" of refusing. N.D.C.C. § 39-08-01(1)(f); Appellant's App'x, at 19. Because the City prosecuted Ms. Nygaard for refusing a chemical test request when Officer Renfro never advised her of the criminal consequences for refusing, this Court should reverse.

Respectfully submitted this 14th day of June, 2021.

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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 12 pages.

Dated this 14th day of June, 2021.

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