

No. _____

**In The
Supreme Court of the United States**

CYNTHIA A. DIVEGLIA,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Respondent.

**On Petition For A Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Pennsylvania's Implied Consent Law is unconstitutional because the civil penalties are excessive and coerce licensees to consent to warrantless blood draws that vitiates any implied consent.

PARTIES TO THE PROCEEDING

Cynthia A. Diveglia, Petitioner

Commonwealth of Pennsylvania,
Department of Transportation,
Bureau of Driver Licensing, Respondent

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**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:**

Petitioner Cynthia Diveglia respectfully petitions for a Writ of Certiorari to review the judgments of the Pennsylvania Commonwealth Court, Pennsylvania Supreme Court, allocatur denied.

OPINIONS BELOW

The Supreme Court of Pennsylvania, Middle District, published at 762 MAL 2017, denied allocatur, and appears at App. 39. The Commonwealth Court of Pennsylvania non-published opinion No. 1821 CD 2016, affirming the trial court's opinion appears at App. 1. The trial court's order appears at App. 33, and the published opinion 2014-S-1535, appears at App. 13.

JURISDICTION

On April 10, 2018, the Pennsylvania Supreme Court denied petitioner's Petition for allowance of appeal. This Court's jurisdiction rests on 23 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Ninth Amendment to the United States Constitution provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



RELEVANT PENNSYLVANIA STATUTES

Pennsylvania's current 2018 Implied Consent Laws found in the Vehicle Code 75 Pa. C.S. § 1547 involving civil penalties and 75 Pa. C.S. § 3804(c) enhanced criminal penalties are closely related, and intertwined to determine civil and criminal penalties.

The Pennsylvania Implied Consent Law is found in the Vehicle Code at 75 Pa. C.S. § 1547, and provides in pertinent part the following:

Pennsylvania Vehicle Code 75 Pa. C.S. § 1547 Chemical testing to determine amount of alcohol or controlled substance:

§ 1547 Chemical testing to determine amount of alcohol or controlled substance:

(a) General rule. – Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock)

(b) Civil penalties for refusal –

(1) If any person placed under arrest for a violation of Section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person as follows:

(i) Except as set forth in subparagraph (ii), for a period of 12 months.

(ii) For a period of 18 months if any of the following apply:

(A) The person's operating privileges have previously been

suspended under this subsection.

(B) The person has, prior to the refusal under this paragraph, been sentenced for

(I) an offense under section 3802;

(II) an offense under former section 3731;

(III) an offense equivalent to an offense under subclause (I) or (II); or

(IV) a combination of the offenses set forth in this clause.

* * *

(2) It shall be the duty of the police officer to inform the person that:

(i) the person's operating privilege will be suspended upon refusal to submit to chemical testing and the person will be subject to a restoration fee of up to \$2,000; and

(ii) if the person refuses to submit to chemical breath testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).

* * *

(e) Refusal admissible in evidence. – In any summary proceeding or criminal proceeding

in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.

* * *

The current 2018 Pennsylvania Law addressing the three tiers for the level of alcohol in the blood is found at 75 Pa. C.S. § 3802. Pennsylvania Law required that motorists who refuse a warrantless blood draw are penalized at the same level as motorists who have been found to have the highest level of alcohol in their blood. Section 3802 provides in pertinent part the following:

75 Pa. C.S. § 3802 Driving under influence of alcohol or controlled substance

(a) General impairment –

(1)

An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual

physical control of the movement of the vehicle.

(2)

An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(b) **High rate of alcohol.** – An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

(c) **Highest rate of alcohol.** – An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

* * *

The Current 2018 Pennsylvania Law addressing the criminal penalties for the tier of the level of alcohol in the blood and the number of offenses is found at 75 Pa. C.S. § 3804:

75 Pa. C.S. Vehicles § 3804 [Effective Until 10/20/2018] Penalties.

Pennsylvania Statutes Part III Operation of Vehicles Chapter 38 Driving After Imbibing Alcohol or Utilizing Drugs *Current through P.A. Acts 2017-82* § 3804 [effective until 10/20/2018] Penalties

(a) General impairment – Except as set forth in subsection (b) or (c), an individual who violates section 3802(a) (relating to driving under influence of alcohol or controlled substance) shall be sentenced as follows:

(1) For a first offense, to:

- (i) undergo a mandatory minimum term of six months' probation;
- (ii) pay a fine of \$300;
- (iii) attend an alcohol highway safety school approved by the department; and
- (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 (relating to drug and alcohol assessments) and 3815 (relating to mandatory sentencing).

* * *

The following statute section applies to motorists who are first offenders and have refused testing of breath under section 1547, or refused a blood test after a valid warrant is obtained. These motorists are penalized the same as motorists who have the highest blood alcohol content.

(c) Incapacity; highest blood alcohol; controlled substances. – An individual who violates section 3802(a)(1) and refused testing of breath under section 1547 (relating to chemical testing to determine amount of alcohol or controlled substance) or testing of blood pursuant to a valid search warrant or an individual who violates section 3802(c) or (d) shall be sentenced as follows:

(1) For a first offense, to:

- (i) undergo imprisonment of not less than 72 consecutive hours;
- (ii) pay a fine of not less than \$1,000 nor more than \$5,000;
- (iii) attend an alcohol highway safety school approved by the department; and
- (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.



STATEMENT OF THE CASE

Petitioner was placed under arrest for DUI on November 16, 2014. The arresting officer transported her to a local hospital where she was requested to submit to a warrantless blood draw which was subsequently deemed to be a refusal. Petitioner was charged with a first offense general impairment and refusal to submit to a warrantless blood draw. Petitioner agreed to a DUI plea on January 7, 2016, and was charged with enhanced criminal penalties under 75 Pa. C.S. 3804(c) for refusing the warrantless blood draw.

On June 23, 2016, this Court decided the case of *Birchfield v. North Dakota*, ___ U.S. ___ 136 S. Ct. 2160 (2016).

On September 9, 2016, the trial on the civil penalty aspect of this case was held. Petitioner served her criminal penalties for the warrantless blood draw refusal prior to the civil trial. This civil trial was an appeal of Petitioner's one year license suspension for refusing a warrantless blood draw request; and also on the issue of whether, based on petitioner's prior brain injuries relating to the processing of information and the exacerbation of that injury by a recent traumatic brain injury with a subdural hematoma, resulting in PTSD rendered petitioner incapable of making a conscious and knowing refusal.

Based on this Court's decision in *Birchfield*, Petitioner presented a motion at trial for a non-suit on the civil penalty for the license suspension, because of the request for a warrantless blood draw. The trial court

denied the motion. In its post-trial opinion, the court opined that the *Birchfield* case did not apply to civil penalties stating, “The Court expressly acknowledged that their decision in *Birchfield*, did not cast doubt on their prior approval of implied consent laws which impose civil penalties in instances where consent is refused.” (App. 14) Therefore, the trial court rejected petitioner’s *Birchfield* argument. The trial court found petitioner did not sustain her burden of proof with regard to her inability to render a conscious and knowing consent due to her cognitive brain injuries, and denied her appeal.

This case was appealed to the Commonwealth court, and the *Birchfield*, constitutional issues were raised in the brief and addressed by the Commonwealth court, which affirmed the trial court’s decision opining that *Birchfield* does not apply to implied consent laws that merely impose civil penalties. (App. 7) The Commonwealth Court distinguished *Birchfield*, asserting that *Birchfield* by its own language does not apply to implied consent laws that merely impose civil penalties. (App. 7) At the time, Pennsylvania law applied both the criminal and civil penalties, both of which petitioner incurred.

Petitioner filed a Petition for Re-Argument, *en banc* on September 5, 2017, and the Petition was denied by Commonwealth court on October 11, 2017. (App. 39)

A Petition for Allowance of Appeal to the Pennsylvania Supreme Court, Middle District, was filed on

November 9, 2017. Petitioner's Allowance for Appeal was denied on April 10, 2018. (App. 40).

ARGUMENT

The issue presented in this case is of exceptional importance and the timing is right to address this issue. The issue of whether unreasonable civil penalties may be imposed on a motorist who asserts the constitutional right to refuse a warrantless blood draw for chemical testing. People are suffering injustice and injury to their fundamental rights as citizens of the United States of America, as a consequence of the civil penalty of a one year drivers license suspension for refusing an unconstitutional warrantless blood draw, pursuant to Pennsylvania's Implied Consent Law. The civil penalty of a one-year driver license suspension substantially interferes with the free exercise of motorist's fundamental rights under the United States Constitution's Fourth and Fifth Amendments.

The Implied Consent Law, as currently written, is unconstitutional because it punishes motorists, like your petitioner, who refuse warrantless blood draws to detect the presence of alcohol in the person's blood. This violated petitioner's Constitutional right of due process and equal protection. The one-year license suspension for a warrantless refusal is an excessive and unreasonable punishment for a refusal to permit a warrantless blood draw. The State does not have a compelling government purpose or reasonable basis, for

punishing motorists civilly for refusing warrantless blood draws, as there are alternatives available such as breath tests, and simply obtaining a warrant. The State lacks a rational basis for the civil punishment of a one-year license suspension and that penalty is excessive and unreasonable especially in light of the NHTSA and Penn DOT statistics that reveal that motorists who are involved in other human-choice violations involving nearly equal or greater fatalities than alcohol-related fatalities have substantially lower penalties than do motorists who are involved in alcohol-related driving violations involving fatalities.

This Court in *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2061 (2016) determined that a warrantless blood draw violates the constitutional protections of the Fourth Amendment. In *Birchfield*, this Court reasoned that blood tests involved a physical intrusion beneath the skin, and also provide a blood sample of information beyond a simple BAC result. *Id.* at 2179. Pennsylvania, and several other states,¹ have interpreted *Birchfield* to apply only to criminal punishment, thus if the state does not criminally punish a refuser, but “merely” imposes civil penalties of license suspensions for one year, then it is reasoned, they have not violated any constitutional protections.

¹ For example: *State of Wisconsin v. Mansfield*, 378 Wis. 2d 742 (Wis. App. 2017), 905 N.W.2d 844, 2017 WI App 80; *Olivek v. The State*, 806 SE2d 505 (Ga. 2017), 521; *Commonwealth v. Timothea T. Neary-French*, 56 NE.3d 159, 168 (2016), 475 Mass. 167; *The People v. Alexander Jeffrey Vannesse*, B283857 (2018).

Pennsylvania's Implied Consent Laws do not specifically make a warrantless refusal a crime in and of itself, but the current law does impose criminal and civil penalties on motorists who refuse breath tests, or blood tests with a valid warrant. In Pennsylvania 75 Pa. C.S. § 1547, (the Implied Consent Law) and 75 Pa. C.S. § 3803-3804, (criminal penalties) are both closely related in the same Vehicle Code and intertwine civil and criminal penalties.

Petitioner is currently serving a license suspension for refusing a warrantless blood draw, although subsequent to her suspension, the Pennsylvania General Assembly amended 75 Pa. C.S. § 1547(b)(2)(ii), and effective January 20, 2018, limited the law to imposing “enhanced criminal penalties” of § 3804(c) on defendants convicted of refusing a chemical testing of their *breath*, upon conviction or plea to 3802(a)(1) (i.e. general impairment, no BAC available because of refusal); or testing of blood pursuant to a valid search warrant § 3802(c) or (d). However, the civil punishment of a one-year license suspension remains regardless of whether the motorist refuses a warrantless blood or a breath test, or a blood test with a valid warrant.

In the case at bar, the Commonwealth Court erred in its reasoning that *Birchfield* only applied to separate and distinct criminal sanctions for refusing to submit to chemical testing, distinguishing *Birchfield* from Petitioner's case which it claims involves merely civil license suspension that is not affected by warrantless blood draws. (App. 7) To the contrary, the *Birchfield* Court specifically addressed the obstacles under

federal law to the admission of warrantless searches conducted under the Implied Consent Laws for criminal, civil or administrative proceedings. *Id.* at 2173.

After this Court concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, the Court then addressed State's alternate argument of whether the Implied Consent Statutes provide a valid consent that would justify the elimination the warrant requirement.

In commencing the analysis of this alternate argument, the United States Supreme Court made the statement: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorist who refuse to comply [internal citations omitted] . . . Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.* at 2185.

This Court found that the coercion of the criminal penalties vitiated the implied consent. The *Birchfield* Court stated, with respect to the Implied Consent argument that:

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

...

... we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense. *Id.* at 2186.

The *Birchfield* Court did not address the constitutionality of Implied Consent Laws as to civil penalties as they were not questioned by the Petitioners in the case before them. *Id.* at 2185. Rather, the petitioners in *Birchfield* specifically questioned whether warrantless blood and breath tests comport with the Fourth Amendment and are therefore unconstitutional. *Id.* at 2172.

This Court did state in the beginning of the analysis that, "If on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a state may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant." *Id.* Then this Court stated "And by the same token if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding." *Id.* It logically follows, that if warrantless blood draw did not comport with the Fourth Amendment, then there would be obstacles under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding. In fact, this Court *did* find that warrantless blood draws were unconstitutional to the extent they require an individual suspected of

driving under the influence to provide a blood sample without a warrant. *Id.* Thus, petitioner is being penalized for asserting a constitutional right.

The Pennsylvania Commonwealth court, in their opinion below states: “We determined that “[b]y its own language, *Birchfield* does not apply to implied consent laws that *merely* impose civil penalties.” (App. 7) (See also *Marchese v. Commonwealth*, 169 A.3d 733 (Pa. Cmwlth. 2017); *Boseman v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 157 A.3d 10, at 21; *Garlick v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 176 A.3d 1030, at 1036 (Pa. Cmwlth. 2018). Yet, in *Birchfield* this Court did address penalties other than criminal penalties stating:

We granted certiorari in all three cases and consolidated them for argument, see 577 U.S. ___, 136 S.Ct. 614, 193 L.Ed.2d 494 (2015), in order to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime *or otherwise penalized* for refusing to take a warrantless test measuring the alcohol in their bloodstream. *Id.* 2172 (emphasis added)

Certainly, a one-year loss of license for asserting a constitutional right qualifies as being “otherwise penalized.”

The Pennsylvania Commonwealth Court repeatedly uses the word “merely” in opinions pertaining to

the civil penalty of driver's license suspensions. The word "merely," implies something that is not large or important, a small action or event. Losing one's driver's license for a year is not a small thing, rather it is a substantial penalty and hardship that interferes with our basic fundamental rights. The loss of a driver's license is a deprivation of the essentials of life, liberty and property. Losing one's driver's license for one year is a devastating deprivation and the suspension of one's driver's license directly and substantially infringes upon the most basic of constitutional rights. Driving is not merely a privilege, or a luxury, but an essential. The right to life, liberty, and property is predicated on the essentialness of a driver license, especially if the licensee lives in a rural area where alternative transportation is not available.

In *Bell v. Burston*, 402 U.S. 535, 91 S.Ct. 1586 (1971), this Court stated:

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether

the entitlement is denominated a "right" or a "privilege." *Sherbert v. Verner*, 374 U.S. 398 (1963) (disqualification for unemployment compensation); *Slochower v. Board of Education*, 350 U.S. 551 (1956) (discharge from public employment); *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of a tax exemption); *Goldberg v. Kelly*, *supra* (withdrawal of welfare benefits). See also *Londoner v. Denver*, 210 U.S. 373, 385-386 (1908); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941). *Bell* at 539

Thirty-five years ago, Pennsylvania's Commonwealth court recognized the essential need of a driver's license. *Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety v. Slater*, 75 Pa.Cmwlth.310 (Pa. Cmwlth. 1983) 462 A.2d 870 stated:

It is hard to accept the continued characterization of a license to drive as a privilege. No one will deny that we have reached a time in our modern way of life when the motor vehicle has clearly become a necessity to many people. The very livelihood of many, such as chauffeurs, truckers, traveling salesmen, men who work in skilled or unskilled labor, depends upon the operation of a motor vehicle. Their drivers' licenses are just as valuable as a license to engage in an occupation or profession.' (Citation omitted.) *Id.* at 319

The *Slater* court went on to acknowledge that driver's license operating privileges are "... protectable

property interests that may not be terminated without procedural due process requirements required by the fourteenth amendment." *Id.*

Rural and many urban communities do not have alternative modes of public or private transportation such as taxi service, Uber, buses, trains, or subways. People living in rural communities, do not have alternate access to get to their jobs, which in turn will lead to loss of income, inability to pay for the essentials of life such as food, clothing, housing, and medical care. Without a job they cannot pay their fines and costs, nor afford to get an ignition interlock device when and if they are an option. Single parent households are crushed by not being able to care and provide for themselves or their children. Senior citizen married couples who often are also in the position of being caregivers for each other cannot compensate for the loss of transportation to care for a spouse, or meet the demands of everyday living. Single adults, especially senior citizens or those with medical conditions, are seriously isolated from the basic necessities of life and their life, liberty and pursuit of happiness. They cannot visit family members, nor attend social activities, travel to hospitals or other health care facilities to visit, and an emergency can happen in the blink of an eye without time to wait for an ambulance. These people, like your petitioner, are essentially under house arrest for an entire year simply because they exercised their constitutional right to be free from a warrantless search.

The Implied Consent Law in Pennsylvania, does not provide any clause for hardship situations. There

exists the availability of a hardship license involving ignition interlock devices, but for motorists who refuse a blood draw, that license option can only be applied for after the motorist serves half of the suspension time. Thus, for a one-year suspension, a motorist can only apply for a license to operate a motor vehicle equipped with an interlock device after serving a six-month "penalty" period. At that time, the motorist can apply for the license. However, in sudden emergencies or other serious hardships during the six-month "penalty" period, there are no provisions for any relief.

Just as this Court recognized that a State may not condition the granting of a driver's license upon pain and coercion of a criminal penalty, when a consent is coerced by severe civil penalties, that condition also vitiates any "implied" consent in the Implied Consent Law. Conditions that attach to a voluntary waiver must be a reasonable condition to obtain or maintain a license. Consent can be only to those civil penalty conditions that are reasonably proportional to the severity of the violation of a warrantless refusal and other refusals, especially in the context of other penalties imposed for alcohol-related vehicular offenses. Otherwise, the Fifth Amendment protection that no person shall be deprived of life, liberty, or property without due process of law is violated. A disproportional penalty of a one-year license suspension in addition to the enhanced criminal penalties, fines, and community service penalties, that clearly exceed the penalties for the underlying criminal act, are a violation of due process and excessive penalties. The

deprivations of so many liberties far outweigh even the criminal penalties for the underlying DUI charges, including the criminal enhancements for the refusal. For example considering the criminal penalty for a first time DUI offender is a mandatory six months of probation; a fine of \$300.00; attend an alcohol highway safety school; and comply with any indicated drug and alcohol treatment. There is no license suspension. A refusal charge (currently imposed for refusing a breath or blood draw with a valid warrant) has the enhanced criminal penalties equal to a motorist with the highest BAC. Thus, the defendant is punished by: 1) undergoing imprisonment of not less than 72 consecutive hours; 2) pay a fine of not less than \$1,000 nor more than \$5,000; 3) attend an alcohol highway safety school; 4) and comply with any recommended alcohol treatment requirements. The penalties for the DUI and the criminal penalties for the refusal together are far less severe than the complete loss of your driver license for one-year. Thus, the civil punishment is at least as coercive as the criminal punishment, and grossly more damaging to the individual and to innocent third parties.

This Court has long recognized the “carnage” and “slaughter” caused by *drunk* drivers (*Birchfield* at 2178, cites omitted), citing in support, NHTSA statistics, as justification for the Federal Government and States’ “paramount interest” in preserving the safety on public highways. The October 2017, NHTSA reports, page 6; reveal that speed-related fatalities (numbering 10,111) closely parallel the “carnage” and

“slaughter” caused by alcohol-related fatalities (numbering 10,497), and the fatalities related to distracted driving number 3,450. In addition to the state of Pennsylvania, the 2017 National Highway Traffic Safety Administration (NHTSA); citing FARS data tables,² reveals that the published statistics for speeding-related fatalities exceed the number of alcohol-related fatalities in a number of states.

Further, according to the Pennsylvania Department of Transportation’s annual 2017 bulletin on Crash Facts and Statistics, the total number of fatalities in Pennsylvania in 2016 were 1,188 and in 2017 were 1,137. The total number of alcohol-related fatalities in the state of Pennsylvania in 2016 were 297 and the total number of alcohol-related fatalities in 2017 were 293.

By comparison, the total *speed*-related fatalities in Pennsylvania in 2016 were 316 and the total speed-related fatalities in 2017 were 304. Thus, speed-related fatalities are exceeding alcohol-related fatalities for the past two years.

² NHTSA 2017 FARS data tables reveal for example:

Illinois: total fatalities are 1,082, alcohol-related are 315 and speed-related are 418;

Virginia: total fatalities are 760, alcohol-related are 220 and speed-related are 257;

New York: total fatalities are 1,025, alcohol-related are 283 and speed-related are 314;

California: total fatalities are 3,623, alcohol-related are 1,059 and speed-related are 1,056.

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	TOTAL FATALITIES	SPEED-RELATED	ALCOHOL-RELATED
2016	1,188	316	297
2017	1,137	304	293

The “carnage” is the same. The “slaughter” is the same. But the punishment is not the same. Punishment is far less for speed-related violations than alcohol-related violations and these statistics do not justify or support the huge discrepancy in the penalties inflicted upon motorists, nor do they support a rational basis for placing excessive penalties of one-year license suspensions on motorists, for not only warrantless blood draws, but for all refusals.

To so severely punish a motorist by a license suspension of one-year for a refusal of a warrantless blood test is not justified on the basis of the state’s interest in maintaining safety on the highways by preventing the serious harm inflicted by *drunk* drivers by either the NHTSA or Penn DOT’s own statistics.

In Pennsylvania, the penalty for speeding is as follows:

75 Pa. C.S. § 3362(c)(1)

(i) \$42.50 for violating a maximum of 65 miles per hour or higher;

....

³ Pennsylvania Department of Transportation’s annual 2017 bulletin on Crash Facts and Statistics, pg. 8.

- (ii) \$35.00 for violating any other maximum speed limit

....

75 Pa. C.S. § 3362(c)(2)

Any person exceeding the speed limit by more than five miles per hour shall pay an additional fine of \$2.00 per mile for each mile per hour over the maximum speed limit.

The penalties for texting and driving are as follows:

75 Pa. C.S. § 3361(a)

Prohibition. – No driver shall operate a motor vehicle on a highway or trafficway in this Commonwealth while using an interactive wireless communications device to send, read or write a text-based communication while the vehicle is in motion. A person does not send, read or write a text-based communication when the person reads, selects or enters a telephone number or name in an interactive wireless communications device for the purpose of activating or deactivating a voice communication or a telephone call.

...

(d)

Penalty. – A person who violates subsection (a) commits a summary offense and shall, upon conviction, be sentenced to pay a fine of \$50.00.

Pennsylvania does not make excessive speeding a crime. Rather, Penn DOT maintains a record for each driver and accesses points for moving violations. The penalty for excessive speeding (i.e., driving 31mph or more over the posted speed limit) the driver must attend a hearing. Upon Penn DOT review the violating driver will receive a penalty of one or both of a 15 day license suspension and/or a special on-road driver's examination. Failure to appear at the hearing results in a 60 day license suspension.

The huge disparity in the punishment between alcohol-related fatalities, speed-related fatalities, or distracted-driving related fatalities is not justified by the government's own statistics, both the state of Pennsylvania and the National statistics published by the federal government. Speed-related fatalities nearly parallel or exceed the alcohol-related fatalities in many states. Thus the punishment of a one-year license suspension for *only* alcohol-related offenses is unreasonable, excessive and does not fit the civil sanctions of driver license suspensions, especially for first time offenders. There is no evidence to justify the disproportionate penalties for a constitutionally protected refusal versus other equally fatal human-choice decisions.

Just as this Court in *Birchfield* recognized that the State's Implied Consent Law was not valid because motorists were coerced to consent on pain of criminal penalties; the civil penalties are even more severe and coercive. Thus, the pain of excessive unreasonable civil penalties must also invalidate any "implied consent"

negating the requirement of a search warrant. These excessive and unreasonable civil punishments for a blood draw refusal are unconstitutional.

Coercion to consent to a warrantless blood draw not only attaches in the Implied Consent Law in the form of the threat of the excessive civil penalty of a one-year license suspension, but also in the implied threat or covert force of how the request for a chemical test is implemented in the field. It has long been established by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S. Ct. 2041 (1973), that a search is only reasonable when the subject consents, stating:

But 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 [(2017)]:

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. *Id.*

In Pennsylvania, it is the arresting police officer who chooses which chemical test to be administered. It is also the arresting police officer who determines what constitutes a “refusal” for purposes of a violation under § 1547(b)(1). What constitutes a refusal is not defined or otherwise described under § 1547.

The issue of what constitutes a refusal was recently addressed in *Nardone v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing*, 634 Pa. 585 (Pa. 2015) 130 A.3d 738. Although the Implied Consent Law identifies both breath, and blood chemical testing, most often it is the blood test that the arresting officer chooses in Pennsylvania.

In construing § 1547(b)(1),⁴ the Supreme Court of Pennsylvania in *Nardone*, stated: “any response from a licensee that is ‘anything less than an unqualified, unequivocal assent’ to submit to testing constitutes a refusal, subjecting the licensee to the one-year suspension.” *Id.* at 63; citing: 604 *Todd v. Com. Dept. of Transp., Bureau of Driver Licensing*, 555 Pa. 193, 723 A.3d 655, 658 (Pa. 1999) (quoting *Renwick*, 669 A.3d at 939). In *Nardone*, the arrestee requested either a breath or a urine test, because he believed a blood draw would exacerbate an injury to a bursa sac on his left

⁴ § 1547(b)(1)

- (i) **Request by driver for test.** – Any person involved in an accident or placed under arrest for a violation of section 1543(b)(1.1) 3802 or 3808(a)(2) may request a chemical test of his breath or blood. Such requests shall be honored when it is reasonably practicable to do so.

arm. For this reason he did not want blood withdrawn by use of a needle. *Id.* at 606. The officer did not draw the blood, but viewed the request for an alternate test as a refusal charging the arrestee with a refusal suspending his license for 12 months. The Supreme Court of Pennsylvania upheld the refusal.

The *Nardone* court went on to state that: "... the purpose of § 1547 is to promote safer roadways and punish motorist who refuse to comply with requested chemical testing. Accordingly, we hold that Appellant had no statutory right to request alternative testing once he was confronted with an official request to submit to a blood test." *Id.* at 603

The Pennsylvania courts have established that driver's licenses are protected property interests, *Slater*, at 318; and that the intent of the Implied Consent Law of § 1547 is to punish motorists that refuse requested chemical testing. *Nardone*, at 603. As such, your petitioner, and other motorists are being punished by a civil license suspension for asserting a right that the law allows.

The United States Supreme Court in *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485 (1982) stated: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), the *Goodwin* Court went on to quote:

In a series of cases beginning with *North Carolina v. Pearce*, 395 U.S. 711, and

culminating in *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) the United States Supreme Court has recognized this basic – and in itself uncontroversial – principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right. *Id.* at 372.

In *Goodwin*, the defendant appealed an increased charge that was imposed by the prosecutor after the defendant rejected a plea bargain and requested a trial. Goodwin alleged vindictiveness by the prosecutor. This Court distinguished governmental action that is fully justified as a legitimate response to perceived criminal conduct, from governmental action that is an impermissible response to noncriminal, protected activity. *Id.* at 373. By analogy, in the case at bar, a refusal is not a crime. The refusal of the unreasonable search of a warrantless blood draw is the permissible response to a noncriminal, protected activity and the refuser should therefore not be punished at all.

The Excessive Fines Clause of the Eighth Amendment, was recently addressed in *Commonwealth of Pennsylvania v. 1997 Chevrolet and Contents seized from James Young [Elizabeth Young]*, __ Pa. __, 60 A.3d 153 (Pa. 2017). The Supreme Court of Pennsylvania applied the test of analyzing the proportionality of the value of the property sought to be forfeited as compared to the gravity of the underlying offense to determine whether the forfeiture is grossly disproportional to the gravity of the offense. In the case at bar, the

property interest forfeited as punishment (*Nardone* at 603) is the suspension of a driver's license for one-year and is likewise grossly disproportional forfeiture compared to the gravity of a constitutional refusal.

The underlying offense is a DUI charge under 3802(a)(1). In Petitioner's case she was charged under section 3802(a)(1) and a first offender, which is an ungraded misdemeanor. Her penalty for the underlying charge was a mandatory minimum of six months' probation; a fine of \$300.00; attend an alcohol highway safety school approved by the department; and comply with all drug and alcohol treatment requirements imposed under section 3814 (relating to drug and alcohol assessments) and section 3815 (relating to mandatory sentencing). But because of the warrantless blood test refusal, her penalty was enhanced by section 3804(c) which included: undergo imprisonment of not less than 72 consecutive hours; a fine of \$1,000; attend an alcohol highway safety school approved by the department; and, comply with all drug and alcohol treatment requirements imposed under section 3814 (relating to drug and alcohol assessments) and section 3815 (relating to mandatory sentencing). In addition to the criminal penalties assessed, Petitioner was also assessed a one year license suspension for the refusal. Clearly, the penalty for the refusal is far in excess of the underlying offense.

The value of the loss of a driver's license cannot be measured only in dollars and cents, although the cost to replace that personal transportation would be exorbitant. Then there is the loss of one's livelihood, and

the associated loss of income not to mention the immeasurable personal losses of the inability to function as a caretaker to third parties, and the associated impact on innocent third parties. In compliance with the drug and alcohol assessment of § 3814, your petitioner was assessed by two different approved evaluators, and neither of the them found any risk of alcohol and no treatment was recommended. As far as the regularity of the criminal conduct, there were no prior records of even a traffic ticket for approximately twenty years before the incident that gave rise to this offense, nor have there been any since.

Even though the Pennsylvania Statutes have been modified to remove criminal penalties for motorists who refuse warrantless blood draws, these same penalties continued to be applied to motorists who refuse a breath test or a blood test with a valid warrant. As such, the penalties are excessive for chemical test refusals, especially in light of the alternatives available.

Pennsylvania's Implied Consent Statute is unconstitutional because its effect goes well beyond merely imposing civil penalties and coercively requires a waiver of a constitutional right from an unreasonable search or else face automatic and concomitant criminal and civil penalties. This is exactly what the *Birchfield* Court, *supra* was addressing: "There must be a limit to the consequences to which a motorist may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* at 2186.⁵

⁵ See also *Camera v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1987); *Frost v. Railroad Commission*

The civil and criminal penalties remain intertwined and automatically invoked by the Implied Consent Law. Here, Petitioner incurred three days in jail for properly asserting her right not to incur a warrantless blood test.⁶ Although the license suspension involves a separate hearing, it is an inseparable part of the same statute that criminalized Petitioner's constitutional right thereby making the entire statutory scheme unconstitutional. Factually, there is nothing to distinguish between the refusal from a criminal or civil aspect. It's the same police officer who reads the civil warnings form, and there is only one blood test, not one for civil and one for criminal. The statute has no severability clause and the civil and criminal consequences are so interwoven as to make that statute inseparable. *Saulsbury v. Bethlehem Steel Company*, 196 A. 2d 664, 666-667 (Pa. 1964) Contrary to the Commonwealth Court's opinion (App. 7), it does not matter that there is no separate crime for refusal. The issue this Court decided in *Birchfield*, in granting certiorari was, "... whether motorist lawfully arrested for drunk driving may be convicted of a crime **or otherwise penalized** for refusing to take a warrantless test measuring the alcohol in their bloodstream." *Id.* at 2172 (emphasis added). Here, despite changes in the law in Pennsylvania and other states, motorists continue to suffer

of State of California, 271 U.S. 583 (1926) (City or State granting privileges may not impose conditions that require relinquishment of Constitutional rights or assess criminal penalty)

⁶ This case is distinguishable from *Boseman v. Commonwealth*, 157 A.3d 10, 21 (Pa. Cmwlth. 2017) allocatur denied August 22, 2017, because *Boseman* did not incur criminal penalties.

severe civil consequences for asserting their constitutional rights to refuse a warrantless blood test.

CONCLUSION AND PRAYER

For the reasons stated in this petition, this Petition for a writ of certiorari should be granted because this Court's guidance is important because it involves a Constitutional question that has not yet been settled by this Court. This case involves citizens beyond just your petitioner, who are and will be suffering a loss of life, liberty and the pursuit of happiness, as the result of excessive and unreasonable civil penalties of driver license suspensions, when other reasonable alternatives are available. Therefore, petitioner respectfully requests this Court to issue a writ of certiorari on the issues presented in this petition.

Respectfully submitted,

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