No.

In the Supreme Court of the United States

THOMAS S. BELL, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The petitioner, a Pennsylvania motorist, refused to submit to a warrantless blood test. Petitioner was charged with driving under the influence, and his refusal was used at trial as evidence of guilt. A divided Pennsylvania Supreme Court held that statutory implied consent permits a State to use Petitioner's exercise of his Fourth Amendment right against him, despite this Court's holding in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), recognizing a constitutional right to refuse to consent to a warrantless blood test.

The question presented is:

Whether a motorist's assertion of his Fourth Amendment right to refuse consent to a warrantless blood test may be used as evidence of guilt for the offense of driving under the influence?

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Pet. App. 1a–77a) is reported at 211 A.3d 761. The opinion of the Superior Court of Pennsylvania (Pet. App. 78a–90a) is reported at 167 A.3d 744. The opinion of the Court of Common Pleas of Lycoming County (Pet. App. 91a–97a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 17, 2019. On September 23, 2019, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including November 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

Pennsylvania law, 75 Pa. Cons. Stat. § 1547(e), provides in relevant part:

> **Refusal admissible in evidence.**—In any summary proceeding or criminal proceeding in which the defendant is

charged with [driving under the influence] or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing . . . may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.

INTRODUCTION

Following his arrest for driving under the influence (DUI), petitioner Thomas Bell refused to consent to a warrantless blood alcohol test. The arresting officers did not obtain a warrant or perform a blood test. Even so, at trial, the court relied on Mr. Bell's refusal to consent to the blood test as evidence that established his guilt for a DUI offense.

After Mr. Bell's conviction, this Court decided *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), which held that a motorist has a constitutional right to refuse a warrantless blood test. In light of *Birchfield*, Mr. Bell moved for reconsideration. The trial court granted the motion, reasoning that *Birchfield*'s holding required the consequent conclusion that such a refusal could not be used as evidence against that person at trial. Because the court had relied on this "refusal evidence" to convict Mr. Bell of a DUI, the court held that he was entitled to a new trial.

The Commonwealth appealed and the case eventually reached the Supreme Court of Pennsylvania. In a 5–2 decision, that court held that the Fourth Amendment did not bar the use of refusal evidence to prove guilt. By contrast, the dissent concluded that using Mr. Bell's refusal to prove his guilt for a DUI offense violated the Fourth Amendment.

The Supreme Court of Pennsylvania's decision incorrectly ignored *Birchfield*'s holding that the Fourth Amendment prohibits a State from imposing criminal sanctions for a motorist's refusal to consent to a warrantless blood alcohol test. To be sure, *Birchfield* involved a separate criminal sanction for refusal

to consent to such a test. But the use of refusal evidence to convict a motorist of the crime of DUI accomplishes the same end: in both instances, the State imposes a criminal penalty on a motorist for exercising a constitutional right. Here, Mr. Bell was forced to choose between the exercise of his constitutional right to refuse a warrantless blood test and the use of that refusal to convict him of a criminal DUI offense. Motorists may not be put to such a Hobson's choice.

For that reason, outside of the DUI context, the long-established, uniform view of state and federal courts is that a defendant's refusal to relinquish Fourth Amendment rights is not admissible evidence of guilt. Yet under the rubric of "implied consent," nearly 30 States have statutes that allow a motorist's criminal conviction for DUI to be based on the refusal to submit to a warrantless blood test.

Since *Birchfield*, state courts are confused about the propriety of using refusal evidence to prove guilt in the DUI context—pulled between *Birchfield*'s holding that a motorist has a right to refuse a warrantless blood test and pre-existing state statutes to the contrary. Of the courts to consider the issue so far, a handful have taken the same approach as the Supreme Court of Pennsylvania here, while several others have signaled confusion, concluding that refusal evidence cannot be used to prove guilt. Given the importance and pervasiveness of this question, a definitive ruling now by this Court would have nationwide significance.

This case is the ideal vehicle for addressing the question presented, which was fully litigated below. A resolution of the issue in Mr. Bell's favor would, at a minimum, cause his conviction to be vacated. Such a

ruling would clarify that a State may not use a motorist's exercise of his Fourth Amendment right to refuse consent to a warrantless blood test as evidence of his guilt for a DUI offense.

STATEMENT

1. Factual Background

On May 16, 2015, petitioner Thomas S. Bell, a 65-year-old man, was driving home from a fundraiser when he was pulled over by the police because his car's rear lights were off. Pet. App. 89a, 120a, 155a. After approaching the car, the officer asked Mr. Bell if he had been drinking. *Id.* at 122a. Mr. Bell replied that he had four beers about five hours earlier. *Id.* at 122a. The police then told Mr. Bell to step out of the car and perform two field sobriety tests. *Id.* at 109a–110a.

The officer noticed that Mr. Bell "was shaky" when he got out of the car, like "somebody that was sitting for hours and hours" and had just stood up. *Id.* at 122a–123a. In fact, Mr. Bell's nerves are cut in his left leg, which causes him to walk with a limp, a fact that Mr. Bell explained to the officers. *Id.* at 166a, 170a. Still, the officers administered a heel-to-toe walk and one-legged stand test. After a suboptimal performance on both tests, Mr. Bell was arrested for DUI. *Id.* at 170a.

Mr. Bell was then transported to Williamsport Hospital DUI Center, where he was asked to submit to a warrantless blood test. *Id.* at 171a. Mr. Bell declined, explaining that he had once contracted hepatitis from Williamsport Hospital "and didn't want a needle in his arm." *Id.* at 145a. The police "never considered a search warrant" for a blood test and

never asked Mr. Bell to take a breath or urine test. *Id.* at 135a, 147a–148a.

2. Procedural Background

Mr. Bell was charged in the Court of Common Pleas of Lycoming County, Pennsylvania with misdemeanor DUI. *See* Pet. App. 89a; 75 Pa. Cons. Stat. § 3802. He moved to suppress evidence of his refusal to submit to a warrantless blood test, arguing that the Fourth Amendment guaranteed him a right to refuse a warrantless blood test. *See* Pet. App. 104a. Because that refusal evidence lay at the heart of the Commonwealth's case, Mr. Bell also moved to dismiss the charge. *Id.*

The trial court denied Mr. Bell's motion and proceeded to a bench trial where the Commonwealth argued that Mr. Bell's refusal was "critical" to its case. Pet. App. 153a. During summation, the Commonwealth argued that Mr. Bell "refused the blood test because he knows that he's guilty and the test will prove it." *Id.* at 186a. In finding Mr. Bell guilty, the judge agreed, saying that "everybody comes up with the excuse 'I don't like needles,' when they refuse a blood test," and they say that because "they know what the result is going to be and there is a consciousness of guilt." *Id.* at 190a.

But the judge acknowledged that there was "a great deal of argument" favoring an acquittal, noting that Mr. Bell "is 65 years old, . . . has a bad leg," and there was no "fault with his driving . . . other than the fact that he failed to activate the rear light." *Id.* at 189a. The sobriety tests also were not persuasive because the only evidence of non-compliance on the heel-

to-toe walk was that Mr. Bell "raised his arms starting out, . . . had more than an inch" between his heel and toe and only "did eight steps." *Id.* The judge also questioned the importance of the one-legged stand test, where Mr. Bell "only went for 25 seconds instead of the required 30." *Id.*

Lamenting the "lack of evidence," the judge nevertheless pointed to "the opinion of two trained police officers, and [to] the refusal" in concluding that he was "convinced that [Mr. Bell] was under the influence of alcohol" that night. *Id.* at 190a. Based on that evidence, the judge found him guilty.

Shortly after Mr. Bell's conviction, this Court decided *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016), which established that blood tests incident to arrest fall under the warrant requirement of the Fourth Amendment. Mr. Bell moved for reconsideration of his motion to suppress, which the trial court granted, reasoning that Mr. Bell had "a constitutional right to refuse" the blood test, and his "refusal cannot provide the basis for him to be convicted of a crime." Pet. App. 109a. Noting that the refusal evidence was "instrumental" in the conviction, *id.* at 105a, the court held Mr. Bell was entitled to a new trial, *id.* at 110a. The Commonwealth appealed and the Pennsylvania Superior Court reversed, reinstating the guilty verdict. *See id.* at 88a–102a.

The Supreme Court of Pennsylvania granted discretionary review to determine whether use of Mr. Bell's refusal as evidence of guilt violated the Fourth Amendment. Pet. App. 2a. The majority held that it did not. *Id.* at 30a–34a. The majority recognized that "a refusal to submit to the warrantless blood test would [normally] be inadmissible at any subsequent

trial" because that use "violates the Fourth Amendment rights of a motorist suspected of DUI." *Id.* at 25a–26a. Even so, the majority concluded that Pennsylvania law allowed use of such evidence as a condition of driving a car. *See id.* at 23a; 75 Pa. Cons. Stat. § 1547(e). That statutory provision was "the distinguishing factor" rendering the evidence admissible. Pet. App. 26a. Two justices concurred, arguing that the refusal would be admissible even without Section 1547(e).

Two justices dissented. The dissent observed that *Birchfield* "altered the Fourth Amendment paradigm in DUI investigations" and created a "substantial ripple effect upon numerous other questions of constitutional dimension." Pet. App. 41a (Wecht, J., joined by Donohue, J., dissenting). The dissent recognized that a "blood test, unlike a breath test, is an intrusive manner of Fourth Amendment search," and in Mr. Bell's case, there was "no readily available exception to the Fourth Amendment's warrant requirement." *Id.* at 42a. Thus, Mr. Bell had "a right to refuse such a warrantless search, and the exercise of that right may not be penalized, coerced, burdened, manipulated, or involuntarily bargained away by the State." *Id.* In other words, the dissent echoed the principal holding in *Birchfield*, that "officers merely must obtain search warrants for blood tests, or resort to the exigent circumstances exception when they cannot." *Id.*

The dissenters noted that protecting Mr. Bell's right will not burden DUI law enforcement because the "evidence that the Commonwealth seeks remains available in every circumstance, either through a categorically valid warrantless breath test or by 'seeking

a warrant for a blood test.'" Pet. App. 82a (quoting *Birchfield*, 136 S. Ct. at 2184). The dissenters concluded that "[w]e need not and should not strain the Fourth Amendment in order to find ways for the Commonwealth to obtain blood evidence without a search warrant. Rather, for blood tests, we should simply enforce the Fourth Amendment's warrant requirement." *Id.* at 82a.

REASONS FOR GRANTING THE PETITION

I. THE PENNSYLVANIA SUPREME COURT'S DECISION ALLOWING REFUSAL EVIDENCE CONFLICTS WITH THE FOURTH AMENDMENT

This Court should grant the petition for a writ of certiorari because the decision below is incompatible with established constitutional principles. This Court held in *Birchfield* that a motorist has a Fourth Amendment right to refuse a warrantless blood test. 136 S. Ct. at 2184. Although a State cannot unreasonably burden the exercise of a constitutional right, *see United States v. Jackson*, 390 U.S. 570, 572 (1968), Pennsylvania's law does precisely that by using a motorist's refusal to relinquish his Fourth Amendment rights to prove guilt in a criminal proceeding.

This Court's recent decisions in *Birchfield*, *supra*, and *Missouri v. McNeely*, 569 U.S. 141, 165 (2013), establish that a blood test is an intrusive search under the Fourth Amendment, requiring either a valid warrant or an exception to the warrant requirement. *See Birchfield*, 136 S. Ct. at 2173. Without either, a motorist has a Fourth Amendment right to refuse consent to a warrantless blood test.

This Court has found, moreover, that no *per se* exceptions to the warrant requirement apply in the DUI context. *See McNeely,* 569 U.S. at 165. Instead, in *McNeely*, this Court concluded that in "those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152.

Three years later in *Birchfield*, this Court adopted a categorical search-incident-to-arrest exception for a breath test but found that exception inapplicable to a blood test. 136 S. Ct. at 2184. The Court found that blood tests are "significantly more intrusive" than breath tests because they "require piercing the skin and extract a part of the subject's body" and allow law enforcement to "extract information beyond a simple [blood alcohol concentration] reading." *Id.* at 2178 (internal quotation marks omitted). This Court found "no satisfactory justification for demanding the more intrusive alternative without a warrant" because "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so." *Id.* at 2184.

Having determined that the Fourth Amendment guarantees motorists a constitutional right to refuse a blood test, the *Birchfield* Court held that a state may not impose criminal penalties for a motorist's refusal to take a blood test under so-called "implied consent" laws. Although the Court recognized in dicta that States may use "implied consent" laws to impose certain civil and evidentiary consequences on a motorist for refusal to consent, it held that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* at 2185. In particular, the Court found it would exceed those constitutional limits "for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Id.* As a result, "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

Birchfield held that a stand-alone crime directly punishing a motorist's refusal to consent violated the Fourth Amendment. But reliance on Mr. Bell's refusal to consent to convict him of a criminal DUI offense suffers from the same constitutional deficiency. To convict a motorist of a crime based on his exercise of his Fourth Amendment right is not a mere "evidentiary consequence," as the Supreme Court of Pennsylvania concluded. Rather, it is an end run around *Birchfield*'s holding that a State may not criminally prosecute a motorist based on his insistence that the State obtain a search warrant where the Fourth Amendment requires one.

This Court's prior precedents recognize that a defendant's assertion of his constitutional rights cannot be used as evidence of his guilt. For example, in *Griffin v. California*, 380 U.S. 609, 614 (1965), this Court held that a State may not comment on a defendant's refusal to testify at trial because doing so would unconstitutionally burden the defendant's Fifth Amendment privilege against self-incrimination. *See also Harman v. Forssenius*, 380 U.S. 528, 541–42 (1965). In *United States v. Jackson*, 390 U.S. 570, 581–82 (1968), this Court extended *Griffin*'s reasoning by striking down a provision in the Federal Kidnapping Act making the death penalty applicable only to those defendants who asserted the right to a jury trial. The Court held that the law impermissibly burdened the defendant's exercise of his Sixth Amendment right to a jury trial by discouraging the exercise of that right. *Id.*

Outside the DUI context, every federal court of appeals to address the issue has applied *Griffin* and *Jackson* to conclude that proving guilt

with refusal evidence violates a defendant's Fourth Amendment rights. *See*, *e.g.*, *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (holding that "refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing" because, otherwise, "an unfair and impermissible burden would be placed upon the assertion of a constitutional right"); *see also United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *United States v. Thame*, 846 F.2d 200, 205–08 (3d Cir. 1988).[1]

Likewise, before *Birchfield*, every state high court to address the question, including the Supreme Court of Pennsylvania, had also concluded that a defendant's refusal to relinquish his Fourth Amendment right is inadmissible to prove guilt. *See*, *e.g.*, *Bargas v. Alaska,* 489 P.2d 130, 133 (Alaska 1971) ("One's assertion of his constitutional right not to submit to a search of his person cannot be used as evidence of guilt if this constitutional right is to have any meaning.").[2]

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[1] Some circuit courts of appeals have not directly addressed the issue but implied or suggested that introducing refusal evidence violates the Fourth Amendment. *See United States v. Moreno*, 233 F.3d 937, 940–41 (7th Cir. 2000); *United States v. McNatt*, 931 F.2d 251, 255–58 (4th Cir. 1991); *see also United States v. Clariot*, 655 F.3d 550, 555 (6th Cir. 2011) ("The exercise of a constitutional right, whether to refuse to consent to a search, to refuse to waive *Miranda* rights or to decline to testify at trial, is not evidence of guilt.").

[2] *See also Idaho v. Christiansen*, 163 P.3d 1175, 1182–83 (Idaho 2007); *Deno v. Kentucky*, 177 S.W.3d 753, 762 (Ky. 2005); *Longshore v. Maryland*, 924 A.2d 1129, 1158–59 (Md. 2007);

Yet, after *Birchfield*, the Supreme Court of Pennsylvania deviated from this well-worn path and concluded that the government may evade the Fourth Amendment based on an evidentiary statute unique to the DUI context. On the one hand, the Supreme Court of Pennsylvania recognized that "a refusal to submit to the warrantless blood test would [normally] be inadmissible at any subsequent trial" because such use would "violate[] the Fourth Amendment rights of a motorist." Pet. App. 26a. The Court nevertheless

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Minnesota v. Jones, 753 N.W.2d 677, 686–87 (Minn. 2008); *Sampson v. Nevada*, 122 P.3d 1255, 1261 (Nev. 2005); *Garcia v. New Mexico*, 712 P.2d 1375, 1376 (N.M. 1986); *North Carolina v. Jennings*, 430 S.E.2d 188, 200 (N.C. 1993); *Ohio v. Wiles*, 571 N.E.2d 97, 118 (Ohio 1991); *Oregon v. Banks*, 434 P.3d 361, 364–68 (Or. 2019); *Pennsylvania v. Chapman*, 136 A.3d 126, 130–31 (Pa. 2016); *Simmons v. South Carolina*, 419 S.E.2d 225, 226–27 (S.C. 1992); *see also Missouri v. Stover*, 388 S.W.3d 138, 156 & n.1 (Mo. 2012) (en banc) (implying that introducing a defendant's refusal evidence impermissible); *Smith v. Wyoming*, 199 P.3d 1052, 1061 n.1 (Wyo. 2009) (same).

Where state supreme courts have not addressed the question, intermediate state courts also uniformly reject use of refusal evidence. *See Williams v. Alabama*, 527 So. 2d 764, 772–73 (Ala. Crim. App. 1987); *Arizona v. Stevens*, 267 P.3d 1203, 1208–09 (Ariz. Ct. App. 2012); *California v. Keener*, 148 Cal. App. 3d 73, 78–79 (Cal. Ct. App. 1983); *Colorado v. Pollard*, 307 P.3d 1124, 1131 (Colo. App. 2013); *Gomez v. Florida*, 572 So. 2d 952, 953 (Fla. Dist. Ct. App. 1990); *Curry v. Georgia*, 458 S.E.2d 385, 386–87 (Ga. Ct. App. 1995); *Michigan v. Stephens*, 349 N.W.2d 162, 164 (Mich. Ct. App. 1984) (per curiam); *New Jersey v. Sui Kam Tung*, 213 A.3d 231, 244–46 (N.J. Super. Ct. App. Div. 2019); *Bosse v. Oklahoma*, 400 P.3d 834, 851 (Okla. Crim. App. 2017); *Reeves v. Texas*, 969 S.W.2d 471, 495 (Tex. Ct. App. 1998); *Washington v. Gauthier*, 298 P.3d 126, 131–32 (Wash. Ct. App. 2013); *Wisconsin v. Banks*, 790 N.W.2d 526, 533–34 (Wis. Ct. App. 2010).

held that normal Fourth Amendment principles did not apply because it found, under Pennsylvania's implied consent law, 75 Pa. Cons. Stat. §§ 1547 *et seq*, that Mr. Bell had "agreed (by undertaking to engage in a civil privilege such as operating a motor vehicle) to accept an ultimatum" to "either consent to a search" or allow his refusal to be used against him in a criminal trial. Pet. App. 26a. The court distinguished *Birchfield* by asserting that the use of refusal evidence to convict Mr. Bell was not a criminal sanction, but merely an "evidentiary consequence" of the exercise of his Fourth Amendment right. *Id.* at 31a–34a.

The Pennsylvania court's use of implied consent diverges from this Court's holding in *Birchfield.* As this Court recently observed, statutory implied consent is a misnomer. Implied consent laws do not "do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532–33 (2019). Absent actual consent or an exigent circumstance, a request that Mr. Bell submit to a warrantless blood test is no different from a request that he submit to a warrantless search of his car, his computer, or his home. In all these situations, Mr. Bell has a constitutional right to refuse, and the State may not unreasonably burden the exercise of that right by introducing the refusal to prove guilt.

Protecting Mr. Bell's Fourth Amendment rights will not leave States without recourse against drunk drivers. Rather, as this Court stated in *Birchfield*, States can readily obtain a warrant for a blood test and "[b]reath tests . . . are widely credited by juries." 136 S. Ct. at 2184.

The Fourth Amendment gave Mr. Bell the right to refuse a warrantless blood test; a State may not take it away by statute. In concluding otherwise, the Supreme Court of Pennsylvania erred, and its holding must be reversed.[3]

II. SINCE *BIRCHFIELD*, STATE COURTS HAVE DIVERGED ON HOW THE FOURTH AMENDMENT PROTECTS MOTORISTS' RIGHT TO REFUSE A WARRANTLESS BLOOD TEST

This Court's decision in *Birchfield* has led to confusion among state courts over how the Fourth Amendment protects a motorist's refusal to consent to a warrantless blood test. By granting the petition for a writ of certiorari, this Court can clarify the confusion and provide guidance on this important issue.

In the short time since *Birchfield*, state courts have read the opinion in different ways. Some States continue to apply pre-*Birchfield* laws allowing evi-

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[3] This Court's decision in *South Dakota v. Neville*, 459 U.S. 553, 563 (1983), which held that refusal evidence was permissible under the Fifth Amendment, does not change the analysis. *Neville* was decided before technological advances made it so easy to obtain a warrant. At the time *Neville* was decided, rapidly dissipating evidence of blood alcohol content created exigent circumstances that allowed law enforcement to compel a blood alcohol test without a search warrant. *See Schmerber v. California*, 384 U.S. 757, 770-71 (1966). No surprise that, in those circumstances where a citizen had no right to refuse a warrantless blood test, the *Neville* Court concluded that a State could constitutionally use refusal evidence in a DUI prosecution. *Neville*'s holding depended on the absence of a constitutional right to refuse a warrantless blood test. But now that *McNeely* and *Birchfield* have recognized that right, *Neville* is inapposite.

dence of refusal—like the law here—without recognizing the import of *Birchfield*'s Fourth Amendment holding. Courts in these States have seized on a limiting admonition in *Birchfield* that "nothing [the Court] say[s] here should be read to cast doubt on" the "general concept of . . . civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2185. But a statement limiting the scope of a holding cannot possibly constitute an endorsement of the very subject matter it claims not to reach.

Like the Supreme Court of Pennsylvania, the Vermont Supreme Court nevertheless held that refusal to consent to a warrantless blood test is admissible as proof of guilt because of the State's implied consent laws. *Vermont v. Rajda*, 196 A.3d 1108, 1119–21 (Vt. 2018); *see also Nebraska v. Hood*, 917 N.W.2d 880, 892–93 & nn.49, 50 (Neb. 2018) (citing *Rajda* in determining that "evidence of a driver's refusal to submit to a warrantless blood draw is admissible in a DUI prosecution").

Going further, the Colorado Supreme Court has held that its implied consent statute means there is "no . . . constitutional right" to "refuse testing" at all. *Fitzgerald v. Colorado*, 394 P.3d 671, 674–75 (Colo. 2017). The court reasoned—in direct disregard of *Birchfield*—that because a defendant lacks any "constitutional right to refuse to take a blood-alcohol test," the constitution does not bar the prosecution from using that refusal to convict the defendant of a DUI at trial. *Id.*

These post-*Birchfield* decisions cannot withstand constitutional scrutiny. *Birchfield*'s dicta, which carved out "civil" and "evidentiary" consequences from its holding, is not an endorsement of *all*

evidentiary consequences, especially not those that create criminal liability for exercising a Fourth Amendment right. In focusing on that dicta, these Courts have held that a State may demand that motorists *either* forgo a constitutional right to be free of warrantless blood tests *or* allow the exercise of that right to be used to prove a crime. In reality, this is "no choice, except a choice between the rock and the whirlpool." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593 (1926).

Other courts have properly recognized the Fourth Amendment protections that flow to motorists in the wake of *Birchfield*. These courts have properly held that the use of refusal evidence to prove guilt is impermissible. The Kentucky Court of Appeals, for example, has held that use of refusal evidence violates the "heightened constitutional protection" that motorists have under the Fourth Amendment. *McCarthy v. Commonwealth*, No. 2017-CA-001927-MR, 2019 WL 2479324, at *3–6 (Ky. Ct. App. June 14, 2019) (publication contingent on review by the Kentucky Supreme Court). The court concluded that "it is unconstitutional to penalize a defendant for exercising his right to be free of warrantless searches by using the defendant's refusal of consent as evidence of guilt." *Id.* at *5. Thus, using a defendant's refusal to consent to a blood test to prove guilt would violate his constitutional right to decline to submit to a warrantless search. *Id.* at *3–7.

The Oregon Supreme Court reached a similar conclusion in interpreting whether refusal evidence burdened an individual's Oregon State Constitution rights. The court held that "[p]ermitting the state to adduce evidence of the exercise of [the constitutional

right to refuse to consent to a warrantless breath test] would place an impermissible burden on its assertion." *Oregon v. Banks*, 434 P.3d 361, 370–71 (Or. 2019); *cf. Idaho v. Jeske*, 436 P.3d 683, 688–89 (Idaho 2019) (assuming without deciding that a State could not comment at trial on a defendant's refusal to consent to a warrantless blood test in light of *Birchfield*; but finding such error harmless under the circumstances of that case).

In sum, in the wake of *Birchfield*, state courts are confused about whether to carve out a *sui generis* exception to long-standing constitutional doctrine that a defendant's exercise of his Fourth Amendment right cannot be used to establish guilt at trial. This Court should grant the petition for a writ of certiorari to clarify that, under *Birchfield*, the Fourth Amendment does not permit a motorist to be convicted of criminal DUI based on his refusal to submit to a warrantless blood test.

III. THIS CASE PRESENTS A QUESTION OF SUBSTANTIAL IMPORTANCE AND IS AN IDEAL VEHICLE FOR DECIDING IT

A. This is a Far-Reaching Question of Substantial Importance

The constitutionality of allowing a State to introduce refusal evidence to prove guilt has the potential to impact thousands of people across the country and merits this Court's review. Every State has an implied consent law, and nearly thirty of them allow use

of refusal evidence to prove guilt.[4] These laws affect motorists every day: over one million people were arrested for driving under the influence in 2018. Fed. Bureau of Investigation, *Estimated Number of Arrests, United States, 2018*, https://perma.cc/3V4G-4KFF (last visited Nov. 12, 2019). The importance of clarifying the scope of Fourth Amendment protections related to blood testing is all the more important with the recent advent of roadside blood tests, which increase the prevalence of the practice. *See* Jenni

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[4] *See* Alaska Stat. § 28.35.032(e); Cal. Veh. Code § 23612(a)(4); Colo. Rev. Stat. § 42-4-1301(6)(d); Conn. Gen. Stat. § 14-227b(b); Del. Code Ann. tit. 21, § 2749; D.C. Code § 50-1905(c); Fla. Stat. § 316.1932(1)(c); Ga. Code Ann. § 40-5-67.1(b); Ind. Code Ann. § 9-30-6-3(b); Kan. Stat. Ann. § 8-1001(n); La. Rev. Stat. § 32:666(A)(2)(c); Me. Rev. Stat. Ann. tit. 29-A, § 2521(3); Miss. Code Ann. § 63-11-41; Mo. Rev. Stat. § 577.041(1); Mont. Code Ann. § 61-8-404(2); Neb. Rev. Stat. § 60-6,197(6); Nev. Rev. Stat. § 484C.240(1); N.H. Rev. Stat. Ann. § 265-A:10; N.Y. Veh. & Traf. Law § 1194(2)(f); N.C. Gen. Stat. § 20-16.2(a)(3); N.D. Cent. Code § 39-20-08; 75 Pa. Const. Stat. § 1547(e); S.C. Code Ann. § 56-5-2950(B)(1); S.D. Codified Laws § 32-23-10.1; Tex. Transp. Code Ann. § 724.061; Utah Code Ann. § 41-6a-524; Vt. Stat. Ann. tit. 23, § 1202(b); W. Va. Code § 17C-5-7(d); Wisc. Stat. § 343.305(4).

Most remaining States do not have statutes addressing the treatment of refusal evidence, while several bar its admission to varying degrees. *See* Mass. Gen. Laws ch. 90, § 24(e) (prohibiting the use of refusal evidence in civil or criminal proceedings but allowing it in certain administrative ones); Mich. Comp. Laws § 257.625a(9) (allowing refusal evidence, but not as proof of innocence or guilt); Va. Code Ann. § 18.2-268.3(C) (allowing only admission of evidence of an *unreasonable* refusal to consent to a blood test); Wash. Rev. Code § 46.61.517 (allowing the use of refusal evidence only when a search warrant, or an exception to the search warrant, authorized the blood test).

Bergal, *Police Are Now Taking Roadside Blood Samples to Catch Impaired Drivers*, PBS NewsHour (Apr. 19, 2019), https://perma.cc/8VBK-69TL.

A ruling for Mr. Bell would make clear that States cannot bypass motorists' Fourth Amendment rights by introducing evidence of their refusal to consent to non-exigent, warrantless blood tests. For this reason alone, this question is an important one for this Court to address. Indeed, four members of this Court have recently explained a need for the Supreme Court to address state implied consent laws. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2545 (2019) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting) (noting that the Court granted certiorari to consider the constitutionality under the Fourth Amendment of provisions in implied consent laws allowing officers to draw blood from unconscious drunk drivers); *id.* at 2551 (Gorsuch, J., dissenting) ("We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute."). This case similarly presents an opportunity for the Court to examine a consequential issue that is now perplexing state courts around the nation.

B. This Case is the Ideal Vehicle to Address the Question

This case is an ideal vehicle to address the issue. First, the constitutional question is squarely presented. Mr. Bell raised his Fourth Amendment objection in the trial court and every court below definitively ruled on the question. Second, the question presented is outcome-determinative of Mr. Bell's reconsideration motion: a holding in Mr. Bell's favor entitles him to a new trial because the evidence of his re-

fusal was "instrumental" to the trial court's guilty verdict. Pet. App. 105a. Third, the question presented allows this Court to clarify post-*Birchfield* inconsistencies surrounding the use of refusal evidence. A finding for Mr. Bell would firmly establish that States cannot penalize the exercise of a Fourth Amendment right by using it to prove guilt in a criminal trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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