No. 19-1070

In the
Supreme Court of the United States

JEFFREY ALAN OLSON,
Petitioner

v.

PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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Questions Presented

Is *Birchfield v. North Dakota*, which applies the Fourth Amendment warrant requirement to DUI blood draws, a "substantive" rule under *Teague v. Lane*?

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The Fourth Amendment to the United States Constitution provides:

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

Statement of the Case

Teague v. Lane, 489 U.S. 288 (1989), generally makes new constitutional rules inapplicable on collateral review. One exception, however, is new "substantive" rules. Substantive rules make certain "primary, private individual conduct" non-criminal—the state may no longer criminalize that conduct.

Here the "primary conduct" is refusing a DUI blood draw. Under *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), that conduct is still criminal. *Birchfield* requires the state to obtain a search warrant or prove a warrant exception—steps that do nothing to decriminalize the primary conduct.

Birchfield's new rule is therefore procedural. In any event, *Teague-Birchfield* claims are necessarily rare, and are headed for extinction. This case does not warrant certiorari.

Jeffrey Alan Olson entered an open guilty plea to driving under the influence in the Court of Common Pleas of Somerset County, Pennsylvania, on September 18, 2015. This was Olson's third DUI conviction (N.T. 12/21/15, 5). His refusal to allow a blood test required a mandatory one-year maximum term for the DUI offense under 75 Pa.C.S. § 3804(c)(3)(i). In addition, Olson's combination of multiple prior offenses and refusal of blood testing increased the grade of the DUI offense to a misdemeanor of the first degree under 75 Pa.C.S. § 3803(b)(4), allowing a maximum term of five years pursuant to 18 Pa.C.S. § 1104. On December 21,

2015, the Honorable John M. Cascio imposed a sentence of 18 to 60 months of imprisonment.

Olson did not appeal. His judgment became final on January 20, 2016, with the expiration of the 30 day period for seeking direct review. 42 Pa.C.S. § 9545(b)(3)("a judgment becomes final at the conclusion of direct review … or at the expiration of time for seeking the review").

Birchfield was decided five months later, on June 23, 2016. On August 17, 2016, Olson filed a petition for state collateral review, claiming that criminal penalties for refusing the blood test were barred by *Birchfield*. Judge Cascio denied the petition on December 23, 2016.

Olson appealed to the Pennsylvania Superior Court. Consistent with this Court's precedents, that court decided that *Birchfield* does not apply retroactively to final judgments on collateral review, because its new rule "does not alter the range of conduct or the class of persons punished," but "regulates only the manner of determining" the degree of the offender's culpability and punishment. *Commonwealth v. Olson*, 179 A.3d 1134, 1139 (Pa. Super. 2018). Olson sought and was granted further review in the Pennsylvania Supreme Court, which affirmed, agreeing that the new rule in *Birchfield* is not substantive under *Teague*. Quoting *Birchfield*, that court emphasized that "a State may [still] criminalize the refusal to comply with a demand to submit to the required testing" provided it complies with the warrant requirement. *Commonwealth v.*

Olson, 218 A.3d 863, 872 (Pa. 2019); *Birchfield*, 136 S. Ct. at 2172.

Olson then filed the instant petition. This Court directed the filing of a formal response.

Reasons for Denying the Writ

1. Certiorari is unwarranted for this vanishing issue.

In the years since *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) was decided, a *Birchfield-Teague* claim (*Teague v. Lane*, 489 U.S. 288 (1989)) has been raised and decided in only four state supreme courts, and one federal court, *Hanzik v. Davis*, No. 3:16-CV-291, 2017 WL 5178796, at *2–3 (S.D. Tex. Nov. 7, 2017) ("The question of whether a state may criminalize a suspected drunk driver's refusal to submit to a warrantless blood draw has nothing to do with whether that state may criminalize drunk driving itself; it relates solely to the issue of how the Fourth Amendment allows the culpability for drunk driving to be determined").

The claim may not reappear. Even in the few jurisdictions that criminalize refusing a blood draw,[1]

[1] A June 2018 survey by the National Association of State Legislatures found that only 11 jurisdictions impose additional criminal penalties for refusing a blood draw: https://www.ncsl.org/Portals/1/Documents/transportation/Criminal_or_Ehanced_Civil_penalties_implied_consent_refusal_27135.pdf

DUI sentences are usually brief. (Olson's five year maximum was unusually high as this was his third offense). Collateral review in which *Teague* applies is generally restricted to offenders in custody. Since the direct appeal process can be lengthy (Olson was unusual in that he did not file one), DUI offenders eligible for collateral review are rare.

Since 2016, of course, offenders with a *Birchfield* claim have either raised it on appeal or waived it, which rules out a *Teague* issue. Olson, whose judgment became final just a few months before *Birchfield* was decided, is unusual in that he benefitted from a peculiarity of Pennsylvania law holding that sentencing illegality claims cannot be waived. *Commonwealth v. Olson*, 218 A.3d 863, 867 (Pa. 2019) ("a challenge to such a sentence implicates the sentence's legality, and thus is nonwaivable").

In short, the *Birchfield-Teague* issue is a *rara avis* likely headed toward extinction. It may not appear again in the few remaining jurisdictions that criminally penalize blood test refusal.

Because this case does not present a question that goes "beyond the academic," *see Rice v. Souix City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955), certiorari is unwarranted.

2. *Birchfield's* new rule applying the Fourth Amendment search warrant requirement is procedural under *Teague*.

Teague establishes a general rule against retroactive application of new rules on collateral review. "[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016); *Teague*, 489 U.S. at 310. There are two "narrow exceptions," *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997), to the *Teague* rule; only the first—for "new substantive rules," *Welch, id.* (citations omitted)—is relevant here.[2]

Because a blood draw is a search of the person, *Birchfield* held that a warrant must be secured, or a warrant exception established, to justify a state's demand for one. *Birchfield*, 136 S. Ct. at 2173-2174.[3]

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[2] The *Teague* exception for "watershed" rules has not been invoked by petitioner, and in any event has proven to be chimerical. *E.g., Whorton v. Bockting*, 549 U.S. 406, 417-418 (2007) ("in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status") (collecting cases); *Beard v. Banks*, 542 U.S. 406, 417 (2004) ("it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception").

[3] This rule is new. Prior decisions held that compelling a blood test did not require a warrant and did not violate the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757 (1966); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) (*Schmerber* "clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test").

Petitoner argues that this Fourth Amendment ruling is "substantive," and thus retroactive, under *Teague*. But a substantive rule is one that categorically bars prosecution of certain primary conduct. *E.g., Texas v. Johnson*, 491 U.S. 397 (1989) (barring prosecution of burning the American flag). *Birchfield* does not do that. [4]

Where the crime consists of refusing a blood draw, the "primary, private individual conduct," *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), is the refusal. *See Lindh v. Murphy*, 521 U.S. 320, 341 (1997) ("the primary conduct occurred when Lindh murdered two people"). Had *Birchfield* stated a substantive rule, states could no longer prosecute refusal of a blood draw. Nothing a state could do would permit it. *Welch v. United States*, 136 S. Ct. at 1265 (under a substantive rule even the use of "impeccable" process could not authorize criminal sanction); *Montgomery*, 136 S. Ct. at 730 (same).

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[4] A new rule may also be substantive if it prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Montgomery v. Louisiana*, 136 S. Ct. at 732 (citations omitted); *e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (barring capital punishment for juvenile offenders). *Birchfield*, however, obviously did not discuss any class of defendants or bar any specific punishment. In addition, a new decision that alters a statue is substantive if it "alter[s] the range of conduct or the class of person" the statute punishes. *Welch v. United States*, 136 S. Ct. at 1264, 1267. *Birchfield*, however, did not discuss, or even mention, the terms of any statute.

Here instead, the primary conduct that was criminal before *Birchfield* remains criminal after *Birchfield*. *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (new rule not substantive because "the range of conduct punished by death in Arizona was the same before [the new rule] as after"). This Court said as much in *Birchfield* itself, explaining that "a State may criminalize the refusal to comply with a demand to submit to the required testing" provided "such warrantless searches comport with the Fourth Amendment." *Birchfield*, 126 S. Ct. at 2172. Under *Birchfield* the state is free to prosecute the primary conduct of refusing a blood draw provided it obtains a search warrant or proves a warrant exception. If the rule was substantive, no prosecution would be possible regardless of what steps the state might take.

Birchfield thus establishes a procedural rule. Requiring Fourth Amendment justification for police conduct does not categorically bar the prosecution of any "primary, private individual conduct." A Fourth Amendment ruling can limit states' ability to prosecute individual homicides, for example, but that does not decriminalize homicides in general. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) (new limit on interrogations did not place "individual conduct beyond the power of the criminal law-making authority to proscribe"; "[t]he proscribed conduct in the instant case is capital murder, the

prosecution of which is, to put it mildly, not prohibited by the rule").[5]

Alleyne v. United States, 133 S. Ct. 2151 (2013), is illustrative. It requires states to treat acts (other than a prior conviction) that increase the minimum penalty as elements of a crime. Such conduct must therefore (inter alia) be found at trial, by a jury, beyond a reasonable doubt. But *Alleyne* does not bar criminalizing any conduct. Quite to the contrary, like *Birchfield* it specifies the procedural measures that are needed to *prosecute* the primary conduct. It is not substantive. *See Alleyne,* 133 S. Ct. at 2164 (Sotomayor, J., concurring) (explaining that in *Alleyne* "procedural rules are at issue"); *id.* at 2173 n. * (Alito, J., dissenting) (*Alleyne* involves a procedural rule).

In this case the Pennsylvania Supreme Court correctly recognized that *Birchfield*, like *Alleyne*, does not categorically decriminalize the primary conduct of refusing a blood draw. 218 A.3d at 873-874 ("*Birchfield* does not prohibit the imposition of criminal penalties for the refusal," but "set[s] forth conditions necessary to" do so) (citing *Alleyne* and

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[5] *Butler* concerned a new Fifth Amendment rule in *Arizona v. Roberson*, 486 U.S. 675 (1988), which extended the bar to police interrogations announced in *Edwards v. Arizona*, 451 U.S. 477 (1981), to cases in which the police seek to question a suspect about an offense unrelated to the subject of the initial investigation.

Montgomery). It accurately applied this Court's precedent.[6]

The defect in petitioner's position is his attempt to expand the definition of "primary, private individual conduct" to include its opposite—conduct by the state. He identifies the primary conduct here as "refus[ing] consent to a blood draw in the absence of a warrant or [warrant] exception" (Pet. 13), and characterizes *Birchfield* as imposing a "prohibition on imposing criminal penalties in the absence of a warrant or exigent circumstances" (Pet. 18).

That argument conflates primary conduct with state action. While under a substantive rule nothing a state does will permit it to prosecute, under petitioner's conception of primary conduct the state's ability to prosecute is contingent on its compliance with the warrant requirement. The latter is conduct by the state, not the primary conduct that constitutes the offense. No state has specifically criminalized "blood test refusal in the absence of a warrant or warrant exception" rather than "blood test refusal," and doing so would obviously run afoul of *Birchfield*. But if one did, the "primary, private individual" conduct would remain the refusal, not the absence of a search warrant or an exception. Just as in *Butler*

[6] The dissenting opinion of Chief Justice Saylor deemed the right to be free from unreasonable searches "substantive" because of its importance. 218 A.3d at 876-877. But "substantive" is not a synonym for "important." As this Court recognized in *Welch*, the *Teague* exception for substantive rules depends on "the function of the rule, not its underlying constitutional source." 136 S. Ct.at 1265.

restriction on interrogations did not decriminalize homicide by disallowing "homicides proved with improper interrogations," *Birchfield* did not decriminalize refusal by preventing penalties for some refusals based on state conduct, i.e., "blood test refusal in the absence of a warrant or warrant exception."

Petitioner notes that his position has been accepted by three states: *Morel v. State*, 912 N.W.2d 299 (ND 2018); *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018); and *State v. Vargas*, 404 P.3d 416 (NM 2017). But while a split of authority may generally support a grant of certiorari, these decisions contain no analysis when it comes to defining primary conduct under *Teague*. Rather, they assume, without discussion, that primary conduct may include a combination of private and state conduct.

The *Morel* Court articulated that substantive rules "place a particular conduct beyond the state's power to punish," 912 N.W.2d at 304, but did not otherwise address the question of whether *Birchfield* decriminalized primary conduct. The *Vargas* Court similarly announced, without further explanation, that the "primary, private, individual conduct" in question is refusal of "warrantless" blood tests. 404 P.3d at 420. But lack of a warrant is state conduct, not primary conduct. Finally, the *Johnson* Court rejected the state's contention that *Birchfield* "modified [only] police conduct" on the ground that "no procedure" could validate prosecution of a refusal "when the police did not have a warrant or a warrant exception." 916 N.W.2d at 683. But that, once again,

conflates private and state conduct. Getting a warrant or proving an exception are procedures undertaken by the state, not primary conduct.

Should this issue ever be raised elsewhere, therefore (and that is unlikely), the next jurisdiction will have the benefit of the Pennsylvania Supreme Court's analysis, and so will be unlikely to repeat the error of the three states on which petitioner relies.

Petitioner further argues that *Birchfield* must be substantive because it supposedly does not meet the definition of a procedural rule (Pet. 18). Unlike a substantive rule that places "certain criminal laws and punishments altogether beyond the State's power to impose," a procedural rule promotes "the accuracy of a conviction or sentence" by governing the "manner of determining" culpability. *Montgomery v. Louisiana*, 136 S. Ct. at 729-730 (emphasis omitted).

But the latter describes *Birchfield*. Actions that the state must take in order to prosecute or convict, such as compliance with the search warrant requirement, obviously concern the "manner of determining" culpability, not whether the offense is categorically invalid to begin with. In any event, even if *Birchfield* did not fall neatly into the definition of a procedural rule, this Court has never held that whatever is not procedural is therefore substantive, however unrelated to primary conduct.

As *Montgomery* further explains, the reason *Teague* excludes substantive rules is that they do not

implicate the states' interest in avoiding continual marshaling of resources on collateral review. Under a substantive rule that is not a problem, because the state had no power to impose the conviction to begin with, and no amount of mustering of resources could matter. 136 S. Ct. at 732.

That again contrasts with *Birchfield*, under which a state may uphold the judgment by proving exigent circumstances—something that may be difficult on collateral review, but is certainly not impossible. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (plurality) (remanding for proceedings regarding exigent circumstances, explaining that police may "almost always" justify a warrantless blood test for stuporous or unconscious suspects); 2539-2540 (Thomas, J., concurring) (exigency to obtain blood test should be recognized *per se*).

Treating *Birchfield* as if it were substantive would be particularly inappropriate under the reasoning of *Teague*. In many pre-*Birchfield* cases (if not most, as *Mitchell* suggests) the state might well have established exigent circumstances had the law required it at the time. Applying *Birchfield* retroactively would make proper convictions appear otherwise only because evidence of exigency was lost due to the passage of time. That would frustrate precisely those "interests in finality, predictability and comity," *Stringer v. Black*, 503 U.S. 222, 228 (1992), that *Teague* protects.

In summary, not only is petitioner's claim unlikely to recur, it is unsuitable for review because it is devoid of merit. The petition should be denied.

Conclusion

For these reasons, the Commonwealth respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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