

IMPLIED CONSENT - SOBRIETY TEST

All 50 states have adopted implied consent laws requiring motorists, as a condition of driving in the state, to have given their implied consent to a blood alcohol content (BAC) test if they are suspected of driving under the influence. The United States Supreme Court will soon consider whether state statutes criminalizing a person's refusal to take a chemical BAC test when police have not obtained a warrant are unconstitutional. Thirteen states criminalize the refusal to take a warrantless BAC test. If the person is later found guilty of driving under the influence, during the sentencing phase some states add on additional consequences during sentencing specifically for the refusal to test.

In 2013 the United States Supreme Court reviewed the issue in *Missouri v. McNeely*, holding that police generally have to obtain a warrant to conduct a BAC test, making it unconstitutional to criminalize the refusal to take a BAC test if a warrant was required to conduct the test but not obtained. The United States Supreme Court has agreed to review three decisions, all of which upheld state statutes--two originating in North Dakota and one in Minnesota.

In *Bernard v. Minnesota*, William R. Bernard, Jr., argued that Minnesota's test refusal statute criminalized his Fourth Amendment right to refuse an unconstitutional, warrantless search. The Minnesota Supreme Court held that the warrantless search of Bernard's breath would have been constitutional as a search incident to a lawful arrest. Bernard argues in his petition to the Supreme Court that "as a practical matter, [the Minnesota Supreme Court decision] reads this court's *McNeely* decision off the books." Minnesota law makes it a crime to refuse an officer's request to take a BAC test, if that individual has been validly arrested for drunk driving.

In *Birchfield v. North Dakota*, the North Dakota Supreme Court concluded that because Danny Birchfield was not tested there was no search, so there was no Fourth Amendment violation. The court distinguished North Dakota's test refusal statute from *Camara v. Municipal Court of San Francisco* (1967) in which the court found a Fourth Amendment violation although no search was conducted. In *Camara*, a city ordinance authorized city officials to conduct warrantless inspections of private property and criminally charge those who refused to comply. North Dakota's test refusal statute, unlike the ordinance in *Camara*, "does not authorize a warrantless search."

In *Beylund v. Levi*, Steve M. Beylund, unlike Birchfield, agreed to take the chemical test and then claimed that it imposed an unconstitutional condition. The North Dakota Supreme Court concluded test refusal statutes are reasonable because "a licensed driver has a diminished expectation of privacy with respect to the enforcement of drunk driving laws, and our implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement to submit to a chemical test."

North Dakota Century Code Section 39-20-04 provides for administrative suspension of an individual's privilege to drive in the state after refusing to submit to a chemical test of blood, breath, or urine, to determine alcohol concentration. Section 39-08-01 makes the refusal to take such a test a criminal violation for driving under the influence.

On April 20, 2016, the United States Supreme Court heard oral arguments in the above mentioned cases. The petitioner argued that implied consent laws make it a criminal offense for an individual to assert a constitutional right. The Justices focused questioning on the invasiveness of a breath test, particularly whether a breath test and blood test are equally invasive being that a blood test requires a warrant prior to testing. Justice Alito also inquired as to why the statute is not viewed as an agreement where in exchange for a driver's license, an individual agrees to a breath test under certain circumstances. The petitioner was also asked why a breath test would not qualify as a special needs exception as a method of preventing drunk driving accidents.

During the April 20, 2016, oral argument, the Justices focused their questioning of the respondents, North Dakota and Minnesota, on the practicality of obtaining a warrant in a timely manner. Justice Kagan inquired as to why North Dakota is not capable of developing a system to obtain warrants within 15 to 20 minutes of a traffic stop like other states of similar size and topography have created. Justice Kennedy noted the states are asking for an extraordinary exception to the warrant requirement if the only reason the states are not getting a warrant is related to an inability to get a warrant in a reasonable period of time. Justice Breyer suggested that if statistics were available to show that at least half of drunk drivers were not arrested because of a warrant requirement, the Court would have a different view.

Data compiled by the National Conference of State Legislators ([appendix](#)) provides detailed information as to the different criminal and civil penalties used in each state.

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