No. 18-1084

IN THE

Supreme Court of the United States

STATE OF MINNESOTA,

Petitioner,

v.

MARK JEROME JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICUS CURIAE* MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), Mothers Against Drunk Driving (MADD) respectfully moves for leave to file the attached brief as *amicus curiae* supporting Petitioner. All parties were provided with timely notice of MADD's intent to file, as required under Rule 37.2(a). Petitioner's counsel consented to the filing of this brief, but Respondent's counsel declined consent.

MADD's interest in this case arises from its abiding commitment to advocate for strong intoxicated-driving laws, until there are No More Victims®. Founded in 1980 by a grieving mother whose teenage daughter was killed by a repeat drunk driver, MADD aids the victims of crimes by individuals driving under the influence of alcohol or drugs, as well as their families, and works to increase public awareness of the problem of drinking and drugged driving. MADD actively engages in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing alcohol and drug-related highway tragedies. MADD is proud to be one of the largest victim-services organizations in the United States.

To further these ends, MADD frequently participates as *amicus* in cases pending in this Court raising important intoxicated-driving-related issues, including at both the certiorari and merits stages. *See, e.g.*, *Minnesota v. Thompson*, 137 S. Ct. 1338, 1339 (2017) (certiorari); *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) (merits); *Navarette v. California*, 572 U.S. 393 (2014) (merits); *Virginia v. Harris*, 558 U.S. 978 (2009) (certiorari).

Amicus has no direct interest, financial or otherwise, in the outcome of this case. The decision below concerns MADD solely because it incorrectly resolves an important and urgent question implicating thousands of lawful intoxicated-driving-related convictions and sentences.

For the foregoing reasons, *amicus* respectfully requests that it be allowed to file the attached brief.

March 20, 2019

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INTEREST OF *AMICUS CURIAE*[1]

Mothers Against Drunk Driving (MADD) was founded in 1980 to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related roadway tragedies. MADD is one of the largest victim-services organizations in the United States. In 2015, for example, MADD provided a service to victims and survivors of drunk- and drugged-driving incidents every four minutes on average.

In 2006, MADD launched a new "Campaign to Eliminate Drunk Driving." One of the key aspects of this campaign is supporting law enforcement in their efforts to catch drunk drivers, keep them off the road, and discourage others from driving while under the influence of alcohol. The strict and swift enforcement of drunk-driving laws, through arrest and prosecution, is essential to that effort. MADD supports law enforcement's use of all constitutionally permissible tools to prevent drunk driving.

A setback in the fight against this all-too-common and deadly crime, the Minnesota Supreme Court's erroneous decision in this case undermines *amicus*'s mission by applying retroactively a new rule announced in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), forbidding certain kinds of blood draws of intoxicated drivers in jurisdictions with criminally enforced implied-consent laws. The decision below threatens to hamper enforcement efforts by unsettling

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[1] Pursuant to Rule 37, counsel for all parties received timely notice of *amicus*'s intent to file this brief. Counsel for Petitioner consented to its filing. Counsel for Respondent declined to consent. No counsel for any party authored this brief in any part, and no person or entity other than *amicus* or *amicus*'s counsel made a monetary contribution to fund its preparation or submission.

thousands of convictions and sentences entered in drunk-driving proceedings that have long been final. The critical need to enhance, rather than hamper, such enforcement efforts implicates the core mission of MADD.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the Petition presents the kind of high-level question that might fill a footnote in a federal-courts casebook, the subject matter of this case is anything but abstract—as many families have learned the hard way. Drunk driving is a national epidemic. The Mark Jerome Johnsons of each state are recurring characters on the nightly news. Intoxicants of all sorts are taking "a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016). As much as ever, states require a "broad range of legal tools to enforce their drunk-driving laws and to secure [blood-alcohol content] evidence," *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (plurality)—not only to deter those tempted to get behind the wheel when they shouldn't, but especially to keep dangerous repeat offenders off the streets. The "stakes" are quite "high." *Virginia v. Harris*, 130 S. Ct. 10, 12 (2009) (Roberts, C.J., dissenting from denial of certiorari) (drunk-driving case).

The decision below spills fuel on a fire. *Birchfield* makes clear that, *if* drawing the blood of an intoxicated driver "comport[s] with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing." 136 S. Ct. at 2172. This Court went on to clarify that some conceivable Fourth Amendment arguments for criminally punishing a blood-test refusal are off limits. Other doctrines, however, remain available to justify past, present, and future use of criminal implied-consent laws

not only to prosecute test refusals themselves but also to obtain convictions and enhance sentences for drunk-driving offenses.

Yet the Minnesota Supreme Court is apparently of the view that, under *Birchfield*, "*no* resources marshaled by a State could preserve a conviction or sentence" under a criminal test-refusal statute, *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (emphasis added), and so it held that the limitations announced in *Birchfield* now apply retroactively to *all* cases, no matter how long they have been final. This holding, in addition to being wrong, is utterly impracticable. It puts trial judges—who will likely confront myriads of *Birchfield*-based post-conviction motions—in a nearly impossible position. Their task now will be to parse stale records to determine whether, in light of case-specific circumstances, a particular offender's years-old conviction or sentence was justified for a reason *other than* the existence of a criminal implied-consent law—including a reason that the underlying case might not have even put in issue. Even if that job were to prove easier than *amicus* anticipates, there is yet a more serious problem with the decision below and others like it: *Birchfield*'s retroactive application puts a cloud of invalidity over likely thousands of test-refusal and drunk-driving convictions, at best needlessly "drain[ing] society's resources" by forcing a mass relitigation of old cases, *Williams v. United States*, 401 U.S. 667, 691 (1971) (opinion of Harlan, J.), which undermines the states' legitimate interest in the finality of their criminal-justice systems, and at worst making it easier for numerous drunk drivers to return to the streets.

Because of this issue's practical significance and in light of the dissension that it has produced in the lower courts, this Court should grant certiorari notwithstanding the lack of a formal split of authority. The Question Presented is not the sort that benefits from further percolation in the lower courts. It is a pure, straightforward issue of law whose nationwide resolution is urgent. This Court should grant the petition and correct the error below.

ARGUMENT

I. APPLYING *BIRCHFIELD* RETROACTIVELY IS FRAUGHT WITH PRACTICAL DIFFICULTIES AND THREATENS TO UNSETTLE COUNTLESS FINAL CONVICTIONS AND SENTENCES

Two important, practical realities make this Court's intervention pressing. *First*, the decision below (and those like it in other states) will force trial judges to hazard a deluge of post-conviction *Birchfield* challenges by offering their best guess to an unmanageable question, which will prove answerable (if at all) only in light of comprehensive trial-court records that often will not exist. That question is whether, in light of *case-specific* circumstances, a particular conviction or sentence was justified for a reason other than the existence of a criminal implied-consent law—including a reason that the underlying case might not have put in issue. *Second*, even if that task proves easier than Petitioner and *amicus* think that it will, there remains the problem that applying *Birchfield* retroactively will cast a pall of invalidity over thousands of test-refusal and drunk-driving convictions, and thus undercut important state interests.

A. A careful reading of *Birchfield* shows why retroactive application of that decision will put judges in a bind. Consider first that this Court did not hold that criminal penalties for refusing a blood test are always and everywhere unlawful. Quite the contrary, *Birchfield* reaffirms the black-letter principle that, *if* a "search[ ] comport[s] 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." 136 S. Ct. at 2172. Conversely, if a search would exceed the Fourth Amendment, then punishing its refusal is unconstitutional, and *threatening* to punish its refusal to elicit consent will undermine any

argument that any consent given was truly voluntary, *see id.* at 2186 ("Because 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 [under a criminal implied-consent law] given the partial inaccuracy of the officer's advisory.") Against that backdrop, *Birchfield* merely takes two Fourth Amendment arguments in support of punishment, or threatening punishment to obtain consent, off the table. First, a state cannot punish a blood-test refusal, or elicit consent to a blood draw based on a threat to punish any refusal, solely on the basis of the search-incident-to-arrest doctrine. Likewise, the State cannot justify a blood draw solely on the ground that the defendant went along with the search "on pain of committing a criminal offense." *Id.* at 2186. Rather, in such cases, courts must weigh any indicia of the voluntariness of "[the] consent given" against "the partial inaccuracy of the officer's advisory." *Id.* at 2186.

But of course a blood test could still "comport with the Fourth Amendment." 136 S. Ct. at 2172. Most obviously, under the exigent-circumstances doctrine, a warrantless blood test satisfies the Fourth Amendment if it is reasonable in light of case-specific details, including any medical attention that the suspect or a victim might require, any need to investigate the scene, the "procedures in place for obtaining a warrant or the availability of a magistrate judge," and the "metabolization of alcohol in the bloodstream and the ensuing loss of evidence." *McNeely*, 569 U.S. at 151, 164–65. Further, *Birchfield* suggests that a truly consensual blood test, even in a criminal implied-consent jurisdiction, is also lawful. *Birchfield*, 136 S. Ct. at 2186. And of course a blood draw comports with the Fourth Amendment if supported by a warrant—which, as *Birchfield* notes, should be easy to come by, at least in theory. After all, magistrates are "in a poor position to challenge" officers' on-the-scene assessments of probable cause in drunk-driving cases. *Id.* at 2181–82.

With this understanding of *Birchfield*, consider now two kinds of soon-to-be-recurring post-conviction challenges. In the first, a drunk driver convicted years ago of criminal test-refusal asks a court for retroactive relief under *Birchfield*, contending that he was unlawfully punished for refusing a blood test. To rule on that petition, it is not enough to know that the driver was indeed criminally punished for refusing a blood draw. Far from it—that fact marks only the *beginning* of the analysis. Now the judge must scour the record to investigate whether some other basis in Fourth Amendment law justified the blood draw, rendering the petitioner's refusal punishable after all. *Id.* at 2172. Did exigent circumstances justify the search? *See* 136 S. Ct. at 2186 ("North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search."). Perhaps. Yet the original criminal proceeding might not have even touched upon that question, since it would have had no bearing on whether the defendant really did refuse. So the record is likely unhelpful. Maybe the judge could try to fill in the evidentiary gaps herself through hearings, but undertaking such an effort many years after the fact might prove next to impossible, especially if witnesses are unavailable to testify. In short, a judge would have a hard time even *approaching* the question that *Birchfield*'s retroactivity would force upon her.[2]

In a second kind of post-conviction *Birchfield* challenge, a defendant convicted years ago of drunk driving argues that his consent to a blood draw had been coerced by the threat of criminal penalties and so the results of the test should not have been admitted. A judge in this case faces still greater difficulties. Her first task would be to test the sufficiency of

[2] Even if the cold record somehow addressed exigent circumstances and proved that there were none, a judge might reasonably consider a second, counterfactual question: Might the officer have easily obtained a warrant for a blood draw had there been a need for one, and if so would the driver still have refused the test, justifying criminal sanction?

the consent argument. As noted, "[b]ecause voluntariness of consent to a search must be determined from the totality of all the circumstances," *Birchfield* leaves open whether a particular driver's consent is valid notwithstanding the "the partial inaccuracy of the officer's advisory" (namely, the representation that refusal will incur criminal liability). 136 S. Ct. at 2186 (quotation omitted). But of course only a record that comprehensively addressed the "totality of the circumstances" bearing on consent—from the officer's conduct to the driver's intelligence, prior experience with law enforcement, and other biographical details—could settle this question. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (including a nonexhaustive list of factors relevant to the voluntariness of consent).

As in the first case, this judge would need a thorough record also to assess exigency, an issue that the judge would presumably reach only after concluding that she could (and should) hold the consent invalid. Yet here again, as in the prior hypothetical, the court would likely find the record wanting. *Compare Wisconsin v. Howes*, 893 N.W.2d 812, 827, 823–27 (Wis. 2017) (opinion of Roggensack, C.J.) *with id.* at 837–44 (Abrahamson, J., dissenting) (debating whether a court can properly assess exigency in a case where the state had not put that doctrine in issue).

In any event, the judge's work would not end even with a finding that the totality of facts did not show exigency. Next up would be "whether the evidence obtained in the search" would have warranted suppression notwithstanding that the search had been "carried out pursuant to a state statute," if in fact it was, or if "the evidence [had been] offered in an administrative rather than criminal proceeding," if relevant. *Birchfield*, 136 S. Ct. at 2186 n.9 (citing cases addressing exclusionary rule exceptions) (citations omitted). This analysis, too, is from straightforward.

B. Even with these real-world complications set aside, the decision below merits review because it and others like it cast

a pall of invalidity over likely several thousands of final convictions and sentences, which fall into several different categories.

First, and most straightforwardly, applying *Birchfield* retroactively casts doubt on all convictions for criminal blood-test refusal entered in the 15 states that Petitioner identifies, Pet. 12 n.5, between at least April 2013 and June 2016.[3] This of course includes convictions based on guilty pleas, which offenders now can seek to withdraw. *E.g.*, *Minnesota v. Trahan*, 886 N.W.2d 216, 219 (Minn. 2016) (vacating plea of guilty to test refusal in light of *Birchfield*). Petitioner reports that, in Minnesota alone, the number of relevant convictions is over 6,700. Pet. 12 & n.6. And while data concerning convictions for blood-test refusals in other states are not readily available, the National Highway Traffic Safety Administration (NHTSA) found that, just in 2011, the crime of test refusal was committed a total of *46,596* times in 12 of the 15 relevant states. *See* NHTSA, *Breath Test Refusal Rates in the United States: 2011 Update* 6 (2014), *available at* https://bit.ly/2XW3wP9 (notwithstanding title, reporting also on test-refusal rates generally; finding 3,620 in Arkansas; 8,022 in California; 21,966 in Florida, 688 in Hawaii; 4,340 in Kentucky; 1,195 in Louisiana; 373 in Maine; 3,530 in Minnesota; 749 in Nebraska; 1,181 in North Dakota; 609 in Tennessee, and 323 in Vermont);[4] *see also Birchfield*, 136 S.

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[3] April 2013 is significant because that is when this Court in *McNeely* made clear that, contrary to case law in many states, the metabolization of alcohol in the blood stream does not alone create a per se exigency justifying a warrantless blood draw; nor, by extension, does it justify the punishment of anyone who refuses one. 569 U.S. at 165. Thus, at least in jurisdictions that followed the pre-*McNeely per se* approach, convictions for blood-draw refusals that became final *before* this Court issued *McNeely* should be beyond reproach even under the decision below. *See, e.g.*, *Sanders v. Dowling*, 594 F. App'x 501, 503 (10th Cir. 2014) (*McNeely* not retroactive); *Siers v. Weber*, 851 N.W.2d 731, 733 (N.D. 2014) (same).

[4] The report lacked 2011 refusal data from Alaska, Rhode Island, and Virginia.

Ct. at 2169 (relying on this data). And while one obviously cannot infer the sum of convictions from those figures, it would not be surprising if that total were also high

Birchfield's retroactivity also risks unsettling any sentence that was merely *enhanced* by the fact of a blood-test refusal, no matter the underlying crime or even whether the relevant state's implied-consent statute imposed criminal or only civil penalties. That is because many courts, in civil and criminal implied-consent jurisdictions alike, have held that *Birchfield* forbids using a blood-test refusal to enhance a sentence even for a different crime, since the enhancement is thought to constitute a separate criminal penalty. *See Wisconsin v. Dalton*, 914 N.W.2d 120, 124 (Wis. 2018) (civil implied-consent state); *but see id.* at 186, 191 (dissenting opinions of Ziegler, J., and Roggensack, C.J.) (disagreeing with this reading of *Birchfield*); *see also, e.g.*, *New Mexico v. Vargas*, 404 P.3d 416, 418 (N.M. 2017); *Pennyslvania v. Giron*, 155 A.3d 635, 640 (Pa. Super. Ct. 2017). Worse, the range of affected cases is much broader than for refusal convictions, since this category is limited neither to drunk-driving-related offenses nor to sentences in which refusal functioned as a formal, statutory enhancer. For example, *Birchfield*'s retroactivity is just as helpful to a burglar who had received an unusually stiff sentence because the judge thought that a past, uncharged test refusal suggested a defiant personality in need of special deterrence. *See* 18 U.S.C. § 3553(a) (stating that sentencing judge "shall consider" the defendant's "characteristics"). That is because, according to some courts, the burglar's refusal produced extra criminal punishment, which *Birchfield* forbids. There is no easy way to add up all of the sentences matching this description, but one suspects that there are more than a few.

There is more: as discussed, any driver convicted of drunk driving on the basis of a consented-to blood draw in a criminal test-refusal jurisdiction can also seek retroactive relief under the decision below, including defendants who pleaded guilty. *E.g.*, *North Dakota v. Beylund*, 885 N.W.2d 77, 78 (N.D. 2016)

("We vacate our opinion affirming Beylund's conviction [for drunk driving] to the extent it is inconsistent with *Birchfield v. North Dakota.* We remand to the district court with directions to allow Beylund to withdraw his guilty plea and for further proceedings under *Birchfield v. North Dakota*."). This category likely covers a significant portion of all drunk drivers convicted between 2013 (*McNeely*) and 2016 (*Birchfield*) in the 15 criminal-refusal states, given that, once *McNeely* rendered exigent-circumstances doctrine a less reliable basis for obtaining urgent blood draws, officers grew to rely more frequently on the "legal tool" of implied-consent statutes—just as the lead opinion in *McNeely* encouraged them to do. 569 U.S. at 160–61 (plurality).

II. THIS IMPORTANT CASE PRESENTS A PURE QUESTION OF LAW THAT WILL NOT BENEFIT FROM PERCOLATION

A. Although this Court often waits for an intercircuit or interstate conflict to develop on a question of law before settling it, a split is not a hard-and-fast requirement of certiorari. *See* Stephen M. Shapiro & Kenneth S. Geller et al., *Supreme Court Practice* 241 (10th ed.). In many cases, it is often enough that the question is of "widespread importance" or that it has yielded "confusing and differing judicial responses." *Id.* at 257 (collecting cases). Allowing "[f]urther percolation" of such questions will not always "offer elucidation as to" their correct answers. *Boumediene v. Bush*, 549 U.S. 1328, 1332 (2007) (Breyer, J., dissenting from denial of certiorari), *reh'g granted, order vacated*, 551 U.S. 1160 (2007); *see also, e.g.*, *Johnson v. Texas*, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting) ("[The] practice of letting issues 'percolate' in the 50 States" should not override this Court's "responsibility to resolve emerging constitutional issues."); *California v. Carney*, 471 U.S. 386, 398–99 (1985) (Stevens, J., dissenting) (resolving an important Fourth Amendment question over a dissent protesting that the Court had "forge[d] ahead" without awaiting a "fully percolated conflict").

B. The Question Presented here, important for reasons already explained, has yielded "differing judicial responses." Shapiro & Geller, *supra*, at 257. And while the state courts of last resort have so far answered it incorrectly, several trial judges and intermediate appellate judges have gotten it right. This Court should therefore take up the question without further delay.

Teague v. Lane, 489 U.S. 288 (1989) and its progeny hold that, although a "new rule" pronounced in a decision of this Court applies to all criminal cases still pending on direct review, it "applies only in limited circumstances" to convictions that are already final. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). One such limited circumstance is when the new rule is "substantive." *Id.* The main category of substantive rules comprises "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 352. Those rules "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.*; *see also Welch v. United States*, 136 S. Ct. 1257, 1266 (2016) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). New *procedural* rules, by contrast, generally do not apply retroactively. *Schriro*, 542 U.S. at 352. "Such rules alter the range of permissible methods for determining whether a defendant's conduct is punishable." *Welch*, 136 S. Ct. at 1265 (citation omitted). They "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*

Evaluating *Birchfield* under those principles, several appellate and trial judges have correctly held that its new rule does not apply retroactively. In this case, for example, all three intermediate appellate judges in addition to the trial court soundly perceived that *Birchfield* only "modified the procedure that law enforcement must follow before administering a chemical test." *Johnson v. Minnesota*, 906 N.W.2d 861, 866 (Minn. Ct. App. 2018). It did not "prohibit

all prosecutions for [blood] test refusal," which is why "refusal remains punishable under Minnesota law." *Id.* at 867. Unpacking this conclusion, the judges explained that "only in certain circumstances are blood . . . tests unconstitutional—either when law enforcement does not have a search warrant or exigent circumstances do not exist." *Id.* So "test refusal is still a crime where the actions of law enforcement comport with the Fourth Amendment, and [*Birchfield*] did not place this category of conduct outside the state's power to punish." *Id.* Likewise many courts have also held that *McNeely* is not retroactive, including because, like *Birchfield*, it merely reads the Fourth Amendment to restrict one of several available grounds for lawful blood testing. *See, e.g.*, *Sanders*, 594 F. App'x 501; *Siers*, 851 N.W.2d 731.

Appellate judges on the Pennsylvania Superior Court read *Birchfield* the same way. This Court's decision "does not alter the range of conduct or the class of persons punished by the law: [drunk driving] remains a crime, and blood tests are permissible with a warrant or consent." *Pennsylvania v. Olson*, 179 A.3d 1134, 1139 (Pa. Super. Ct. 2018), *appeal granted*, 190 A.3d 1131 (Pa. 2018). Hence a sentencing enhancement for a test refusal "is procedural because the new *Birchfield* rule regulates only the manner of determining the degree of defendant's culpability and punishment." *Id.*

These and other reasoned responses to *Birchfield*'s retroactivity, described here and in the Petition, show the full range of approaches to the Question Presented, and they provide this Court with more than enough guidance on the proper resolution of this straightforward dispute. There is no reason to delay, and, given the stakes, there is every reason not to. This Court should grant the petition and clarify that *Birchfield*'s blood-test holding applies only to non-final and prospective cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

March 20, 2019

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