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 of the State of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

The Minnesota Supreme Court, in accord with this Court's recent decisions in *Welch v. United States*, 136 S.Ct. 1257 (2016) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), held that this Court's ruling in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) is retroactively applied to test-refusal convictions. Petitioner, the State of Minnesota, has filed an untimely petition for a writ of certiorari asking this Court to reverse the decision, which is consistent with the other high courts that have decided the issue.

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,
PETITIONER,

V.

MARK JEROME JOHNSON,
RESPONDENT.

Respondent Mark Jerome Johnson respectfully prays that this Court deny the State of Minnesota's petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

JURISDICTION

The Minnesota Supreme Court rendered its decision on August 22, 2018. The petition for a writ of certiorari was filed on February 19, 2019, more than 90 days after the decision. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. Const. amend. V: "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *."

U.S. Const. amend. XIV, sec. 1: "No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law. * * *."

U.S. Sup. Ct. Rule 13: "Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort * * * is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. * * * . The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed * * * the time to file the petition * * * runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment."

Fed. R. App. P. 41: "Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs. * * * . The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. * * * . The mandate is effective when issued."

Minn. R. Civ. App. P. 136.02: "Unless the parties stipulate to an immediate entry of judgment, the clerk of the appellate courts shall enter judgment pursuant to the decision or order not less than 30 days after the filing of the decision or order. The service and filing of a petition for review to, or rehearing in, the Supreme Court shall stay the entry of the judgment. Judgment shall be entered immediately upon the denial of a petition for review or rehearing."

STATEMENT OF THE CASE

I. Factual history.

This case, consolidated by the Minnesota appellate courts, arises out of two separate but similar district court actions. In both district court cases, respondent Mark Jerome Johnson was stopped by police and offered a warrantless blood or urine test. In both cases, Johnson exercised his Constitutional right to refuse an unconstitutional search, and in both cases, he was convicted of the crime of test refusal. The Minnesota Supreme Court correctly held that this Court's decision in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) announced a new substantive rule of law that is fully retroactive for people convicted of test-refusal crimes. *Johnson v. State of Minnesota*, 916 N.W.2d 674, 677 (Minn. August 22, 2018). Petitioner State of Minnesota now asks this Court to disregard its own Rules and precedent by granting certiorari.

On July 31, 2009, St. Anthony, Minnesota police stopped Johnson's car because his registration was expired. (Pet. 2.) Johnson showed signs of impairment, and police arrested him. (Pet. 2.) Police read Johnson the Minnesota Implied Consent advisory and asked him whether he would submit to a warrantless blood and/or urine test. (Pet. 2, Pet. App. 32.) Johnson refused both. (Pet. 2.) Police did not request a breath test. (Pet. 2, Pet. App. 32.) Johnson was subsequently charged with one count of first-degree test refusal in violation of Minn. Stat. § 169A.20 (2008). Significantly, Johnson was not charged with driving while intoxicated (Pet. 2.) On April 29, 2010, Johnson pleaded guilty to first-degree test refusal in violation of Minn. Stat. § 169A.24 (2008), and on July 26, 2010, the district court sentenced Johnson to forty-eight months in prison, stayed for seven years of

probation. (Pet. 2.) The trial court revoked Johnson's probation at his request on December 23, 2014. (Pet. App. 33.)

On June 20, 2014, police stopped Johnson's car again, this time for a turn signal violation and a noise violation. (Pet. App. 50.) After Johnson showed indicia of intoxication, police requested a blood and/or urine test. (Pet. App. 51.) Johnson consulted with an attorney, then refused both tests. (Pet. App. 51.) Police did not offer a breath test. (Pet. App. 51.) Johnson was charged with a single count of first-degree test refusal in violation of Minn. Stat. § 169A.24 (2012). (Pet. App. 22.) Again, Johnson was not charged with driving under the influence. (Pet. 3.) On March 16, 2015, Johnson pleaded guilty to the sole count of the charging document, and was sentenced to fifty-one months in prison. (Pet. App. 51-52.)

II. Proceedings below.

On December 7, 2016. Johnson filed identical petitions for postconviction relief under Minn. Stat. § 590.01, arguing that this Court's decision in *Birchfield* announced a new substantive rule of law retroactive to final test-refusal convictions. (Pet. 3.)[1] Johnson's postconviction petitions were denied by the district court, and Johnson appealed. (Pet. 3-4.) The Minnesota Court of Appeals consolidated the two cases and affirmed the lower courts, holding that *Birchfield* announced a new procedural rule of law that did not apply retroactively to final test-refusal convictions. (Pet. 4.) The Minnesota

[1] As Petitioner notes, the Minnesota Supreme Court subsequently applied the *Birchfield* rationale to two of its own decisions, *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016) (vacating conviction for refusing a warrantless blood test), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016) (applying *Birchfield* rationale and holding that urine test, like a blood test, is an intrusive search requiring a warrant or warrant exception). (Pet. 3, n.1.)

Supreme Court granted Johnson's petition for review and unanimously reversed the lower courts' decisions. *Johnson*, 916 N.W.2d at 677.

In an opinion authored by the Chief Justice, the Minnesota Supreme Court reasoned that this Court's decision in *Birchfield* applied retroactively to test-refusal convictions because the rule changed who can be prosecuted for test refusal, thus "alter[ing] the * * * class of persons that the law punishes." *Johnson*, 916 N.W.2d at 677 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). The court further noted that the *Birchfield* rule "placed a category of conduct" – namely, refusing an unconstitutional search – "outside the state's power to punish," thereby preventing even the most "impeccable fact finding procedures" from validating the criminal conviction. *Johnson*, 916 N.W.2d at 683. The court reversed the lower courts' decisions and remanded Johnson's convictions to the district court for further proceedings. *Id.* at 685. The State of Minnesota filed a petition for a writ of certiorari on February 19, 2019, and on March 20, 2019, Mothers Against Drunk Driving ("MADD") filed an amicus brief in support of the state.

REASONS FOR DENYING THE PETITION

The State of Minnesota seeks review of the Minnesota Supreme Court's unanimous decision holding that *Birchfield* announced a new substantive rule of criminal procedure and reversing the district court's denial of Johnson's collateral attack against his conviction for refusing warrantless blood and urine tests. The state argues that review is necessary because the *Birchfield* rule is procedural, and because vacating prior test-refusal convictions will increase the number of intoxicated drivers on the road and create

an unworkable backlog in district courts. This Court should deny the state's petition because the petition is untimely and without merit.

I. The petition is untimely.

A petition for a writ of certiorari seeking review of the decision of a state court of last resort "is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." U.S. Sup. Ct. Rule 13(1). "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." U.S. Sup. Ct. Rule 13(3).

In federal court, the filing of the Court of Appeal's decision constitutes the entry of judgment. *See, e.g., Clay v. United States*, 537 U.S. 522, 525 (2003) (calculating time to petition for certiorari from date federal court of appeals filed its decision). Assuming no petition for rehearing is filed, the "mandate" is usually issued twenty-one days later by the clerk of appellate courts and "consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs." *See* Fed. R. App. P. 41.

The Minnesota Supreme Court also treats the filing date of its decision as the entry date of the judgment for purposes of calculating the time for petitioning this Court for certiorari. *See, e.g., Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010) (holding defendant's time to petition for certiorari expired ninety days from date court filed its decision). And the filing of that judgment by the clerk of appellate courts appears to be the equivalent of what constitutes the mandate under federal law. *See* Minn. Rs. Civ. App. P. 136.02 and 140.03 (directing clerk of appellate courts to, if no petition for

rehearing is filed, enter judgment "pursuant to the decision" not less than thirty days after filing of decision).

The Minnesota Supreme Court entered its judgment when it rendered its decision in this case on August 22, 2018. *Johnson*, 916 N.W.2d at 674. The state filed its certiorari petition 181 days later on February 19, 2019. The state's petition was filed more than ninety days after the state supreme court's decision and should be denied as untimely. *See, e.g., County of Sonoma v. Eva Isbell*, 439 U.S. 996 (1978) (denying petition for certiorari as untimely).

II. Neither the state's petition nor the amicus's brief have any merit.

In a unanimous opinion authored by the Chief Justice, the Minnesota Supreme Court soundly decided Johnson's case based upon well-established principles of retroactivity and consistently with two other state high courts. In contrast, the State of Minnesota's petition and MADD's amicus brief are based on incorrect, irrelevant, and misleading principles. There is no compelling reason to grant a writ of certiorari, and the petition should be denied in its entirety.

A. Neither Petitioner nor the amicus have offered a compelling reason to grant certiorari.

This Court will only grant a writ of certiorari if there is a compelling reason that comports with the "character" of the examples in U.S. Sup. Ct. Rule 10 (Considerations Governing Review on Writ of Certiorari). Neither Petitioner nor the amicus have expressed any reason for the Court to grant this petition under this rule. Rule 10(b), which allows review if state courts of last resort conflict in their decisions on an

important federal question, is irrelevant for two reasons. First, Minnesota's retroactivity decision in *Johnson* is not a federal question. *Cf. Danforth v. Minnesota*, 552 U.S. 264, 269 (2008) (holding that state courts are not bound by federal retroactivity analysis). Second, even if this were a federal question, three state supreme courts (out of fifteen states criminalizing the refusal of a chemical test) have considered the retroactivity of *Birchfield* for test refusal convictions, and all three have unanimously found that the rule is substantive and fully retroactive. *See Johnson*, 916 N.W.2d at 684 (opinion authored by Chief Justice); *Morel v. State of North Dakota*, 912 N.W.2d 299, 304 (N.D. 2018) (opinion authored by Chief Justice); *State of New Mexico v. Vargas*, 404 P.3d 416, 420 (N.M. 2017).

Rule 10(c), which allows this Court to grant review of a state court's decision in an important question of federal law, is also irrelevant for two reasons. Again, this is not a federal question. Furthermore, this is not the sort of important issue that is appropriate for this Court to decide under Rule 10(c).

Petitioner and the amicus frame the issue as important and request review based upon their claims that courts will be overrun with collateral attacks on convictions if *Johnson* is allowed to stand. (Pet. 12; Amicus Br. 3-5, 8-9.) In fact, Petitioner states that more than 6,700 convictions could be reversed in Minnesota alone. (Pet. 12.) This is materially misleading and must be corrected. There have been more than 6,700 test refusal convictions in Minnesota, but the vast majority of those are *breath test refusals*, which are not affected by *Birchfield* or *Johnson*. *See Birchfield*, 136 S.Ct. at 2184 ("[W]e conclude that the Fourth Amendment permits warrantless breath test incident to arrest for

drunk driving."). It is highly likely that the same is true of the 45,596 test-refusal arrests in other states.[2] In reality, the "countless convictions" that the amicus predicts will be vacated (Amicus Br. 4.) are quite easily countable.

The Office of the Minnesota Appellate Public Defender ("OMAPD") is statutorily responsible for filing all postconviction pleadings for indigent defendants in Minnesota. *See* Minn. Stat. § 590.05. Since August 22, 2018, the OMAPD has identified fewer than forty defendants who *might* be entitled to relief under *Johnson*. In fact, in the nine months since the Minnesota Supreme Court decided *Johnson*, the OMAPD has filed approximately twenty postconviction petitions requesting review of blood and/or urine test-refusal convictions. This number, less than half of one percent of all test refusal convictions in the state, is hardly the havoc that Petitioner and the amicus predict. This is not the type of compelling and important question that this Court considers under Rule 10.

Petitioner and amicus further warn that catastrophic damage will be done to society if the Minnesota Supreme Court's decision is allowed to stand, and that such a retroactivity decision somehow hampers law enforcement efforts to keep drunk drivers off the road. (Pet. 6, 9-10, 12; Amicus Br. 2-5, 8-10.) Both of these contentions are meritless.

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[2] The amicus admits that 45,596 represents only test-refusal arrests, not convictions; neither *Johnson* nor *Birchfield* have any bearing upon arrests, as arrests cannot be reversed or vacated. The amicus further admits that this number includes breath tests and that there are not statistics available for blood and urine refusals. (Amicus Br. 8.)

The amicus's fight appears to be with this Court's decision in *Birchfield*, not the state supreme court's decision in *Johnson*. The question of whether a person can be convicted of test refusal for refusing an unconstitutional search has already been answered, and Johnson is simply requesting that he receive the benefit of that decision. In addition, neither the amicus nor Petitioner identify how law enforcement efforts will be hampered by vacating a conviction where, in many cases, the sentence has already been served.[3] Johnson did not ask the Minnesota Supreme Court to amend driving while intoxicated laws. Instead, this case presented a purely legal question about the retroactivity of an issue that this Court already decided.

To that end, both the amicus and Petitioner operate under a fatal logical flaw: they represent Johnson as a "habitual drunk driver" who has taken a "grisly toll" on the roads. (Pet. 12; Amicus Br. 2.) But this is wrong. Johnson was never charged with drunk driving in either of his convictions before this Court. He was charged and convicted only with refusing an unconstitutional search – something that is no longer a crime following this Court's decision in *Birchfield.* 136 S.Ct. at 2184. Johnson did not argue (and the *Johnson* opinion does not hold) that *Birchfield* applies retroactively to convictions for driving while intoxicated. The Minnesota Supreme Court properly held that Johnson must be allowed to challenge his conviction not for drunk driving, but for having "the temerity to

[3] Johnson's underlying sentences for test-refusal expired on June 19, 2018 (Ramsey County D. Ct. File No. 62-CR-10-1150) and March 17, 2019 (Ramsey County D. Ct. File No. 62-CR-14-4557). He remains solely subject to conditional release periods.

engage in conduct protected by the Bill of Rights." *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971) (Brennan, J., concurring).[4]

The amicus's brief is furthermore rife with hypothetical situations: trial judges will "*likely*" face postconviction petitions and the existing records in such petitions are "*unlikely*" to be helpful. (Amicus Br. 3, 6, emphasis added.) There will "*likely*" be thousands of cases affected by the Minnesota Supreme Court's decision (which, as discussed *supra*, is untrue), and "*one suspects*" and "*could infer*" that collateral cases could be included. (Amicus Br. 8-9, emphasis added.) This type of guesswork is exactly what this Court tries to prevent by refusing to grant certiorari in cases that have not presented a concrete and fully percolated question. *See California v. Carney*, 471 U.S. 386, 398-400 (1985) ("Premature resolution of the novel case presented has stunted the natural growth and refinement of alternative principles...The certainty that is supposed to come from speedy resolution may prove illusory if a premature decision raises more questions than it answers.") (Stevens, J., dissenting).

B. The Minnesota Supreme Court's unanimous holding comports with this Court's longstanding retroactivity principles.

Petitioner erroneously claims that the Minnesota Supreme Court violated retroactivity principles by holding that *Birchfield* is retroactive to test-refusal convictions. Petitioner's analysis is incorrect.

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[4] Importantly, Johnson was charged *only* with refusing a warrantless blood or urine test. Unlike many people who are accused of driving under the influence in Minnesota, Johnson was not charged with driving while intoxicated *and* test-refusal.

When a new substantive rule is announced, it applies retroactively to final cases. *Teague v. Lane*, 489 U.S. 288, 311 (1989). To determine whether a rule is substantive, courts look to the essence of the rule. A new rule is substantive if the decision "narrow[s] the scope of a criminal statute by interpreting its terms" or places "particular conduct * * * beyond the State's power to punish[.]" *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Similarly, when the Supreme Court decrees that "a * * * criminal statute does not reach certain conduct," that ruling is substantive and therefore retroactive. *Bousley v. United States*, 523 U.S. 614, 620 (1998). Such a holding "necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Schriro*, 542 U.S. at 352 (internal quotations omitted). A new rule that modifies the elements of a criminal offense is normally substantive because it "alter[s] the range of conduct the statute punishes[.]" *Id.* at 354.

In an opinion authored by the Chief Justice, a unanimous Minnesota Supreme Court correctly determined that the *Birchfield* rule is substantive because it narrowed the scope of the test-refusal statute and changed the elements of test refusal. *Johnson*, 916 N.W.2d at 682. To bring Minnesota's test-refusal statute into compliance with the *Birchfield* decision, the Minnesota legislature later narrowed the scope of the statute by adding a requirement that an officer have a warrant or a valid warrant exception. *See* Minn. Session Laws, Ch. 83, Art. 2, Sec. 2; Minn. Stat. § 169A.20, subd. 2(2) (2017).

Furthermore, the Minnesota Supreme Court properly held that Johnson is part of a new class of people: those who refused to submit to a warrantless blood or urine test and were convicted of test refusal despite the lack of exception to the warrant requirement.

Johnson, 916 N.,W.2d at 684. Because the people in this class are legally and factually innocent, there is no procedural mechanism that could guarantee a valid conviction – no matter how "impeccable" the factfinding procedures. *Schriro*, 542 U.S. at 352. This is because Johnson was convicted of test refusal, not driving while intoxicated. Johnson is not, as the state asserts, a "habitual drunk driver." (Pet. 12.) He is a habitual exerciser of his Constitutional rights. No procedure could validate Johnson's conviction for refusing an unconstitutional search because it is no longer a crime to exercise one's Constitutional rights. Thus, the Minnesota Supreme Court correctly held that the *Birchfield* rule is not procedural. It is substantive, and fully retroactive.

Petitioner argues that *Birchfield* cannot be retroactive because it has a procedural component. (Pet. 8, 11.) This argument is flawed because this Court has already held that a procedural component of a new rule does not inherently make that rule procedural. *See Mackey v. United States*, 401 U.S. 667 (1971); *United States v. United States Coin & Currency*, 401 U.S. 715 (1971). Indeed, a rule might be procedural as applied to one person (where, as in *Mackey*, *evidence was gathered* in violation of the defendant's Constitutional rights), but substantive as applied to another (where, as in *Coin & Currency*, *the conviction itself* was invalid). *See Mackey*, 401 U.S. at 675; *Coin & Currency*, 401 U.S. at 724; *See also Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (holding that new rule invalidating clause of sentencing statute was substantive despite arguably having procedural component).

Petitioner and amicus ignore the vital distinction between the procedural and substantive components of the new rule. The *Birchfield* rule is arguably procedural for

people who submit to a warrantless test and are convicted of driving while intoxicated. These people could be found guilty of their crime – driving while intoxicated – if the government used different procedures to gather evidence.[5] But *Welch* and *Coin & Currency* make it clear that *Birchfield's* procedural component is irrelevant to the question of whether it also has a substantive reach. The Minnesota Supreme Court correctly determined that *Birchfield* is substantive and fully retroactive for people convicted of refusing an unconstitutional search regardless of the rule's procedural component.

Petitioner also argues that Johnson is not entitled to retroactive application of the *Birchfield* rule because that case relied upon Fourth Amendment principles. (Pet. 8.) This faulty analysis is again belied by this Court's case law.

The focus on the nature of the amendment is irrelevant in this retroactivity analysis for two reasons. First, Johnson is not making a Fourth Amendment suppression claim or arguing that the state relied on improperly-obtained evidence when it convicted him of test refusal. Instead, as in *Birchfield*, there is no evidence to suppress because Johnson's conviction was for refusing a warrantless test – not driving while intoxicated. *Birchfield*, 136 S. Ct. at 2186. Johnson challenged not the validity of the evidence against him, but the validity of his conviction itself. This is more properly considered as a Fifth

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[5] The amicus contends that people convicted of driving while intoxicated after consenting to a warrantless blood test could have their convictions vacated following the Minnesota Supreme Court's *Johnson* decision. (Amicus Br. 9-10.) This contention not only materially misstates the issue presented in *Johnson*, but is also legally incorrect under *Mackey*, where this Court held that evidence gathered in violation of a person's Constitutional rights does not invalidate a final conviction. *Mackey*, 401 U.S. at 675.

and Fourteenth Amendment due process claim, not a Fourth Amendment suppression issue. That is because the ultimate question is whether the state had jurisdiction to prosecute (and whether the court had jurisdiction to convict) Johnson in the first place. *Johnson*, 916 N.W.2d at 681. The Fourth Amendment is thus irrelevant to the question of whether *Birchfield* is retroactive. *Id.*

Second, this Court has affirmed that the nature of the constitutional amendment is not the focus of retroactivity analysis. Indeed, the *Welch* Court specifically held that this Court determines "whether a new rule is substantive or procedural by considering the function of the rule, not its underlying constitutional source." 136 S. Ct. at 1265; *see also Coin & Currency*, 401 U.S. at 725 ("[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based.") (Brennan, J., concurring) (internal quotations omitted). Similarly, the Court recently held that a decision regarding mandatory life sentences for juveniles was fully retroactive regardless of the fact that the decision was based upon an Eighth Amendment claim. *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016). Because the constitutional source of the new rule is irrelevant to retroactivity analysis, Petitioner's argument fails.

This Court should recognize the State of Minnesota's petition and the amicus's brief for what they are: an expression of the state's and MADD's disagreement with this Court's decision in *Birchfield,* and an ill-conceived attempt to obtain review of issues that soundly comport with this Court's retroactivity jurisprudence or are simply not presented by this case. Because this petition was untimely, and because there is no reason to grant the petition under U.S. Sup. Ct. Rule 10, this Court should deny the state's request for a

writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied because it is untimely and without merit.

Respectfully submitted,

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