No. _____

In The Supreme Court of the United States

STATE OF MINNESOTA,

Petitioner,

v.

RYAN MARK THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160 (2016), when a driver is properly arrested for impaired driving, is a urine test a valid search incident to arrest (like a breath test), or must police delay a demand for a urine test until they obtain a search warrant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Minnesota, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.

OPINIONS BELOW

State v. Thompson, 886 N.W.2d 224 (Minn. 2016), App. 1.

State v. Thompson, 873 N.W.2d 873 (Minn. Ct. App. 2015), App. 22.

JURISDICTION

The Minnesota Supreme Court issued its decision on October 12, 2016. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case presents a question under the Fourth Amendment to the United States Constitution: "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."

STATEMENT OF THE CASE

On April 13, 2012, police saw a car cross the center line while leaving a bar's parking lot. App. 3. An officer stopped the car and noticed that the driver, Respondent Ryan Thompson, had watery and glassy eyes, and that an overwhelming odor of alcohol was coming from the car. App. 3. Thompson stated that he had only consumed one beer, but he failed field sobriety tests and a preliminary breath test. App. 3-4. Arrested and asked to submit to a blood or urine test, Thompson refused both, stating that he did not think he had been "prosecuted properly." App. 4.

Charged with second-degree test refusal, third-degree driving while impaired, obstruction of legal process, and driving over the center line, Thompson challenged the constitutionality of the test-refusal charge. App. 4, 6. After the district court held that the statute was constitutional, Thompson waived his right to a jury trial; the test-refusal charge was submitted on stipulated facts, and the other three charges were dismissed. App. 4-5. The district court found Thompson guilty of test refusal, but on appeal the Minnesota Court of Appeals reversed, concluding that it is unconstitutional to charge an individual with blood or urine test refusal without a warrant or exigent circumstances. App. 5, 22.

The Minnesota Supreme Court granted the State's petition for review, and affirmed the court of appeals. App. 5, 18. It discussed this Court's decision in *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160, 2184-85 (2016), which holds that a breath test is a valid search incident to arrest, but a blood test requires a warrant. App. 8-10. The Minnesota Supreme Court held that, although in terms of physical intrusion a urine test is more similar to a breath test than a blood test, a urine test raises the same privacy concerns that this Court addressed in *Birchfield* with regard to blood tests, because a urine sample can be used to detect and assess a wide range of disorders, and unlike a breath sample a urine sample remains after testing, which may result in anxiety for the person tested about whether the sample will be used for purposes other than impaired-driving testing. App. 12-14. It also stated that participation in a urine test involves a substantial invasion of privacy beyond the arrest itself. App. 14-16. It acknowledged the State's "great" need to test allegedly impaired drivers, and "a breath test's inability to detect controlled substances," but nevertheless held that "the availability of a less-invasive breath test weighs against the reasonableness of requiring the more revealing and embarrassing urine test absent a warrant or exigent circumstances." App. 17-18.

REASONS FOR GRANTING THE WRIT

This case provides this Court with the opportunity to decide a question with immediate, daily, and significant nationwide impact: Does a warrantless urine test incident to a lawful arrest for impaired driving comport with the Fourth Amendment? This Court left this question open in *Birchfield v. North Dakota*, where it held that a breath test does not require a warrant, but a blood test does. 136 S.Ct. at 2168 n. 1 (noting that none of the cases before the Court involves a urine test).

I. This Is An Important, Pressing Question

This is an extremely important question, which should be decided by this Court sooner rather than later. Breath testing cannot detect drug-impaired driving. *Id.* at 2184 (acknowledging that a breath test cannot detect substances other than alcohol that can impair a driver's ability to operate a car safely). Because of the growing availability of legally sold marijuana, and the opioid-abuse epidemic, drug-impaired driving is a growing problem. Drugs other than alcohol "are involved in about 16% of motor vehicle crashes. Marijuana use is increasing and 13% of nighttime, weekend drivers have marijuana in their system."[1]

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[1] *Injury Prevention & Control: Impaired Driving: Get the Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION (JAN. 4, 2016, 11:12 AM), http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html.

If warrants are required for both blood and urine tests (absent exigent circumstances), it will mean that police must spend time obtaining a warrant in any case involving impairment caused by drugs, or when a breath test is not feasible because a breath-test machine is not available, a certified operator of the machine is not available, or the driver has asthma or some other difficulty in providing an adequate breath sample. Requiring a search warrant in all these situations will impose a substantial cost on police and the judiciary, just as requiring a search warrant for all breath tests would impose a substantial cost, as this Court recognized in *Birchfield*. *Id.* at 2180-83 (noting, inter alia, that "[p]articularly in sparsely populated areas, it would be no small task for courts to field a large new influx of warrant applications that would come on any day of the year at any hour"). And requiring a warrant for urine testing will create a greater burden on police than the warrant requirement for blood testing, because such a requirement will result in delay. A blood test requires a trip to a hospital or similar facility; this trip provides time to obtain a warrant without necessarily delaying the test. Urine testing, however, requires only a private location, so requiring a warrant

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See also, Minnesota Department of Public Safety, Office of Traffic Safety, *Minnesota Impaired Driving Facts 2014*, at 2, Table 1.01, https://dps.mn.gov/divisions/ots/reports-statistics/Documents/2014-impaired-driving-facts.pdf (detailing the recent increase in controlled-substance DWI incidents, while the overall occurrence of DWI incidents decreases); 2015 annual report, https://dps.mn.gov/divisions/ots/law-enforcement/Documents/2015%20Impaired%20Driving%20Facts%20accessible.pdf *(same)*.

for urine testing will tie up police officers who could be on patrol or otherwise engaged in their anti-impaired-driving duties.

Until this Court decides this issue, police in all fifty states will have to obtain a warrant for a driver's urine or blood in every non-exigent circumstance where breath testing is insufficient or unavailable, if they wanted to be assured that they will have an admissible test result. This is an important, straightforward issue that needs to be decided as soon as possible; there would be a substantial cost to police, the judiciary, and society – and no material benefit – to waiting to see how other courts rule on it.

II. The Minnesota Supreme Court's Decision Is Wrong

Under *Birchfield*, "a State may criminalize the refusal to comply with a [urine-test] demand" if a warrantless urine test "comport[s] with the Fourth Amendment." *Id.* at 2172. Whether a warrantless urine test is constitutional is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." *Id.* at 2176 (quoting *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473, 2484 (2014)).

Under this analysis, a urine test, like a breath test, is a valid search incident to arrest.

A. Privacy

Beginning with the intrusion of urine testing on an individual's privacy, while a breath test involves a physical intrusion that "is almost negligible," a urine test need not involve *any* physical intrusion. *Id.* at 2176.[2] And a urine test, like a breath test, does not involve extracting a part of the subject's body; it just involves collecting matter that, like air, would leave the body "sooner or later . . . even without the test." *Id.* at 2177.

The Minnesota Supreme Court stated that unlike a breath test, a urine test involves an invasion of privacy and embarrassment. App. 15-16. A urine test, however, need not necessarily involve either. *See, e.g.*, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658, 115 S.Ct. 2386, 2393 (1995) (upholding the suspicionless drug testing of school athletes where urine samples are collected under conditions "nearly identical to those typically encountered in public restrooms"). A urine test could be done simply by placing a dye tablet in toilet water to prevent tampering by "dipping,"[3] handing the suspect a receptacle, and waiting outside the bathroom door, yet under the Minnesota Supreme

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[2] While a urine test could conceivably involve a catheter, it need not, just as a breath test could conceivably involve using physical force to get a suspect to exhale, but need not. Petitioner concedes that using a catheter would require a warrant under the reasoning in *Birchfield*.

[3] http://kahntactusa.com/Products/128-blue-dye-tablets.aspx.

Court's ruling, a urine test can never be a valid search incident to arrest under any circumstances.[4]

Importantly, *Birchfield* reiterates that "once placed under arrest, the individual's expectation of privacy is necessarily diminished." 136 S.Ct. at 2177. And it is well established that body searches – which can involve inspecting private parts – are valid incident to arrest. *Id.* at 2175-77. It seems obvious that a genital inspection is more invasive of privacy and embarrassing than having to urinate in private, or under the sole observation of a same-sex police officer.[5] *See Florence*

[4] The Minnesota Supreme Court cited a 2011 link to urine-collection-kit instructions that an arrestee must urinate in full view of the arresting officer. App. 15. But it has also previously held that recommendations on testing are not law and the failure to follow them does not result in suppression but rather goes to the weight of the evidence. *See Young v. Commissioner of Public Safety*, 420 N.W.2d 585, 586 (Minn. 1988). As pointed out above, there are other, less intrusive methods to minimize tampering that could easily be implemented. This Court could – in overruling the Minnesota Supreme Court's holding that urine collection can *never* be a valid search incident to arrest – provide guidance that urine should be collected in a manner that minimizes embarrassment, like the urine collection procedure that this Court described as "minimally intrusive" in *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 834, 122 S.Ct. 2559, 2567 (2002). *See Bell v. Wolfish*, 441 U.S. 520, 560, 99 S.Ct. 1861, 1885 (1979) (stating that cavity searches of inmates, which can be conducted without probable cause, "must be conducted in a reasonable manner").

[5] If police collect a urine sample in an improper way, the suspect can move for suppression, the same as with any other evidence. In addition, if police ask an arrested driver to submit to a urine test under outrageous circumstances, he or she can refuse and assert the "affirmative defense" that the test was refused "upon reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c);

v. Board of Chosen Freeholders, 566 U.S. ___, 132 S.Ct. 1510, 1520 (2012) (noting that, before being placed in a jail's general population, an arrestee may be required "to lift [his] genitals or cough in a squatting position").

The Minnesota Supreme Court also relied on its conclusion that a urine test involves a high degree of intrusion upon an individual's privacy because urine analysis can yield more information than breath analysis. App. 13. But Thompson has never claimed that urine can yield more information than DNA, which can be collected with nothing more than probable cause to arrest. *Id.* at 2177 (citing *Maryland v. King*, 569 U.S. ___, 133 S.Ct. 1958, 1969 (2013)). Further, obtaining a warrant before collecting a urine sample will not protect against illegally overbroad analysis of the sample. Minnesota Statutes section 169A.51, subdivision 1, limits chemical testing to "determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." Thompson has never identified any violation of this statute, or other misuse of a urine sample. *See NASA v. Nelson*, 562 U.S. 139, 155-59, 131 S.Ct. 746, 761-63 (2011) (explaining that "a 'statutory or regulatory duty to avoid unwarranted disclosure' generally allays . . . privacy concerns" (citation omitted)).

State v. Johnson, 672 N.W.2d 235, 242 (Minn. Ct. App. 2003) (stating that a jury instruction in a criminal test-refusal case "was a substantially correct statement of the law" when it informed the jury that a defendant who reasonably refused to submit to testing could not be found guilty), *rev. denied* (Minn. Mar. 16, 2004).

B. Legitimate Government Interests

On the other side of the equation, urine testing promotes immensely important government interests. Indeed, the strength of the interest in punishing impaired drivers, and deterring impaired driving and test refusal, cannot be overstated, as this Court recognized in *Birchfield*, 136 S.Ct. at 2166, 2169-70, 2178-79, 2184.

As explained above, requiring a warrant for *both* urine and blood testing – like requiring a warrant for all breath testing – would create a "considerable" impact on police and courts, because a warrant would then be required whenever drug impairment is suspected, a breath-test machine is not available, or a suspect is unable to perform a breath test. *Id.* at 2180

Finally, as with breath testing, requiring a warrant for urine testing would not significantly advance the interests of preventing illegal searches, or delineating the scope of searches, because – as this Court explained in *Birchfield* – to obtain a warrant an officer would typically just need to recite the same facts that led the officer to find there was probable cause for arrest, and in every case the scope of the search would just be collection of the sample. *Id.* at 2181-82.

* * *

This Court should grant this petition and reach the same conclusion that it reached regarding breath tests; it should hold "that the Fourth Amendment permits warrantless [urine-sample collection] incident to

arrest for [impaired] driving. The impact of [urine] tests on privacy is slight, and the need for [scientific] testing is great." *Id.* at 2184. If it does not, warrants will increasingly be required in impaired-driving cases, which will burden the judiciary and hinder police efforts to combat impaired driving.

CONCLUSION

This Court should grant this petition for writ of certiorari.

Dated: January 10, 2017

Respectfully submitted,

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886 N.W.2d 224
Supreme Court of Minnesota.

STATE of Minnesota, Appellant,
v.
Ryan Mark THOMPSON, Respondent.

No. A15-0076.
|
Oct. 12, 2016.

Syllabus by the Court

1. Under *Birchfield v. North Dakota*, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), the Fourth Amendment does not allow the State to prosecute respondent for violating Minn.Stat. § 169A.20, subd. 2 (2014), for refusing the blood test requested of him.

2. Because the intrusion into respondent's privacy interests is greater than the government's need for a urine sample, a warrantless urine test does not fall within the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement.

3. Because the good-faith exception to the exclusionary rule is a rule of evidence and respondent does not challenge the admission of any evidence, the good-faith exception does not apply.

4. Because respondent cannot be prosecuted under the Fourth Amendment for refusing to consent to an unconstitutional search, Minn.Stat. § 169A.20, subd. 2, which criminalizes an arrestee's refusal to

take a warrantless blood or urine test, is unconstitutional as applied.

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OPINION

GILDEA, Chief Justice.

The question presented in this case is whether Minn.Stat. § 169A.20, subd. 2 (2014) ("test refusal statute"), is constitutional as applied to respondent Ryan

Mark Thompson. After Thompson was arrested on suspicion of driving while impaired and refused warrantless blood and urine tests, he was charged with and convicted of test refusal. Thompson moved to dismiss the test refusal charge, arguing that the statute was unconstitutional, but the district court denied his motion. On appeal, the court of appeals reversed. *State v. Thompson*, 873 N.W.2d 873, 880 (Minn.App.2015). Because we conclude that the test refusal statute is unconstitutional as applied to Thompson, we affirm.

Around 1:00 a.m. on April 13, 2012, an Owatonna police officer watched patrons as they left a bar in Owatonna at closing time. The officer saw a vehicle, which police later determined Thompson was driving, jump the curb and then stop quickly before reversing and leaving the parking lot. As the vehicle turned onto the street outside the bar, it cut the corner short and crossed the center line. The officer initiated a traffic stop.

When the officer approached the vehicle, Thompson provided the driver's license of a female passenger in the vehicle. Thompson informed the officer that he did not have his license with him, but the officer was eventually able to identify Thompson by his name and date of birth. The officer noticed "an overwhelming odor" of alcohol coming from the vehicle while he spoke with Thompson, and saw that Thompson had "watery and glassy eyes." Thompson maintained that he had consumed only one beer.

After Thompson failed standardized field sobriety tests and a preliminary breath test, the officer placed Thompson under arrest for driving while impaired, and transported him to the Steele County Detention Center. There, officers gave Thompson a telephone, a telephone book, and a directory of attorneys he could contact. Thompson left a voicemail with one attorney and told the officer that he had finished attempting to contact an attorney. After the officer read the Minnesota Implied Consent Advisory to Thompson, the officer asked Thompson to submit to a blood or urine test. Thompson refused both tests, and when asked why, stated "[f]or the fact that I don't think I've been prosecuted properly."

The State subsequently charged Thompson with one count of second-degree test refusal, Minn.Stat. §§ 169A.20, subd. 2, 169A.25 (2014); one count of third-degree driving while impaired, Minn.Stat. §§ 169A.20, subd. 1(1), 169A.26 (2014); one count of obstruction of legal process, Minn.Stat. § 609.50, subds. 1(2), 2(3) (2014); and one count of driving over the centerline, Minn.Stat. § 169.18, subd. 1 (2014). Thompson moved for dismissal of the test refusal charge, arguing that the application of the test refusal statute to him violated his substantive due process rights and the doctrine of unconstitutional conditions. Relying on our decision in *State v. Bernard*, 859 N.W.2d 762 (2015), *aff'd sub nom. Birchfield v. North Dakota*, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), the district court held that the statute was constitutional. Thompson then waived his right to a jury trial and other trial

rights, and the parties agreed to a stipulated-facts trial under Minn. R.Crim. P. 26.01, subd. 4, on the test refusal charge. The State dismissed the other charges. The district court found Thompson guilty of test refusal.

The court of appeals reversed Thompson's conviction, concluding that charging an individual with test refusal violates a fundamental right because a warrantless search of a driver's blood or urine does not qualify under an exception to the warrant requirement and the test refusal statute is not narrowly tailored to serve a compelling government interest. *Thompson*, 873 N.W.2d at 878, 880. We granted the State's petition for review.

On appeal, the State argues that the test refusal statute was constitutionally applied to Thompson because a warrantless search of his blood or urine would have been constitutional as a search incident to a valid arrest.[1] In the alternative, the State argues that even if a warrantless search violates the Fourth Amendment, we should nevertheless uphold Thompson's conviction under the good-faith exception to the exclusionary rule. We address each argument in turn.

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[1] In its initial brief, the State, citing *Maryland v. King*, ___U.S. ___, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013), also argued that we should uphold warrantless blood and urine tests under a general reasonableness analysis. The State abandoned this argument following the Supreme Court's decision in *Birchfield*, ___ U.S. ___, 136 S.Ct. 2160.

I.

We turn first to the State's contention that the test refusal statute is constitutional as applied to Thompson. Under the test refusal statute, "[i]t is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Minn.Stat. § 169A.20, subd. 2. Minnesota law also provides that "[a]ny person who drives . . . a motor vehicle within this state . . . consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance" and authorizes law enforcement to request that a driver submit to a chemical test of their blood, breath, or urine in certain circumstances. *See* Minn.Stat. § 169A.51, subd. 1 (2014).

The State contends that a warrantless search of an arrestee's urine, conducted after the suspected drunk driver is in police custody, is constitutional under the Fourth Amendment as a search incident to a valid arrest. Because an arrestee has no right to refuse a constitutional search, the State argues, the test refusal statute is constitutional as applied to Thompson. For his part, Thompson maintains that a warrantless urine search does not qualify as a search incident to a valid arrest and that the test refusal statute unconstitutionally criminalizes the assertion of the right to be free from unreasonable searches. The constitutionality of a statute presents a question of law that we review

de novo. *In re Welfare of M.L.M.*, 813 N.W.2d 26, 29 (Minn.2012).

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. The "touchstone" of the Fourth Amendment is reasonableness. *United States v. Knights*, 534 U.S. 112, 118, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). When law enforcement seeks to conduct a search to uncover evidence of criminal wrongdoing, reasonableness typically requires law enforcement to obtain a judicial warrant before conducting the search. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (citing *Skinner v. Ry. Labor Execs' Ass'n*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)); *see also Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014) ("Such a warrant ensures that the inferences to support a search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (citation omitted) (internal quotation marks omitted)). Searches conducted without a warrant, "outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The exception at issue here is the search-incident-to-arrest exception. *See, e.g.*, *Riley*, ___ U.S. at ___, 134 S.Ct. at

2483-84 (discussing the search-incident-to-arrest exception).

While this case was pending before our court, the United States Supreme Court decided *Birchfield*, ___ U.S. ___, 136 S.Ct. 2160. In *Birchfield*, the Court considered the search-incident-to-arrest exception in analyzing the constitutionality of the application of North Dakota's and Minnesota's test refusal statutes to warrantless breath and blood tests.[2] Specifically, the Court considered how one of the "established and well-delineated" exceptions to the warrant requirement, a search performed incident to a valid arrest, applied to breath and blood tests of drivers arrested for drunk driving. ___ U.S. at ___, 136 S.Ct. at 2174-76, 2188. The Court noted that in *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), it had previously "repudiated 'case-by-case adjudication' of the question whether an arresting officer had the authority to carry out a search of the arrestee's person" and reaffirmed that "[t]he permissibility of" a search incident to an arrest "does not depend on whether a search of a *particular* arrestee is likely to protect officer safety" or lead to the discovery of evidence that could be destroyed. *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2176. The Court reaffirmed "*Robinson's* categorical rule" in *Riley*, ___ U.S. at ___, 134 S.Ct. at 2484, and

[2] In 2013, North Dakota adopted a law similar to Minnesota's test refusal statute that makes it a crime for a driver to refuse to submit to a test of their blood, breath, or urine to determine their alcohol concentration or the presence of other drugs. *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2170; *see also* N.D. Cent.Code § 39-08-01(1)-(3) (2016).

further explained how the rule should be applied in "situations that could not have been envisioned when the Fourth Amendment was adopted." *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2176.

The Court in *Birchfield* applied the test used in *Riley* to determine whether breath and blood tests of suspected drunk drivers qualified as searches incident to a valid arrest, balancing "'the degree to which [breath and blood tests] intrud[e] upon an individual's privacy and . . . the degree to which [breath and blood tests are] needed for the promotion of legitimate governmental interests.'" *Id.* at ___, 136 S.Ct. at 2176 (quoting *Riley*, ___ U.S. at ___, 134 S.Ct. at 2484). To assess the intrusion upon individual privacy, the Court considered three factors: (1) the extent of the physical intrusion upon the individual to obtain the evidence; (2) the extent to which the evidence extracted could be preserved and mined for additional, unrelated private information; and (3) the extent to which participation in the search would enhance the embarrassment of the arrest. *Id.* at ___, 136 S.Ct. at 2176-77. The Court then proceeded to balance these considerations against the government's "great" need for alcohol concentration testing. *Id.* at ___, 136 S.Ct. at 2178-84.

Applying this framework, the Court upheld our decision in *Bernard*, 859 N.W.2d 762, holding that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2184. The court concluded that breath tests have only a "slight" impact on individual

privacy. *Id.* at ___, 136 S.Ct. at 2184. A blood test, however, due to its "significantly more intrusive" nature, may not be "administered as a search incident to a lawful arrest for drunk driving" and requires a warrant absent the existence of exigent circumstances. *Id.* at ___, 136 S.Ct. at 2185.[3]

Thompson refused both a blood and a urine test. *Birchfield* is dispositive with respect to the blood test that Thompson refused. A warrantless blood test may not be administered as a search incident to a lawful arrest of a suspected drunk driver. *See also State v. Trahan*, No. A13-0931, 886 N.W.2d 216, 224, 2016 WL 5930153 (Minn. filed Oct. 12, 2016) (holding that test refusal statute was unconstitutional as applied to a driver prosecuted for refusing a warrantless blood test). The Court in *Birchfield* did not address whether warrantless urine tests were constitutional under the search-incident-to-arrest exception. But *Birchfield* presents the appropriate framework for us to analyze the constitutionality of Minnesota's test refusal statute as it applies to warrantless urine tests.[4]

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[3] The State does not argue that exigent circumstances are present in this case.

[4] Thompson argued, and the court of appeals held, that the test refusal statute was unconstitutional as applied to Thompson using a substantive due process analysis. Specifically, the court of appeals held that charging an individual with test refusal implicates a fundamental right because a warrantless search of the driver's blood or urine would not have been constitutional under an exception to the warrant requirement, and that the test refusal statute is not narrowly tailored to serve a compelling government interest. *Thompson*, 873 N.W.2d at 879-80. In *Birchfield*, the

A.

We turn first to the impact urine tests have on individual privacy interests, considering, as the Court did in *Birchfield*, the level of physical intrusion, the ability of the State to retain a sample containing other personal information, and the enhanced embarrassment a urine test is likely to cause during an arrest.

1.

The State argues that although the breath test upheld in *Birchfield* as a search incident to a valid arrest involved a "negligible" physical intrusion into an arrestee's bodily integrity, a urine test "need not involve *any* physical intrusion." Such a test neither "'require[s] piercing the skin'" nor "extract[ing] a part of the subject's body." *Birchfield*, ___ U.S. at ___, 136 S.Ct.

Court did not examine whether criminalizing the refusal to submit to an unconstitutional search violated the Due Process Clause. Instead, the Court's conclusion that the warrantless blood test violated the Fourth Amendment was dispositive. ___ U.S. at ___, 136 S.Ct. at 2184. The Court has followed this method of analysis in other cases as well. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) ("'[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" (quoting *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994))); *see also Camara v. Mun. Ct.*, 387 U.S. 523, 534, 540, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (recognizing "a constitutional right" to insist that home inspectors obtain a search warrant for an otherwise unreasonable search, "and that appellant may not constitutionally be convicted for refusing to consent").

at 2178 (quoting *Skinner*, 489 U.S. at 625, 109 S.Ct. 1402). For his part, Thompson argues that a urine test intrudes upon an individual's privacy interest. This intrusion, however, is not a physical one, and so we address this aspect of Thompson's argument later in our analysis.[5]

With respect to the physical intrusion portion of the analysis, we agree with the State that urine tests do not implicate many of the physical intrusion concerns the Court discusses in *Birchfield's* analysis of blood tests. The administration of a urine test does not involve an intrusion beneath the surface of the skin, and urine is arguably "not part of [the human] bod[y]," given that urination is a "natural process" that would occur "sooner or later . . . even without the test." *Id.* at ___, 136 S.Ct. at 2177. In terms of physical intrusion, therefore, a urine test is more similar to a breath test than a blood test. *Cf. id.* at ___, 136 S.Ct. at 2176-77 (discussing the minimal invasiveness of a breath test).

2.

Although urine tests resemble breath tests in terms of a lack of physical intrusiveness, the fact that a urine test "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a

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[5] Thompson and amicus American Civil Liberties Union note that urine testing *can* involve the taking of a urine sample through forced catheterization. The State concedes this point, but this case does not involve that type of forced urine sample.

simple [alcohol concentration] reading" makes urine tests comparable to blood tests. *Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2178. Indeed, Thompson argues, there is an even greater risk associated with urine samples, as they can "contain additional metabolites and other types of 'highly personal information' that will never appear in a blood sample."

Regardless of whether urine samples contain *more* information than blood samples, the logic in the Court's analysis of blood tests applies with equal force to urine tests. A breath test, as the Court noted, is capable of revealing only one thing in the hands of law enforcement: an individual's blood-alcohol concentration. *Id.* at ___, 136 S.Ct. at 2177. Urine tests, on the other hand, can be used to detect and assess a wide range of disorders and can reveal whether an individual is pregnant, diabetic, or epileptic. *See Skinner*, 489 U.S. at 617, 109 S.Ct. 1402. Moreover, no breath sample remains after a breath test, *see Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2177. But that is not true with respect to a urine test. Even when law enforcement is prohibited from using the collected urine samples for purposes other than alcohol concentration testing, "the potential [for abuse] remains and [the test] may result in anxiety for the person tested." *Id.* at ___, 136 S.Ct. at 2178. The taking of a urine sample, therefore, raises

the same privacy concerns that the Court addressed in *Birchfield* with regard to blood tests.[6]

3.

With respect to the third part of the analysis, Thompson, citing the Supreme Court's discussion in *Skinner*, contends that urine tests cause considerably more embarrassment for arrestees than breath tests. *See* 489 U.S. at 617, 109 S.Ct. 1402 ("'There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.'" (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir.1987))). The State, on the other hand, argues that participation in a urine test need not involve any embarrassment nor an invasion of privacy, and that even if the test does implicate some privacy rights, arrestees

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[6] The State contends that the retention of urine samples is comparable to the warrantless DNA collection that the Court upheld in *King*, ___ U.S. at ___, 133 S.Ct. at 1969. The buccal swab of an arrestee's inner cheek in that case was "reasonable" given the arrestee's diminished expectation of privacy and the "brief intrusion" of the swab. *Id.* at ___, 133 S.Ct. at 1979. The Court, however, went on to stress that it was not "suggest[ing] that any search is acceptable solely because a person is in custody." *Id.* at ___, 133 S.Ct. at 1979. Moreover, the warrantless search in *King* was not upheld as a search incident to a valid arrest, and as a result, *King* is inapposite to our analysis here.

have a diminished expectation of privacy once they are validly placed under arrest.

Urine tests for law enforcement purposes, regardless of how they are administered, implicate significant privacy interests. *See Skinner*, 489 U.S. at 617, 109 S.Ct. 1402 ("[T]he process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests."). When an arrestee submits to a urine test on suspicion of drunk driving, the arrestee must urinate, on command, "in full view" of the arresting officer, who must witness the arrestee "void directly into the bottle." Bureau of Criminal Apprehension Forensic Sci. Lab., *Urine Collection Kit Instructions for Arresting Officer* (2011), https://dps.mn.gov/divisions/bca/bca-divisions/forensic-science/Documents/Urine%20Specimen%20Collection%20Instructions.pdf. Because the participation in a urine test involves "a substantial invasion beyond the arrest itself," case law suggests that such a test cannot be justified as a search incident to an arrest. *See Riley*, ___ U.S. at ___, 134 S.Ct. at 2488.

In urging us to uphold the urine test as a valid search incident to arrest, the Minnesota Attorney General, as amicus on behalf of the State, contends that the "[p]rovision of a urine sample is not materially different from other full-body searches conducted incident to arrest." Similarly, the State asserts that the Court has long recognized body searches as valid when conducted incident to an arrest. But a search that involves an arrestee performing a personal and private

bodily function "in full view" before law enforcement implicates privacy concerns in ways that even a thorough full-body search does not. Compared to blood testing, which does not involve an arrestee performing a private bodily function in front of law enforcement, urine testing involves a much greater privacy invasion in terms of embarrassment. This factor therefore strongly indicates that urine testing implicates weighty privacy concerns.

In sum, in terms of the impact on an individual's privacy, a urine test is more like a blood test than a breath test. Specifically, although a urine test does not require a physical intrusion into the body in the same way as a blood test, urine tests have the potential to provide the government with more private information than a breath test, and there can be no question that submitting to a urine test under the watchful eye of the government is more embarrassing than blowing into a tube.

B.

On the other side of the balancing analysis, we consider the State's asserted need to obtain alcohol concentration readings through urine tests to prevent drunk driving. In *Birchfield*, the Court reiterated the state and federal government's "paramount interest" in preserving public-highway safety. ___ U.S. at ___, 136 S.Ct. at 2178. The Court further stated that the government's interest is not satisfied by simply removing suspected drunk drivers from the road through a

lawful arrest because the government has a compelling interest in deterring drunk driving so individuals do not pose a threat to others in the first place. *Id.* at ___, 136 S.Ct. at 2179. Nor is the government's interest served in full, the Court reasoned, by authorizing administrative license revocation penalties that are "unlikely to persuade the most dangerous offenders." *Id.* at ___, 136 S.Ct. at 2179.

The reasonableness of a particular *type* of test to determine alcohol concentration depends, however, on the "availability of [] less invasive alternative" tests. *Id.* at ___, 136 S.Ct. at 2184. In concluding that the government interest in obtaining alcohol concentration readings through warrantless blood tests was diminished, the Court stressed that the government "offered no satisfactory justification for demanding the more intrusive alternative [test]" when a breath test, a reasonable search incident to a valid arrest, would typically serve the government's needs. *Id.* at ___, 136 S.Ct. at 2184. In situations in which a breath test would *not* serve the government's interest, "[n]othing prevents the police from seeking a warrant" for an alternative test "when there is sufficient time to do so, . . . or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Id.* at ___, 136 S.Ct. at 2184.

Although *Birchfield* addressed the availability of breath tests as an alternative to warrantless blood tests, the same logic applies with equal force to warrantless urine tests. Breath tests, validly performed incident to an arrest, will serve the State's interest in

deterring drunk driving and preserving highway safety. The availability of an alternative test impacts the reasonableness of urine tests just as it does blood tests. The State here presents no justifications for warrantless urine tests other than those the Court considered and rejected in *Birchfield* in the context of blood draws. *See Birchfield*, ___ U.S. at ___, 136 S.Ct. at 2184 (rejecting the justification for warrantless blood tests based on a breath test's inability to detect controlled substances because the "police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance"); *id.* at ___, 136 S.Ct. at 2184-85 (addressing the availability of alternative forms of testing for arrestees unable to perform a breath test and concluding that there is "no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be"). Accordingly, despite the State's "great" need for alcohol concentration testing, the availability of a less-invasive breath test weighs against the reasonableness of requiring the more revealing and embarrassing urine test absent a warrant or exigent circumstances.

Based on our analysis, we hold that a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver. Such tests significantly intrude upon an individual's privacy and cannot be justified by the State's interests given the availability of less-invasive breath tests that may be performed incident to a valid arrest.

II.

If we conclude that the warrantless blood or urine test would have been unconstitutional under the Fourth Amendment, the State argues that Thompson is still not entitled to relief because of the good-faith exception to the exclusionary rule, which we adopted in *State v. Lindquist*, 869 N.W.2d 863 (Minn.2015).[7] The State argues that because the arresting officer objectively relied in good faith on binding appellate precedent in choosing not to obtain a warrant in Thompson's case, we should decline to suppress evidence of Thompson's test refusal and uphold his conviction.

We considered and rejected this precise argument in *Trahan*, No. A13-0931, slip op. at 11-12. As was the case in *Trahan*, the good-faith exception to the exclusionary rule has no application because Thompson has not sought to exclude any evidence the State wants to use against him. For the reasons we set out in *Trahan*, the State's good-faith exception argument fails.

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[7] The good-faith exception to the exclusionary rule does not require the suppression of illegally obtained evidence when the evidence is obtained in " 'reasonable reliance' " on " 'binding appellate precedent' " that " 'specifically *authorizes* a particular police practice' " at the time of the search. *Lindquist*, 869 N.W.2d at 869 (quoting *Davis v. United States*, 564 U.S. 229, 241, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)).

III.

Having concluded that conducting a blood or urine test without a warrant violates the Fourth Amendment, the question remains whether Thompson can be prosecuted for refusing to submit to an unconstitutional search.[8] In *Birchfield*, the Court held under the Fourth Amendment that North Dakota could not prosecute the driver in that case for refusing to submit to an unconstitutional blood test. ___ U.S. at ___, 136 S.Ct. at 2186. We reach the same conclusion here and hold that Thompson cannot be prosecuted for refusing to submit to an unconstitutional warrantless blood or urine test, and that Minn.Stat. § 169A.20, subd. 2, is unconstitutional as applied.[9]

Affirmed.

CHUTICH, J., took no part in the consideration or decision of this case.

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[8] At oral argument, the State asked us to limit the retroactive application of this ruling to cases pending on the date of this decision. Because the State raised the issue of the retroactive application of our ruling for the first time at oral argument, we need not decide this issue. *See State v. Morrow*, 834 N.W.2d 715, 724 n. 4 (Minn.2013).

[9] Because we hold that the test refusal statute is unconstitutional under the Fourth Amendment, we need not address Thompson's alternative arguments that the statute violates the doctrine of unconstitutional conditions and his Fifth Amendment right against self-incrimination.

McKEIG, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

873 N.W.2d 873
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Ryan Mark THOMPSON, Appellant.

No. A15-0076.
|
Dec. 28, 2015.

Syllabus by the Court

1. Charging a driver with violating Minn.Stat. § 169A.20, subd. 2 (2010) for refusing to submit to a urine test implicates a fundamental right because a warrantless search of the driver's urine would not have been constitutional under an exception to the warrant requirement.

2. When applied to the refusal of a warrantless urine test, Minn.Stat. § 169A.20, subd. 2 violates a driver's right to substantive due process under the United States and Minnesota Constitutions because it is not narrowly tailored to serve a compelling government interest.

Attorneys and Law Firms

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Considered and decided by STAUBER, Presiding Judge; KIRK, Judge; and SMITH, Judge.

OPINION

SMITH, Judge.

Appellant challenges his conviction of second-degree test refusal following his refusal to submit to a blood or urine test. We conclude that conducting a warrantless blood or urine test would not have been constitutional under an exception to the warrant requirement, charging appellant with criminal test refusal implicates his fundamental right to be free from unconstitutional searches, and the test-refusal statute as applied to warrantless blood and urine tests is not narrowly tailored to serve a compelling government interest. We therefore reverse appellant's conviction because the test-refusal statute violates appellant's right to substantive due process under the United States and Minnesota Constitutions.

FACTS

On April 13, 2012, an Owatonna police officer was sitting outside a bar at closing time when he saw a vehicle drive forward, jump a curb, and then stop quickly. After the vehicle backed up and exited the bar parking lot, it "cut the corner short" and drove over the center

line. The officer conducted a traffic stop and identified the driver as appellant Ryan Thompson. The officer "detected an overwhelming odor of an alcoholic beverage coming from the vehicle" and noticed that Thompson "had watery and glassy eyes." Thompson stated that he had consumed one beer.

The officer then asked Thompson to submit to field sobriety tests, which Thompson failed. Thompson also failed a preliminary breath test. The officer arrested Thompson and drove him to the Steele County Detention Center, where he read Thompson the implied-consent advisory. Thompson left a message for an attorney and "stated that he was done" using the telephone. The officer then completed reading the implied-consent advisory, and Thompson refused to take a blood or urine test.

Thompson was charged with second-degree test refusal, third-degree driving while under the influence, obstructing legal process, and driving over the centerline. At an omnibus hearing, Thompson challenged the constitutionality of the test-refusal statute, arguing that it violated his due-process rights and the unconstitutional-conditions doctrine. The district court concluded that the test-refusal statute is constitutional. To challenge the district court's ruling on appeal, Thompson submitted the second-degree test-refusal charge to the district court under Minn. R.Crim. P. 26.01, subd. 4. The other charges were dismissed. The district court found Thompson guilty of second-degree test refusal.

ISSUE

Does the test-refusal statute violate appellant's right to substantive due process under the United States and Minnesota Constitutions by criminalizing his refusal to submit to a warrantless blood or urine test?

ANALYSIS

Minnesota's test-refusal statute makes it a crime to refuse to submit to a chemical test of blood, breath, or urine in certain circumstances. Minn.Stat. § 169A.20, subd. 2. These circumstances include when an officer has probable cause to believe that a person was driving, operating, or physically controlling a motor vehicle while under the influence of alcohol and has read the person the implied-consent advisory. Minn.Stat. § 169A.51, subds. 1-2 (2010).

Thompson challenges the constitutionality of the test-refusal statute as applied to him.[1] "The constitutionality of a statute is a question of law that we review de novo." *State v. Ness*, 834 N.W.2d 177, 181

[1] Thompson argues in his reply brief that the test-refusal statute is unconstitutional on its face, but his principal brief argues that the statute is unconstitutional as applied to him. Generally, issues not raised or argued in an appellant's principal brief cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n. 2 (Minn.App.1990), *review denied* (Minn. Sept. 28, 1990). As in *Bernard*, we construe Thompson's argument as an as-applied challenge to the test-refusal statute. *See State v. Bernard*, 859 N.W.2d 762, 765 n. 2 (Minn.2015).

(Minn.2013) (quotation omitted). To successfully challenge a statute's constitutionality, "the challenger bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn.1990).

A. The Fourth Amendment

Because Thompson's due-process argument is based on a Fourth Amendment violation, we must first analyze whether a warrantless search would have been constitutional under the Fourth Amendment. *See Bernard*, 859 N.W.2d at 766. The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see* Minn. Const. art. I, § 10. The collection and testing of both blood and urine is a search. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1412-13, 103 L.Ed.2d 639 (1989). "A warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement." *Bernard*, 859 N.W.2d at 766. "The state bears the burden of establishing an exception to the warrant requirement." *State v. Ture*, 632 N.W.2d 621, 627 (Minn.2001).

Citing *Bernard*, the state argues that the search-incident-to-arrest exception applies here. The search-incident-to-arrest exception allows police "to conduct a full search of the person who has been lawfully arrested" and to search "the area within the immediate control of the arrestee." *Bernard*, 859 N.W.2d at 767-69

(quotation omitted). The exception traditionally seeks to protect arresting officers and to preserve any evidence that an arrestee might conceal or destroy. *Arizona v. Gant*, 556 U.S. 332, 338-39, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009). But the supreme court has determined that these concerns apply only to a warrantless search of the area around the arrestee, not to a search of the arrestee's body. *Bernard*, 859 N.W.2d at 768-69. In *Bernard*, the supreme court held that a warrantless *breath* test was "constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." *Id.* at 772. The supreme court declined to address whether a warrantless blood or urine test would also be constitutional under this exception. *Id.* at 768 n. 6.

Thompson argues that the search-incident-to-arrest exception cannot apply here because any search would have occurred well after his arrest at the traffic stop. But the timing is no different than in *Bernard*, where the driver was arrested, taken to a police station, and read the implied-consent advisory before placing one phone call and refusing the breath test. *See id.* at 764-65. The timing of any potential search did not affect the supreme court's determination that the search-incident-to-arrest exception applied. *See id.* at 767. Similarly, the timing of any potential test here does not preclude the application of the search-incident-to-arrest exception. *See State v. Riley*, 303 Minn. 251, 254, 226 N.W.2d 907, 909-10 (1975) (explaining that there is no difference "between searches of a defendant immediately incident in time to the custodial

arrest and searches made of a defendant later during his custody").

After the parties submitted their briefs, we released an opinion analyzing whether the search-incident-to-arrest exception applies to warrantless blood tests. In *State v. Trahan*, a driver was offered a blood or urine test, consented to a urine test, could not produce a sample, and then refused a blood test. 870 N.W.2d 396, 399 (Minn.App.2015), *review granted* (Minn. Nov. 25, 2015). The driver pleaded guilty to first-degree test refusal regarding the blood test. *Id.* at 399-400. We concluded that a warrantless blood test could not be justified under the search-incident-to-arrest exception because "[a] blood draw is undeniably intrusive" and "[u]nlike breath, blood does not naturally and regularly exit the body." *Id.* at 401.

Thompson was offered both a blood test and a urine test and refused both tests. Because *Trahan* determined that a warrantless blood test would not have been constitutional under the search-incident-to-arrest exception, we must only determine the constitutionality of a warrantless urine test. *See id.* at 402 n. 3 (rejecting consideration of this issue because the driver's guilty plea was based on his blood test refusal only).

We conclude that, as with a warrantless blood test, a warrantless urine test cannot be justified under the search-incident-to-arrest exception. "There are few activities in our society more personal or private than the passing of urine." *Skinner*, 489 U.S. at 617, 109 S.Ct. at

1413 (quotation omitted). Because a driver must produce a urine sample in front of an officer, a urine test is unquestionably more intrusive than a breath test. *See Bernard*, 859 N.W.2d at 768 n. 6 (explaining that a breath test is less invasive than a blood or urine test). A urine test "intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner*, 489 U.S. at 617, 109 S.Ct. at 1413.

At oral argument, the state cited three cases discussed in *Bernard* to support its argument that a warrantless urine test would be constitutional under the search-incident-to-arrest exception. In *State v. Emerson*, medical professionals took X-rays and photographs of an arrestee and performed a medical examination. 266 Minn. 217, 218-19, 123 N.W.2d 382, 384 (1963). The supreme court determined that these actions did not violate the arrestee's due-process rights. *Id.* at 221, 123 N.W.2d at 385. In *Maryland v. King*, the United States Supreme Court upheld a warrantless buccal swab of an arrestee's cheek for DNA by jail officials, comparing it to fingerprinting and photographing an arrestee. ___ U.S. ___, ___, ___, 133 S.Ct. 1958, 1965, 1980, 186 L.Ed.2d 1 (2013). These cases are distinguishable by the much more invasive nature of a urine test. *See Skinner*, 489 U.S. at 617, 109 S.Ct. at 1413 (explaining that the passing of urine is generally private and that "its performance in public is generally prohibited by law as well as social custom" (quotation omitted)).

The state also cited *State v. Riley*, in which the supreme court determined that the search-incident-to-arrest exception justified a warrantless visual inspection of an arrestee's penis in a prison cell. 303 Minn. 251, 253-55, 226 N.W.2d 907, 909-10 (1975). But *Riley* is also distinguishable. In *Riley*, the officer conducted a brief visual inspection after the victim told police that "her assailant had unusual markings on the left side of his penis." *Id.* at 253, 226 N.W.2d at 908-09. In contrast to the brief nature of this inspection, producing a urine sample can take a long time due to the anxiety and stress of the situation and a person can remain exposed to the officer for a considerable length of time. *See State, Dep't of Highways v. Lauseng*, 289 Minn. 344, 345 n. 1, 183 N.W.2d 926, 926-27 n. 1 (1971) (stating that an arrestee may be unable to produce urine due to "the emotional disturbance created by arrest or accident" (quotation omitted)); *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn.App.2010) (commenting that an arrestee was unable to produce a urine sample after several glasses of water and three opportunities to do so in more than one hour), *review denied* (Minn. Mar. 15, 2011).

Moreover, the visual inspection in *Riley* was performed for the limited purpose of identifying whether the suspect had the "unusual markings" identified by the victim. *See* 303 Minn. at 253, 226 N.W.2d at 908-09. The supreme court explained that there was both "overwhelming independent justification" for the search and "ample probable cause" for the arrest. *Id.*

at 255, 226 N.W.2d at 910. Unlike the identification rationale in *Riley*, a urine sample is used to collect evidence against the arrestee. *See* Minn.Stat. § 169A.45, subd. 1 (2010) (stating that the results of a blood, breath, or urine test may be admitted in a prosecution for driving while impaired). In addition, a urine test "can reveal a host of private medical facts," including whether someone is "epileptic, pregnant, or diabetic." *Skinner*, 489 U.S. at 617, 109 S.Ct. at 1413. Although officers do not analyze an arrestee's urine to learn sensitive medical information, we cannot ignore the potentially broad scope of a urine test. *See Bernard*, 859 N.W.2d at 771 n. 8 (stating that a breath test reveals only "the level of alcohol in the arrestee's bloodstream").

We acknowledge that a urine test is less intrusive than a blood draw, which requires inserting a needle into the arrestee's skin. *See Trahan*, 870 N.W.2d at 401. But a urine test is far more intrusive than a breath test and other searches that have been upheld under the search-incident-to-arrest exception. *See Bernard*, 859 N.W.2d at 772 (breath); *State v. Bonner*, 275 Minn. 280, 287, 146 N.W.2d 770, 775 (1966) (photographs and fingerprints); *Emerson*, 266 Minn. at 221, 123 N.W.2d at 385 (photographs, X-rays, and medical examination); *see also King*, 133 S.Ct. at 1980 (buccal swab of cheek for identification under reasonableness-in-the-circumstances standard). In addition, our legislature treats both blood and urine tests differently than breath tests. *See* Minn.Stat. § 169A.51, subd. 3 (2010) (requiring an officer to offer an alternative test before

a driver can be charged with refusing a blood or urine test but not a breath test). Because a warrantless search of Thompson's urine would invade one of the most private of human activities, *see Skinner*, 489 U.S. at 617, 109 S.Ct. at 1413, it would not have been constitutional under the search-incident-to-arrest exception to the warrant requirement, *see Trahan*, 870 N.W.2d at 402.

B. Substantive Due Process

Having concluded that no exception to the warrant requirement would have justified a warrantless search of Thompson's blood or urine, we next consider Thompson's substantive due-process argument. *See Trahan*, 870 N.W.2d at 403. The Due Process Clauses of the United States and Minnesota Constitutions prohibit arbitrary and wrongful government actions, "regardless of the fairness of the procedures used to implement them." *Bernard*, 859 N.W.2d at 773 (quotation omitted); *see* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. If the challenged statute implicates a fundamental right, it is subject to strict-scrutiny review. *See In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn.2014) (applying strict scrutiny because the statute implicated a fundamental right, the right to parent). But if the statute does not implicate a fundamental right, it is subject to rational-basis review. *Bernard*, 859 N.W.2d at 773.

"Every citizen has a fundamental right to be free from unreasonable searches." *Trahan*, 870 N.W.2d at

403. In *Trahan*, we determined that the driver's fundamental right to be free from unreasonable searches was implicated because a warrantless blood test would have been unconstitutional. *Id.* at 404. As in *Trahan*, because a warrantless search of Thompson's blood or urine would have been unconstitutional, Thompson's fundamental right to be free from unreasonable searches is implicated. *See id.*

We therefore apply strict-scrutiny review to assess the constitutionality of the test-refusal statute. *See R.D.L.*, 853 N.W.2d at 133; *Trahan*, 870 N.W.2d at 404. "Once a statute is subject to strict scrutiny, it is not entitled to the usual presumption of validity." *R.D.L.*, 853 N.W.2d at 133 (quotation omitted). The state must show that the statute is "narrowly tailored to serve a compelling government interest." *Id.*

As noted in *Bernard* and *Trahan*, the state has a compelling interest in keeping impaired drivers off its roads. *See Bernard*, 859 N.W.2d at 773; *Trahan*, 870 N.W.2d at 404. But in *Trahan*, we determined that criminalizing the refusal of a warrantless blood test was not narrowly tailored because the state had "other viable options to address drunk driving," including (1) offering a breath test and charging a driver with refusing that test; (2) prosecuting the driver without measuring the alcohol concentration; and (3) securing a search warrant. 870 N.W.2d at 404; *see Missouri v. McNeely*, ___ U.S. ___, ___, 133 S.Ct. 1552, 1562, 185 L.Ed.2d 696 (2013) (suggesting that, today, search warrants are often easy to obtain via telephone or electronic communication). Because these alternatives are

similarly available in the context of a warrantless urine test, we conclude that the test-refusal statute is not narrowly tailored to serve the state's compelling interest in keeping its roads safe. *See Trahan*, 870 N.W.2d at 404. The test-refusal statute therefore fails strict scrutiny as applied to Thompson, and Thompson's right to substantive due process under the United States and Minnesota Constitutions was violated. *See id.*

The state suggests that we should nevertheless apply the good-faith exception to the exclusionary rule to affirm Thompson's conviction. The supreme court recently adopted the good-faith exception in the narrow situation where "law enforcement acts in objectively reasonable reliance on binding appellate precedent." *State v. Lindquist*, 869 N.W.2d 863, 876 (Minn.2015). In *Trahan*, we declined to apply the good-faith exception to affirm the driver's conviction for refusing a blood test, in part because the exception applies only to Fourth Amendment violations and no unconstitutional search actually occurred. *See* 870 N.W.2d at 405; *see also Lindquist*, 869 N.W.2d at 876. Accordingly, we also decline to apply the good-faith exception to affirm Thompson's conviction for refusing blood and urine tests.

Finally, because we reverse Thompson's conviction on due-process grounds, we need not address Thompson's other arguments regarding the constitutionality of the test-refusal statute.

DECISION

The test-refusal statute violates appellant's right to substantive due process under the United States and Minnesota Constitutions by criminalizing his refusal to submit to a warrantless blood or urine test. We therefore reverse appellant's conviction.

Reversed.