No. 17-903

In The
Supreme Court of the United States

JARED S. HOERLE,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This is a DUI case involving the admission of a warrantless blood draw that was obtained in April 2015, over a year before this Court issued its decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The two questions presented by Petitioner's petition are:

1. Should this Court address whether *Birchfield* created a categorical rule that consent to submit to a chemical test is involuntary when a person is advised that failure to do so is a crime, even though the Nebraska Supreme Court expressly stated that it was not relying on consent in affirming Petitioner's conviction, but rather on the good-faith exception to the exclusionary rule?

2. Did the Nebraska Supreme Court err by concluding that the good-faith exception applied to Petitioner's blood draw in this case, which was obtained prior to *Birchfield* and in accordance with Nebraska's implied consent statute, which, as the court noted, was "not clearly unconstitutional at the time"?

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STATEMENT OF THE CASE

1. On April 11, 2015, at about 10:45 p.m., Officer Christopher Johnson of the Lincoln Police Department responded to a motorcycle accident in Lincoln, Nebraska. Officer Johnson identified the motorcyclist as Petitioner, Jared Hoerle, who smelled strongly of alcohol and had watery and bloodshot eyes and droopy eyelids. Petitioner acknowledged he had just been in an accident on his motorcycle. Officer Johnson then asked Petitioner if he was in need of medical attention and Petitioner declined. Officer Johnson asked Petitioner if he had been drinking and Petitioner admitted he had been at a nearby bar, where he had "a few shots and some beers." Pet. 2-4; Pet. App. 2-4; R. 119:3-134:7.

Officer Johnson conducted a DUI investigation, including a preliminary breath test, after which he determined that Petitioner was under the influence of alcohol. Officer Johnson arrested Petitioner for DUI and took him to the Lancaster County Jail, where a chemical breath testing machine was available. The jail refused to admit Petitioner, however, because he had been in an accident and Officer Johnson did not have a "fit for confinement" form for Petitioner, i.e., written confirmation from a hospital that Petitioner was medically fit to be confined in jail. Pet. 2-4; Pet. App. 2-4; R. 134:8-141:23.

After being turned away from the jail, Officer Johnson took Petitioner to the hospital to get a "fit for confinement" form. Once there, Officer Johnson also decided to have a blood draw done to determine

Petitioner's alcohol concentration. He informed Petitioner that he was requesting a blood sample for that purpose and read Petitioner a Post Arrest Chemical Test Advisement Form, which stated:

> You are under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcohol liquor or drugs. Pursuant to law, I am requiring you to submit to a chemical test or tests of your blood, breath, or urine to determine the concentration of alcohol or drugs in your blood, breath, or urine.
>
> Refusal to submit to such test or tests is a separate crime for which you may be charged.
>
> I have authority to direct whether the test or tests shall be of your breath, blood or urine, and may direct that more than one test be given.

> A. *Request for test*: I hereby direct a test of your _X_ blood ___ breath ___ urine to determine the _X_ alcohol ___ drug content.[1]

Pet. 2-4; Pet. App. 2-4; R. 134:8-141:23.

Petitioner signed the advisement form and agreed to provide a blood sample, which was obtained at 12:34 a.m. A test of the blood sample revealed that Petitioner's blood alcohol level at the time the sample was taken was .195 +/- .006.

Pet. 2-4; Pet. App. 2-4; R. 141:23-196:5.

2. Petitioner was charged with aggravated DUI, which, in Nebraska, requires proof that the defendant had an alcohol concentration of .15 or more.[2] Petitioner's blood test result was admitted at trial, by stipulation of the parties, and a jury found him guilty of aggravated DUI. Pet. 2-4; Pet. App. 2-4; R. 141:23-203:13.

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[1] Post Arrest Chemical Test Advisements are required under Nebraska's implied consent statute, which provides that "[a]ny person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged. . . . failure to provide such advisement shall negate the state's ability to bring any criminal charges against a refusing party pursuant to this section." See Neb. Rev. Stat. § 60-6,197(6).

[2] A person is guilty of DUI in Nebraska if he or she operates a motor vehicle while under the influence of alcohol or while having an alcohol concentration of .08 or more. See Neb. Rev. Stat. § 60-6,196. The offense is aggravated if the person has an alcohol concentration of .15 or more. See Neb. Rev. Stat. § 60-6,197.03.

3. The day after Petitioner's trial concluded, this Court issued its decision in *Birchfield*. Petitioner immediately filed a motion for new trial, alleging his blood draw was unconstitutional in light of *Birchfield*. The trial court held a hearing on the motion at which the State argued that the blood draw was properly admitted at trial because (i) it was consensual, and (ii) the exclusionary rule should not apply given that the blood draw was obtained prior to *Birchfield* and in accordance with Nebraska's implied consent law. The trial court denied the motion for new trial, making no factual or legal findings as to whether the blood draw was consensual. Pet. 2-4; Pet. App. 2-4; R. 207:22-272:6.

4. Petitioner appealed and the Nebraska Supreme Court affirmed his conviction, concluding that the blood draw was properly admitted at trial.

On the issue of consent, the Nebraska Supreme Court disagreed with Petitioner's assertion that *Birchfield* created a categorical rule that consent is involuntary when a suspect submits to a warrantless blood draw after being advised that failure to do so may result in criminal penalties. The Nebraska Supreme Court noted that one of the three cases at issue in *Birchfield*, the Beylund case, involved a warrantless blood draw following an invalid advisement of this nature and *Birchfield* itself remanded that case back to the state court to address whether the blood draw was consensual despite the invalid advisement. The *Birchfield* Court noted that voluntariness of consent to a search must be "determined from the totality of all the circumstances." The Nebraska Supreme Court

interpreted this to mean that *Birchfield* did not categorically invalidate warrantless blood draws based on consent when a driver receives an invalid advisement of this nature, but rather a court must consider the totality of the circumstances to determine whether a driver's consent to a blood test was freely and voluntarily given. The Nebraska Supreme Court did not ultimately address whether Petitioner's consent was voluntary, however, because it found that the good-faith exception applied and noted "we can resolve the appeal on that basis." Pet. App. 5-9.

In applying the good-faith exception, the Nebraska Supreme Court pointed to the footnote in *Birchfield* which noted that if Beylund's consent was not found to be voluntary upon remand, the state court would then need to address whether Beylund's blood test result should be suppressed given that the search was carried out pursuant to a state statute and the evidence was offered in an administrative proceeding rather than a criminal proceeding, with the footnote citing to both *Heien v. North Carolina*, 135 S.Ct. 530 (2014) and *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998). The Nebraska Supreme Court found that *Birchfield*'s juxtaposition of these two cases illustrated that this Court did not foreclose application of the good-faith exception where the Fourth Amendment violation is due to an officer's reasonable mistake of law. The Nebraska Supreme Court also pointed to this Court's decisions in *Illinois v. Krull*, 480 U.S. 340 (1987) and *Michigan v. DeFillippo*, 443 U.S. 31 (1979), which held that the exclusionary rule does not

apply when an officer objectively and reasonably relies on a statute that is not clearly unconstitutional. The Nebraska Supreme Court found that *Krull* and *DeFillippo* were controlling and held that "[b]ecause the officer here acted in objectively reasonable reliance on a statute that had not been found unconstitutional at the time, excluding the results of Hoerle's blood test would not serve the purpose of the exclusionary rule." Pet. App. 9-15.

REASONS FOR DENYING THE PETITION

A. Review is not warranted on the first Question Presented

Petitioner claims this Court should grant certiorari in this case because the Nebraska Supreme Court erred by concluding that *Birchfield* did not create a categorical rule of involuntary consent and state appellate courts are divided on the issue. (Pet. 5-6) Certiorari should be denied on this claim because (1) the Nebraska Supreme Court did not rely on consent in affirming Petitioner's conviction, nor did it address or make findings as to whether Petitioner's consent was voluntary, (2) the Nebraska Supreme Court correctly concluded that *Birchfield* did not create a categorical rule of involuntary consent, and (3) state appellate courts are not divided on the issue.

1. The Nebraska Supreme Court did not rely on consent in affirming Petitioner's conviction, nor did it address or make any findings as to whether Petitioner's consent was voluntary.

The Nebraska Supreme Court briefly addressed whether *Birchfield* created a categorical rule of involuntary consent, concluding that it created no such rule. But that was the extent of the court's analysis on the issue. The court did not rely on consent in affirming Petitioner's conviction, nor did it address or make findings as to whether Petitioner's consent was voluntary. The court found that it was unnecessary to do so given that the good-faith exception applied and noted that "we can resolve the appeal on that basis." Pet. App. 8-9.

Indeed, Petitioner himself acknowledges that "the Nebraska Supreme Court did not make a finding either way whether Petitioner's consent was voluntary, applying the good-faith exception instead." (Pet. 6) Therefore, the validity of Petitioner's consent is not an issue before this Court. See *Camreta v. Greene*, 563 U.S. 692, 717 (2011) ("The 'judicial Power' is one to render dispositive judgments, not advisory opinions.") (internal quotation marks omitted).

2. The Nebraska Supreme Court correctly found that *Birchfield* did not create a categorical rule of involuntary consent.

While the Nebraska Supreme Court's conclusion that *Birchfield* did not create a categorical rule of involuntary consent had no bearing on its decision, its conclusion on the issue was nonetheless correct. This is evidenced by *Birchfield* itself, which remanded Beylund's case back to the state court to reevaluate his consent even though he submitted to a warrantless blood draw similar to the one read to Petitioner. In remanding Beylund's case, *Birchfield* explained that "[b]ecause voluntariness of consent to a search must be 'determined from the totality of all the circumstances,' we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory."[3] If *Birchfield* created a categorical rule of involuntary consent, no remand would have been necessary and the totality of the circumstances would not need to have been assessed.

Petitioner claims that *Birchfield* did create a categorical rule of involuntary consent and contends that Beylund's case was remanded for a reevaluation of consent only because it arose out of an administrative proceeding rather than a criminal case. (Pet. 6) In other words, according to Petitioner, voluntariness of consent is evaluated differently in an administrative

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[3] *Birchfield v. North Dakota*, *supra*, 136 S. Ct. at 2186 (citing to and quoting from *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

proceeding than a criminal proceeding. That contention fails for two reasons.

First, there is no reason why voluntariness of consent would apply differently in an administrative proceeding than in a criminal case. Petitioner provides no authority that it does.

Second, even if there is some conceivable distinction between the two types of proceedings for purpose of evaluating consent, no distinction was drawn by the state court in Beylund's case. The North Dakota Supreme Court reviewed Beylund's case under North Dakota's Administrative Agencies Practice Act, which authorizes a review of whether, among other things, a defendant's constitutional rights have been violated.[4] The North Dakota Supreme Court went through an extensive Fourth Amendment analysis and held that Beylund voluntarily consented to the chemical blood test, and that North Dakota's implied consent law was not unconstitutional under either the Fourth Amendment or the doctrine of unconstitutional conditions.[5] So, even though Beylund's case arose out of an administrative proceeding, the North Dakota Supreme Court clearly conducted a standard Fourth Amendment analysis in evaluating his consent.

Moreover, in remanding Beylund's case and directing the state court to reevaluate his consent, this Court

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[4] See NDCC § 28-32-46; *Beylund v. Levi*, 859 N.W.2d 403, vacated and remanded sub nom. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

[5] See *Beylund v. Levi*, *supra*.

cited to and quoted from *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), which, of course, was a criminal case in which this Court clarified and applied the voluntariness requirement for consent under the Fourth Amendment. If Beylund's case was remanded only because it involved an administrative proceeding in which ordinary principles of criminal law and procedure would be inapplicable, as Petitioner suggests, there would have been no reason for this Court to cite *Schneckloth* and direct the state court to reevaluate the voluntariness of Beylund's consent in accordance with the framework set forth in *Schneckloth*. All told, nothing in *Birchfield* even hinted that anything turned on Beylund's case arising out of an administrative hearing.

3. State appellate courts are not divided on the issue.

Petitioner also claims that state appellate courts are divided on the issue of whether *Birchfield* created a categorical rule of involuntary consent. He cites two cases, *State v. Schmidt*, 385 P.3d 936 (Kan. App. 2016) and *State v. Blackman*, 898 N.W.2d 774 (Wis. 2017), as conflicting with the Nebraska Supreme Court's decision. (Pet. 6-7) Neither does.

In *Blackman*, which involved a pre-*Birchfield* blood draw following a post-arrest advisement similar to the one found invalid in *Birchfield*, the Wisconsin Supreme Court addressed whether Blackman's consent was voluntary in light of this Court's decision in

Birchfield. The Wisconsin Supreme Court noted that voluntariness of consent is determined by the "totality of the circumstances," citing *Birchfield* and *Schneckloth*, and upon evaluating the totality of the circumstances the court concluded that Blackman's consent was not voluntary.[6] The Wisconsin Supreme Court's decision in *Blackman* did not conclude or suggest that *Birchfield* created a categorical rule of involuntary consent. It did just the opposite. Like the Nebraska Supreme Court, it expressly and unequivocally held that such a determination is based on the totality of the circumstances.

In *Schmidt*, as in *Blackman*, the issue was also whether the defendant's pre-*Birchfield* blood draw was voluntary in light of *Birchfield*. The State's position in *Schmidt* (which it submitted prior to *Birchfield*) was that Schmidt's consent to the blood draw was voluntary under Kansas' implied consent law, so his consent was also voluntary for purposes of the Fourth Amendment.[7] The Kansas Court of Appeals rejected the State's argument, noting that *Birchfield* rejected that same argument, and went on to conclude that Schmidt's blood draw was involuntary.[8] This was the extent of *Schmidt*. The Kansas Court of Appeals' decision in *Schmidt* did not indicate whether, in its view, *Birchfield* created a categorical rule of involuntary consent as opposed to requiring a court to consider

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[6] *State v. Blackman*, 898 N.W.2d 774, 785-787 (Wis. 2017).

[7] See *State v. Schmidt*, 385 P.3d 936, 939 (Kan. App. 2016), review denied (Oct. 27, 2017).

[8] See *id*., 385 P.3d at 940.

the totality of the circumstances. That intermediate appellate court decision, therefore, is also not inconsistent with the Nebraska Supreme Court's decision on the issue.

For all of the reasons set forth above, the first question presented does not merit further review.

B. Review is not warranted on the second Question Presented

Petitioner also claims that certiorari should be granted in this case because the Nebraska Supreme Court incorrectly concluded that the good-faith exception applies to pre-*Birchfield* blood draws and state courts of last resort are divided on the issue. (Pet. 7-11) Certiorari should be denied on this claim because (1) the Nebraska Supreme Court correctly applied the good-faith exception, and (2) state courts of last resort are not divided on the issue.

1. The Nebraska Supreme Court correctly applied the good-faith exception in affirming Petitioner's conviction.

In applying the good-faith exception, the Nebraska Supreme Court relied on this Court's decisions in *Illinois v. Krull*, 480 U.S. 340 (1987) and *Michigan v. DeFillippo*, 443 U.S. 31 (1979), both of which held that the exclusionary rule does not apply to searches conducted in good-faith reliance on a statute or ordinance later found to be invalid. The Nebraska Supreme Court

quoted and relied on the following language from *Krull*:

> The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter further Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.[9]

Applying this rationale from *Krull*, the Nebraska Supreme Court concluded that the good-faith exception applied to Petitioner's blood draw because it was obtained prior to *Birchfield* and in accordance with Nebraska's implied consent statute, which, as the court noted, "was not clearly unconstitutional at the time of [Petitioner's] arrest in April 2015." The Nebraska Supreme Court concluded that "[b]ecause the officer here acted in objectively reasonable reliance on a statute that had not been found unconstitutional at the time, excluding the results of [Petitioner's] blood test would

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[9] *Illinois v. Krull*, 480 U.S. 340, 349 (1987).

not serve the purpose of the exclusionary rule." Pet. App. 9-15.

The Nebraska Supreme Court's decision is consistent with this Court's decisions in *Krull* and *DeFillippo*, as well as other recent decisions by this Court addressing the good-faith exception. As this Court explained in *Davis v. U.S.*, 564 U.S. 229, 240 (2011), "in 27 years of practice under *Leon*'s good-faith exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." The rationale, as this Court explained in *Davis*, is that when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the "deterrence rationale loses much of its force" and exclusion cannot "pay its way."[10]

The rationale from *Krull*, *DeFillippo* and *Davis* is directly on point here. There was no indication prior to *Birchfield* that Nebraska's implied consent statute was unconstitutional or otherwise invalid, even in the context of warrantless blood draws. Indeed, for at least 50 years prior to this Court's decision in *Birchfield*, the Nebraska Supreme Court rejected various constitutional challenges to Nebraska's implied consent law. See, e.g., *State v. Turner*, 263 Neb. 896 (2002) (rejecting due process challenge to implied consent law); *State v. Williams*, 189 Neb. 127 (1972) (rejecting 5th Amendment challenge to admissibility of blood test results); *State v. Oleson*, 180 Neb. 546 (1966) (rejecting 6th

[10] *Davis v. U.S.*, 564 U.S. 229, 238 (2011).

Amendment challenge to chemical tests being conducted without the opportunity to consult counsel). This Court itself has also spoken favorably about states' use of implied consent laws. See, e.g., *South Dakota v. Neville*, 459 U.S. 553 (1983); *Missouri v. McNeely*, 569 U.S. 141 (2013). So it was perfectly reasonable for law enforcement to rely on Nebraska's implied consent statute in carrying out warrantless blood draws because as in *Krull*, "this defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable."[11]

Petitioner claims that "[t]he issue in pre-*Birchfield* blood draws is not whether the officers reasonably relied on their understanding of the law, but rather, whether each defendant gave free and voluntary consent to the blood draw." (Pet. 9) This contention disregards the fact that Petitioner's consent in this case was obtained in accordance with Nebraska's implied consent statute, which was not clearly unconstitutional at the time. This is precisely why the good-faith exception applies.

As discussed above, this Court has repeatedly held that the good-faith exception applies when an officer objectively and reasonably relies on a law in effect at the time, even if that law is later deemed invalid. The Nebraska Supreme Court found this Court's precedent was controlling given that the protocol followed by the officer in this case was "required by statute" and the

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[11] See *Illinois v. Krull*, *supra*, 480 U.S. at 359.

officer had no reason to question the validity of that statute. Pet. App. 12-14. Petitioner himself acknowledges that the Nebraska Supreme Court applied the good-faith exception on this basis, as well as the fact that the officer who obtained the blood draw in this case "relied on state statute" by informing Petitioner he would face criminal prosecution if he refused to submit to the blood test. (Pet. 9) By his own acknowledgment, then, the Nebraska Supreme Court conducted a straightforward application of the good-faith exception in accordance with this Court's decisions. It did not err by doing so.

2. State courts of final resort are not divided on the issue.

Petitioner also claims that state courts of last resort are divided on the issue of whether the good-faith exception applies to pre-*Birchfield* blood draws. He cites to one case, the Wisconsin Supreme Court's decision in *State v. Blackman*, *supra*, which he claims is in conflict with the Nebraska Supreme Court's decision on this issue. (Pet. 10-11) *Blackman* is easily distinguishable on this issue, however.

In *Blackman*, the Wisconsin Supreme Court held that the good-faith exception did not apply to the defendant's pre-*Birchfield* blood draw because "[t]he error in the instant case is not an error attributable solely to the legislature."[12] The court held that the exclusionary rule's deterrent effect would be served by

[12] *State v. Blackman*, *supra*, 898 N.W.2d at 788.

suppressing the evidence because if it was not suppressed, "law enforcement officers across the state will continue to read the Informing the Accused form to accuseds in the same situation as Blackman without providing correct information to provide the basis for the accused's voluntary consent."[13]

This concern does not exist in Nebraska because, as the Nebraska Supreme Court pointed out, the good-faith exception will not apply to any post-*Birchfield* Fourth Amendment violations. Those violations will have to be suppressed. So the concerns expressed by the Wisconsin Supreme Court in *Blackman* are simply not present in Nebraska. Therefore, *Blackman* is not inconsistent with the Nebraska Supreme Court's decision on this issue.

For all of the reasons set forth above, the second question presented does not merit further review.

[13] See *id*.

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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