No. _____

In the Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

JARED MCCARTHY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DANIEL CAMERON
Attorney General

BARRY L. DUNN
Deputy Attorney General

MATTHEW F. KUHN*
Solicitor General

Office of the Kentucky Attorney General
700 Capitol Ave., Ste.118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

*Counsel of record

BRETT R. NOLAN
Principal Deputy Solicitor General

JEFFREY A. CROSS
Deputy Solicitor General

MICHAEL R. WAJDA
Assistant Solicitor General

MARK D. BARRY
Assistant Attorney General

QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits the admission of a defendant's refusal of a blood test in an impaired-driving prosecution.

2. Whether the Fourth Amendment prohibits a mandatory minimum sentence based on a defendant's refusal of a blood test in an impaired-driving prosecution.

PARTIES TO THE PROCEEDING

The Commonwealth of Kentucky, petitioner here, was the appellant below.

Jared McCarthy, respondent here, was the appellee below.

STATEMENT OF RELATED PROCEEDINGS

No such proceedings exist.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kentucky.

OPINIONS BELOW

The Supreme Court of Kentucky's decision is reported at 628 S.W.3d 18. App.1–44. Its decision denying rehearing is unreported. App.65–66. The Kentucky Court of Appeals' decision is unreported but is available at 2019 WL 2479324. App.45–64. The Daviess Circuit Court's judgment is unreported. App.73–79.

JURISDICTION

The Supreme Court of Kentucky issued its decision on April 29, 2021 and denied rehearing on August 26, 2021. On November 10, 2021, Justice Kavanaugh extended the Commonwealth's time to file this petition for a writ of certiorari until December 22, 2021. The Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Kentucky statutes, Ky. Rev. Stat. §§ 189A.010 and 189A.105, are reproduced in the appendix. App.80–106. Because these statutes have been amended in non-material ways since the date in question, the previous and current versions of the statutes are included.

The Fourth Amendment of 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.

INTRODUCTION

The Supreme Court of Kentucky has held that the Fourth Amendment prohibits the Commonwealth from admitting a motorist's refusal of a blood test in an impaired-driving prosecution. In the wake of this decision, Kentucky motorists suspected of impaired driving now have little incentive to agree to such a test. As a result, this ruling has meaningfully weakened the Commonwealth's ability to keep its roads safe from impaired drivers.

This distressing state of affairs is especially pronounced in prosecutions for drug-impaired driving, given that breath tests do not detect drug use. Drug-impaired driving is a major problem in Kentucky, as it is nationwide. In 2020 alone, 1,873 collisions in Kentucky involved a driver under the influence of drugs, with 86 fatalities and 1,086 injuries.

Think about what prosecutions in Kentucky for drug-impaired driving now look like because of the

decision below. Kentucky juries are left to wonder why—in 2021—the Commonwealth failed to offer scientific evidence of a motorist's drug use. Because of the decision below, the Commonwealth cannot even explain this hole in its case by pointing out that the defendant refused a blood draw. And so prosecutions for drug-impaired driving now resemble those from an earlier era when scientific testing was not available.

Kentucky's high court justified this sea change by relying on *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). But *Birchfield* is not the wrecking ball to States' implied-consent laws that the court below believed. In fact, *Birchfield* specifically cautioned that "nothing we say here should be read to cast doubt" on implied-consent laws that impose "*evidentiary consequences* on motorists who refuse to comply." *Id.* at 2185 (emphasis added). Kentucky's court thus read *Birchfield* to do exactly what it disclaimed.

Kentucky is far from alone in allowing the admission of refusal evidence. Most States do. *See Missouri v. McNeely*, 569 U.S. 141, 161 (2013) (plurality opinion). But the Supreme Court of Kentucky *is* alone in holding that the Fourth Amendment prohibits admitting a motorist's refusal of a blood draw. Five state high courts have reached the opposite conclusion, as have four intermediate appellate state courts.

But there is more. Under Kentucky's implied-consent law, repeat offenders who refuse a blood test and are convicted of impaired driving face a mandatory minimum term of imprisonment. No longer.

Kentucky's high court wielded *Birchfield* to invalidate that important deterrent for recidivists. That decision is not only wrong, it also deepened an established split of authority among state high courts, which now stands at 3–1 in favor of the ruling below. Certiorari is needed on both issues.

STATEMENT OF THE CASE

A. Kentucky's implied-consent law

Like every other State, Kentucky has an implied-consent statute to discourage motorists from driving while impaired. *McNeely*, 569 U.S. at 161. Under Kentucky law, "any person who operates or is in physical control of a motor vehicle" has "given his or her consent" to testing to "determin[e] alcohol concentration or [the] presence of a substance which may impair one's driving ability." Ky. Rev. Stat. § 189A.103(1). This provision applies if an officer has "reasonable grounds" to believe a motorist was driving while impaired. *Id.*

If a motorist nevertheless refuses testing, several consequences follow. The motorist's license "shall" be suspended. Ky. Rev. Stat. § 189A.107(1). The motorist is also informed that his or her refusal "may be used against him or her in court as evidence" of impaired driving. Ky. Rev. Stat. § 189A.105(2)(a)1.a. And for repeat offenders, the motorist's refusal can lead to a mandatory minimum term of imprisonment if he or she is ultimately convicted of impaired driving. Ky. Rev. Stat. § 189A.105(2)(a)1.b.; Ky. Rev. Stat. § 189A.010(5)(b)–(d) & (11)(e).

The goal behind Kentucky's implied-consent statute is to provide an incentive for all motorists to cooperate when an officer reasonably requests testing. Because blood-alcohol-concentration ("BAC") tests "are needed for enforcing laws that save lives," Kentucky's law serves "importan[t]" needs that are "hard to overstate." *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2535 (2019) (plurality opinion).

B. McCarthy's arrest and trial

1. On January 6, 2015, a grand jury indicted Jared McCarthy for impaired driving with an aggravating circumstance, fourth or subsequent offense within five years. Trial Court Record ("R.") 7–8. Before trial, McCarthy moved to exclude his post-arrest refusal to permit a blood draw. R.35–37. He also challenged the potential imposition of a mandatory minimum term of imprisonment based on his refusal. R.36. If convicted, McCarthy's refusal subjected him to a 240-day mandatory minimum term of imprisonment instead of a 120-day one. App.3–4 n.2, 84–85, 86. To support his arguments, McCarthy relied on the Fourth Amendment as applied by *Birchfield*. R.35–37. The Commonwealth opposed McCarthy's motion. R.39–43.

The trial court determined that McCarthy's refusal to allow a blood draw "shall not be used as an enhancement during the trial." App.67. As to whether the Commonwealth could use McCarthy's refusal at trial, the trial court took a middle position: "The Commonwealth can introduce the refusal to explain the absence of any scientific evidence but cannot use

the refusal to imply any motivation as to why [McCarthy] refused the test. The Commonwealth cannot use the refusal as implying guilt against [McCarthy] in its case in chief." App. 67–68.

2. The jury deadlocked in the first trial against McCarthy. R.74–75. During the second trial, the Commonwealth's case rested on the testimony of the officer who arrested McCarthy, Officer Benjamin Fleury, and the dash-cam video of many of the events in question.

Officer Fleury testified that, in the early morning hours of November 1, 2014, he was parked in his patrol car in an alley in Owensboro, Kentucky. Video Record[1] ("VR") 1:15:28–1:15:51. At approximately 12:50 a.m., he heard a car's tires spinning in gravel. VR 1:18:41–1:18:52. He then saw a vehicle leaving a local bar "at a high rate of speed." VR 1:19:00–1:19:08; 1:22:00–1:22:04. Officer Fleury saw the vehicle turn, "fish-tail[]," and almost lose control. VR 1:19:23–1:19:33. The vehicle then traveled away at a "high rate of pace" while "kind of swerving." VR 1:19:28–1:19:54.

Officer Fleury followed the vehicle. Once he caught up, he turned on his car's emergency lights. VR 1:20:00–1:20:10. He then activated the car's siren, which he does only if a vehicle "does not stop." VR 1:20:10–1:20:18. After the vehicle stopped, Officer Fleury approached the car and spoke with McCarthy, who was the driver, and observed three passengers in the car. VR 1:20:37–1:21:02. Officer Fleury explained

[1] All video-record citations are from September 27, 2017.

that he had stopped McCarthy because he was "swerving." VR 1:21:06–1:21:18. McCarthy apologized and claimed he had been "talking." VR 1:21:19–1:21:27. Officer Fleury observed that McCarthy had "red glossy eyes" and a "little bit of slurred speech." VR 1:21:39–1:21:44. He also noticed a "very pungent" smell of alcohol coming from the vehicle. VR 1:21:44–48.

Officer Fleury had McCarthy exit the vehicle. VR 1:22:43–1:22:49. Officer Fleury asked McCarthy three times whether he had been drinking alcohol that night. Only after the third inquiry did McCarthy specifically deny drinking alcohol. VR 1:22:51–1:23:10. But with McCarthy out of the vehicle, Officer Fleury smelled alcohol on McCarthy's person. VR 1:23:22–1:23:28.

Officer Fleury then performed his standard field-sobriety tests. VR 1:23:32–1:23:35. He observed an "involuntary jerk" of McCarthy's eyes, which Officer Fleury took as an "indicator of impairment." VR 1:23:45–1:24:48. Officer Fleury had McCarthy do a one-leg stand while counting out loud. VR 1:26:43–1:27:14. During this test, McCarthy "swayed," "hopped in place," and "used his arms for balance." VR 1:27:28–1:27:36. And while counting out loud, McCarthy repeated the number 13 several times. VR 1:27:37–1:27:55. Officer Fleury also had McCarthy perform a "walk and turn"—McCarthy had to walk heel to toe in a straight line with his arms by his side, turn around, and walk back in the same manner. VR 1:28:12–1:28:38. While doing this, McCarthy

"swayed," "used his arms for balance," and "stepped off line multiple times." VR 1:29:17–1:29:23.

At this point, Officer Fleury arrested McCarthy. VR 1:31:07–1:31:10. In McCarthy's car, Officer Fleury found three open containers of beer and two bottles of prescription medication prescribed to McCarthy (hydrocodone and clonazepam). VR 1:33:21–1:34:37. With McCarthy under arrest, two of his passengers, who were "highly intoxicated," took a cab home, and the other passenger, who showed no signs of impairment, left the scene on foot. VR 1:34:58–1:35:18.

Officer Fleury took McCarthy to the hospital for a blood test. VR 1:35:40–1:35:44. Officer Fleury informed the jury that McCarthy refused to permit a blood draw. VR 1:35:45–1:35:47. Although the trial court had previously ruled that McCarthy's refusal could be used to explain only the lack of scientific evidence in the case, McCarthy did not request, and the trial court did not give, a jury admonition. App.6 n.4, 34.

McCarthy called three witnesses for his defense, who primarily testified that he did not consume alcohol on the night in question. VR 3:11:44–3:11:52; 3:23:03–3:23:40; VR 3:38:25–3:39:18.

After deliberating for about two hours, during which time the jury watched the dash-cam video again, VR 6:20:47–6:28:42, the jury found McCarthy guilty of driving while impaired, VR 6:39:54–6:40:07. The jury determined that this conviction was McCarthy's fourth such conviction in five years and recom-

mended a sentence of two years' imprisonment (from a range of one to five years). VR 6:59:13–6:59:25, 8:28:52–8:29:01; R.87. The trial court imposed that sentence, with a mandatory minimum term of imprisonment of 120 days. App.78.

C. The proceedings on appeal

On appeal, the Kentucky Court of Appeals reversed and remanded for a new trial in which the Commonwealth "would be prohibited from making reference to [McCarthy's] failure to consent to an invasive blood draw." App.64. The panel held that "allowing the Commonwealth to comment on [McCarthy's] lack of a blood test was improper" and violated the Fourth and Fifth Amendments.[2] App.53.

The Supreme Court of Kentucky affirmed.[3] App.42. It acknowledged that *Birchfield* recognized this Court's prior "approv[al of] state laws attaching evidentiary consequences to a motorist's refusal to submit to a test." App.27. But it distinguished this part of *Birchfield* by emphasizing that one of the cases on which the Court relied arose under the Fifth

---

[2] The Commonwealth discussed both the evidentiary and sentencing issues in its brief before the Kentucky Court of Appeals. *McCarthy v. Commonwealth*, No. 2017-CA-1927 (Ky. App.), Appellee Br. at 7–14 (Sept. 12, 2018). The Court of Appeals did not discuss the sentencing issue in detail, but it stated that McCarthy did not "suffer an enhanced penalty for exercising his constitutional right to refuse" a blood test. App.53.

[3] The Commonwealth's brief before the Supreme Court of Kentucky focused on the evidentiary issue, but it did discuss the sentencing issue. *Commonwealth v. McCarthy*, No. 2019-SC-0380 (Ky.), Appellant Br. at 5–17 (Feb. 12, 2020).

Amendment. App.28–29. *Birchfield*, Kentucky's court continued, "now outlines the Fourth Amendment ramifications of BAC tests." App.29.

The court acknowledged that some post-*Birchfield* courts have allowed the admission of a blood-draw refusal. App.29. But the court charted a different course. It found significant "*Birchfield*'s emphasis on the distinction between when a defendant's refusal to submit [to testing] is constitutionally significant . . . and when it is not." *Id.* (quoting 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(l) (6th ed.)). That is, the court focused on its conclusion that—unlike with a breath test—"[i]n all cases, a criminal defendant has the constitutional right to refuse to consent to a blood test." App.31. The court thus concluded that, under the Fourth Amendment, McCarthy's refusal of a blood test "could not be offered as evidence of his guilt." App.33. Nor could it be offered "to explain why [the Commonwealth] did not have scientific evidence to prove its case." App.34.

The Supreme Court of Kentucky also considered whether McCarthy's refusal could be the basis for a mandatory minimum term of imprisonment. App.23–27. Here as well, the court found *Birchfield* controlling. It relied on *Birchfield*'s "broader objective in granting certiorari" to hold that "*Birchfield*'s guidance is not limited to statutes which create separate criminal charges for refusal alone." App.24. The court thus held that "[t]he mandatory additional jail time imposed in KRS 189A.105 following conviction for DUI is an unauthorized criminal penalty and was

properly considered as such by the trial court." *Id.* Despite this, the court noted that some courts "have concluded that [*Birchfield*] does not prohibit statutes such as ours that make refusal to consent to a blood test grounds for enhanced penalties upon conviction for DUI." App.26.

Two justices filed a partial dissent. App.42–44. They "agree[d] that McCarthy's refusal to permit the blood draw cannot be used to enhance his DUI penalty." App.42 (VanMeter, J., concurring in part and dissenting in part). They, however, disputed the majority's conclusion that McCarthy's refusal could not be admitted under the Fourth Amendment. *Id.* The majority opinion, the partial dissent urged, "is predicated largely on an expansive interpretation of *Birchfield*." *Id.* The partial dissent, by contrast, read *Birchfield* to "explicitly tell[] us that the evidentiary consequence of McCarthy's refusal has no constitutional implication." App.43.

The Commonwealth petitioned for rehearing, which was denied by a 5–2 vote. App.65–66. This timely petition for a writ of certiorari follows.

REASONS TO GRANT THE PETITION

The decision below creates one split of authority and deepens another, both of which concern the constitutionality of States' implied-consent laws. At issue is the States' ability to effectively use their laws to prevent the "carnage" that "occurs with tragic frequency on our Nation's highways." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). Certiorari is needed to decide whether a motorist's refusal of a blood draw

may be used (i) as evidence at trial and (ii) as the basis for a mandatory minimum term of imprisonment for repeat offenders.

I. The Court should determine whether a motorist's refusal of a blood draw can be used as evidence at trial.

The Supreme Court of Kentucky held that the Fourth Amendment prohibits the Commonwealth from introducing evidence that a motorist refused a blood draw. App.33–35. Certiorari is justified for the following reasons: The decision below cannot be squared with *Birchfield*; it creates a lopsided split of authority; and it meaningfully frustrates the Commonwealth's ability to prosecute impaired drivers, especially those who are impaired by drugs or a combination of drugs and alcohol.

A. The decision below is contrary to *Birchfield*.

By extending the holding of *Birchfield* beyond its terms, the Supreme Court of Kentucky's decision is inconsistent with this Court's Fourth Amendment jurisprudence. *See* S. Ct. R. 10(c).

"[M]ost States allow [a] motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, 569 U.S. at 161. In fact, this Court has signaled approval of such laws even though they "impose *significant* consequences when a motorist withdraws consent." *Id.* (emphasis added). As *McNeely* put it, the "States have a broad range of legal tools to enforce their

drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 160–61. One of those "legal tools" is what Kentucky tried here: to admit refusal evidence in an impaired-driving prosecution. *See id.*

This approach is hardly novel. Nearly 40 years ago, this Court considered South Dakota's equivalent law, under which "refusal to submit to a blood-alcohol test 'may be admissible into evidence at the trial.'" *Neville*, 459 U.S. at 556 (citation omitted). Such a law, the Court acknowledged, will put suspects to a choice that is not "an easy or pleasant one." *Id.* at 564. The Court nevertheless upheld the law against Fifth Amendment and due-process challenges. *Id.* at 560–66. As to the Fifth Amendment, the Court held that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer." *Id.* at 564. And as to due process, *Neville* explained that it was not "fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial." *Id.* at 565.

This was the state of the law when the Court decided *Birchfield*. At issue there were state laws that made "it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired." *Birchfield*, 136 S. Ct. at 2166. After evaluating the interests surrounding blood and breath tests, the Court held that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185.

Although most of *Birchfield* focused on the warrant exception for a search incident to arrest, *id.* at 2174–85, the Court also considered the States' "alternative argument that [blood] tests are justified based on the driver's legally implied consent to submit to them" under implied-consent laws, *id.* at 2185. On this issue, the Court reasoned:

> Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and *evidentiary consequences* on motorists who refuse to comply. *See, e.g.*, *McNeely*, 133 S. Ct. at 1565–66 (plurality opinion); *Neville*, 459 U.S. at 560. Petitioners do not question the constitutionality of those laws and *nothing we say here should be read to cast doubt on them*.

Id. (emphasis added).

For present purposes, this is *Birchfield*'s key passage. It is thus important to unpack exactly what it says.

To begin with, it refers to implied-consent laws like Kentucky's—a law that "impose[s] . . . evidentiary consequences on motorists that refuse to comply." *See id.*; *see also* Ky. Rev. Stat. § 189A.105(2)(a)2.a. Not even the court below disputed this point. App.27–33. Such laws, *Birchfield* explained without reservation, have been referred to "approvingly" by this Court. *See Birchfield*, 136 S. Ct. at 2185 (collecting sources). Not stopping there, *Birchfield* underscored that "nothing"

in its decision should be read to "cast doubt" on the propriety of States' refusal laws. *See id.*

Yet that is exactly what the court below did. Although the Supreme Court of Kentucky twice acknowledged the above-quoted passage, App.21–22, 27, it read *Birchfield* to stand for a proposition that this Court expressly denied reaching—that States cannot attach "evidentiary consequences" to a motorist's refusal to undergo blood testing. In fact, this Court did not just stop short of reaching that issue. The Court went out of its way to state that *nothing* in its decision should even cast doubt on its prior approval of these kinds of implied-consent laws.

There is simply no way to reconcile *Birchfield* with the decision below. *Birchfield* specifically instructed future courts not to interpret its decision the way Kentucky's court did. The partial dissent below made this very point: *Birchfield* "explicitly tells us that the evidentiary consequence of McCarthy's refusal has no constitutional implication." App.43 (VanMeter, J., concurring in part and dissenting in part).

The court below gave two primary reasons for nullifying *Birchfield*'s plain language. First, the majority distinguished *Neville*, App.27–29, which *Birchfield* relied on for the proposition that "[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose . . . evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185. The majority noted that *Neville* applied the Fifth Amendment, while

Birchfield arose under the Fourth Amendment. App.28–29. Fair enough. But the court below overlooked that *Birchfield* also cited *McNeely*—a Fourth Amendment case—for the same point. *Birchfield*, 136 S. Ct. at 2185; *McNeely*, 569 U.S. at 144, 160–61. And of course, *Birchfield* itself addressed the Fourth Amendment, and it applied the Fourth Amendment when it held that "nothing we say here should be read to cast doubt" on refusal laws like Kentucky's. *See Birchfield*, 136 S. Ct. at 2185.

Second, the court below went beyond *Birchfield*'s conclusion that a blood draw is not allowed as a search incident to an arrest for impaired driving. The court reasoned that because a search warrant is purportedly required "in all cases" to obtain blood evidence, the Fourth Amendment must also prohibit admitting a motorist's refusal to allow a blood draw. App.30–33. In so concluding, the court analogized to case law outside the impaired-driving context that prohibits using refusal evidence if there is no search warrant.[4] But this line of thinking runs into the same problem discussed above. It applies *Birchfield* to conclude—contrary to its express terms—that state laws that "impose . . . evidentiary consequences on motorists who refuse to comply" are unconstitutional. *See Birchfield*, 136 S. Ct. at 2185.

Worse still, the court below overlooked how *Birchfield* approached the implied-consent laws at issue

[4] The cases on which the court below relied likewise applied the Fourth Amendment. *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582–84 (Ky. 2007); *Deno v. Commonwealth*, 177 S.W.3d 753, 760–62 (Ky. 2005).

there, which criminalized a motorist's refusal of blood testing. *Birchfield* explained that these laws simply go too far and thus do not comply with the Fourth Amendment. As *Birchfield* put it, "[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.* (emphasis added). This statement—specifically, the "limit" it describes—presupposes consequences short of criminal prosecution to which a motorist may in fact "be deemed to have consented" by driving on public roads. *See id.* That is, if there is a "limit" to attaching consequences to a defendant's refusal, there must be some consequences that are permissible. And that is why *Birchfield* distinguished between laws that merely "insist upon an intrusive blood test" and those that "impose criminal penalties." *See id.* Laws like Kentucky's that "insist upon an intrusive blood test" but do not criminalize refusal are consistent with the Fourth Amendment. *See id.* at 2185–86; *see also Mitchell*, 139 S. Ct. at 2532–33 (discussing *Birchfield*).

Kentucky's high court did not even try to engage with this part of *Birchfield* beyond including it in a block quote. App.22. But *Birchfield* can only be understood to convey that laws that do not criminalize refusal of a blood draw pass muster under the Fourth Amendment. To use *Birchfield*'s language, the choice offered to motorists under an implied-consent regime that does not criminalize refusal is "another matter" from a law that does. *See Birchfield*, 136 S. Ct. at 2185. *Birchfield* explained its bottom-line holding exactly that way: "[W]e conclude that motorists cannot

be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186. The Supreme Court of Kentucky made no effort to reconcile its holding with this aspect of *Birchfield*.

B. The decision below creates a lopsided split of authority among state high courts.

Whether the holding of *Birchfield* should be extended to prohibit the States from introducing blood-draw refusal evidence at trial is now the subject of a split among state high courts. *See* S. Ct. R. 10(b).

The court below did not hide that other state courts disagree with its reading of *Birchfield*. App.29. But Kentucky's high court failed to mention that it stands alone in finding a Fourth Amendment violation under the circumstances presented here. *See State v. Kilby*, 961 N.W.2d 374, 379 (Iowa 2021) (collecting authorities and summarizing that "[n]early all courts confronting the question after *Birchfield* reject state and federal constitutional challenges to the admissibility of evidence of test refusals in the criminal trial for operating a motor vehicle while intoxicated"). Five state courts of last resort—those in Vermont, Colorado, Pennsylvania, Nebraska, and Maine—disagree with the conclusion reached below. As do several intermediate appellate state courts—those in New Mexico, Wisconsin, Kansas, and Texas.

The most exhaustive treatment of this legal issue is in *State v. Rajda*, 196 A.3d 1108 (Vt. 2018). There, the Vermont Supreme Court squarely held that "the admission of evidence of a refusal to submit to a

blood test in the context of a DUI criminal proceeding does not violate the Fourth Amendment of the U.S. Constitution." *Id.* at 1121. *Rajda* noted that "the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Id.* at 1119 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980)) (cleaned up). And *Rajda* read *Birchfield* to say "[i]n essence" that "the nature of the choice offered to [a] defendant under implied consent laws is fundamentally altered—to the point where it infringes impermissibly on the Fourth Amendment—only when the alternative to submitting to a warrantless blood draw is to commit a crime—the crime of refusal." *Id.* at 1120. *Rajda* also commented that other state courts agree with its holding. *Id.* at 1118–19 (collecting authorities).

The Colorado Supreme Court is one such court. In *Fitzgerald v. People*, 394 P.3d 671 (Colo. 2017), *cert. denied*, 138 S. Ct. 237 (2017), the court took what it termed a "short leap" from this Court's case law, including *Birchfield*, to hold that "introducing evidence of [a motorist's] refusal to consent to a blood or breath test to determine his BAC [does] not impermissibly burden his Fourth Amendment right." *Id.* at 676. Colorado's court understood this Court's precedent to "all but sa[y] that anything short of criminalizing refusal does not impermissibly burden or penalize a defendant's Fourth Amendment right to be free from an unreasonable warrantless search." *Id.*; *see also People v. Hyde*, 393 P.3d 962, 970–73 (Colo. 2017) (Eid, J., concurring the judgment).

The Supreme Court of Pennsylvania agrees. It has held that the "admission of [a blood-draw] refusal at a subsequent trial for DUI . . . remains constitutionally permissible post-*Birchfield*." *Commonwealth v. Bell*, 211 A.3d 761, 776 (Penn. 2019), *cert denied*, 140 S. Ct. 934 (2020). Pennsylvania's high court read *Birchfield* entirely differently than the court below: "As implied by *Birchfield*, the pertinent question in determining the constitutionality of a statute demanding this particular choice is whether the consequence for refusing a warrantless blood test undermines the inference that the motorist implicitly consented to it, and suggests instead that the 'search' was coerced." *Id.* at 773. The *Bell* court found "ample support" that this Court would "approve [of] this particular evidentiary consequence in the context of a Fourth Amendment challenge." *Id.* at 776.

Still more state high courts agree. In *State v. Hood*, 917 N.W.2d 880 (Neb. 2018), the Nebraska Supreme Court refused to read *Birchfield* "as placing restrictions on the use of evidence of a driver's refusal in a DUI proceeding." *Id.* at 892. According to the court, "*Birchfield* itself clarified that the propriety of evidentiary consequences for a driver's refusal to submit to a blood draw should not be questioned." *Id.* Maine's Supreme Judicial Court approached this issue similarly. It reasoned, citing *Birchfield*, that "neither the threat of evidentiary use of the refusal nor the threat of license suspension renders the consent involuntary." *State v. LeMeunier-Fitzgerald*, 188 A.3d 183, 192 (Me. 2018), *cert. denied*, 139 S. Ct. 917 (2019).

These five state high courts are not the only courts that disagree with the decision below. After *Birchfield*, four intermediate appellate state courts have likewise held that the States may admit a defendant's refusal of a blood draw into evidence. *State v. Storey*, 410 P.3d 256, 267–69 (N.M. Ct. App. 2017), *cert. denied*, 2017 WL 11596486 (N.M. Oct. 31, 2017); *State v. Levanduski*, 948 N.W.2d 411, 414–18 (Wis. Ct. App. 2020); *State v. Mulally*, No. 119,673, 2020 WL 4032827, at *13–16 (Kan. Ct. App. July 17, 2020); *Dill v. State*, No. 05-15-01204-CR, 2017 WL 105073, at *1–2 & n.1 (Tex. App. Jan. 11, 2017).

In summary, Kentucky's high court has no company in prohibiting the admission of a motorist's refusal of a blood draw under the Fourth Amendment. The split of authority on this issue is 9–1, with Kentucky's court being the only outlier. This divergence of authority warrants certiorari. *See, e.g.*, *McNeely*, 569 U.S. at 147 n.2.

C. The decision below creates substantial obstacles to prosecuting impaired drivers.

Whether the Fourth Amendment prohibits the admission of blood-draw refusal evidence is a question of utmost importance to the States. *See* S. Ct. R. 10(c). "The importance of the needs served by BAC testing is hard to overstate" because "BAC tests are needed for enforcing laws that save lives." *Mitchell*, 139 S. Ct. at 2535. "In the best years," deaths from impaired driving "add up to more than one fatality per hour." *See id.* at 2536. To fight back against this

"carnage," *Neville*, 459 U.S. at 558, every State has passed an implied-consent law, *McNeely*, 569 U.S. at 161. And "most states allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* Although there is much more work to do in keeping our roads safe, there is good reason to believe that impaired-driving laws are making a difference. *See Birchfield*, 136 S. Ct. at 2169–70; *Mitchell*, 139 S. Ct. at 2536.

Allowing States to admit a motorist's refusal of a blood draw serves as a powerful deterrent to impaired driving. To be sure, it can put motorists to a tough choice. *Neville*, 459 U.S. at 564. But that is the point, as facing this prospect deters impaired driving. And the States have a "compelling interest in creating 'effective deterrent[s] to drunken driving' so such individuals make responsible decisions and do not become a threat to others in the first place." *Birchfield*, 136 S. Ct. at 2179 (citation omitted).

By keeping a motorist's refusal away from juries, Kentucky's high court has meaningfully weakened the Commonwealth's implied-consent regime, especially the incentive structure that supports it. Because of the decision below, only the rare Kentucky motorist will allow a blood test.[5] Why would the driver do anything but refuse? After all, his or refusal cannot be used at trial in any way—even merely to

[5] Kentucky law has been construed to prohibit officers from securing a search warrant for blood testing if the motorist did not cause death or physical injury. *See Combs v. Commonwealth*, 965 S.W.2d 161, 163 (Ky. 1998); *Commonwealth v. Duncan*, 483 S.W.3d 353, 359 (Ky. 2015).

establish why the Commonwealth is not presenting scientific evidence. App.34–35. Refusal rates are already much too high. *Birchfield*, 136 S. Ct. at 2169 ("On average, over one-fifth of all drivers asked to submit to BAC testing in 2011 refused to do so."). The decision below needlessly exacerbates this problem.

Because of the decision below, the Commonwealth is left to impose license suspension as a consequence for refusal. Ky. Rev. Stat. § 189A.105(1). But "license suspension alone is unlikely to persuade the most dangerous offenders, such as those who drive with a BAC significantly above the current limit of 0.08% and recidivists, to agree to a test that would lead to severe criminal sanctions." *Birchfield*, 136 S. Ct. at 2179. As Nebraska's high court recognized, if *Birchfield* bars the admission of refusal evidence, "no drunk driver would *ever* submit to a blood test." *See Hood*, 917 N.W.2d at 892 (emphasis added). Such is the position in which the Commonwealth finds itself.

Kentucky's high court downplayed this "difficulty" as "largely" of the Commonwealth's "own doing." App.35. The court reasoned that the Commonwealth can still rely on a breath test to discern impairment and stated that "nothing in *Birchfield*" prohibits admitting a motorist's refusal of a breath test. *Id.*

But this overlooks that breath tests do not detect all substances that can impair driving. As this Court recognized in *Birchfield*, "[o]ne advantage of blood tests is their ability to detect not just alcohol *but also other substances* that can impair a driver's ability to operate a car safely." *Birchfield*, 136 S. Ct. at 2184

(emphasis added). By contrast, "[a] breath test cannot do this . . . ." *Id.* Said differently, a breath test "results in a BAC reading on a machine, *nothing more*." *Id.* at 2177 (emphasis added).

The inability of a breath test to discern drug use is no small matter. Drug-impaired driving is a huge problem, both nationwide and in Kentucky. Nationwide, "[d]uring 2018, 12 million . . . U.S. residents reported driving under the influence of marijuana in the past 12 months; 2.3 million . . . reported driving under the influence of illicit drugs other than marijuana." Alejandro Azofeifa, et al., *Driving Under the Influence of Marijuana and Illicit Drugs Among Persons Aged ≥ 16 years – United States, 2018*, Morbidity & Mortality Weekly Report 68(50), 1153–57 (Dec. 20, 2019), https://perma.cc/7FXF-CZM9.

Statistics from Kentucky are equally distressing. For 2020, 1,873 collisions in Kentucky involved a driver under the influence of drugs, with 86 fatalities and 1,086 injuries. Kentucky State Police, *Traffic Collision Facts*, at 45 (2020), https://perma.cc/8NPR-4R57. Moreover, in 2020, 43 percent of impaired-driving arrests in Kentucky involved only drugs, and another 11 percent involved a combination of drugs and alcohol. Victor Puente, *Lawmakers Working to Tighten Ky. DUI Laws About Blood Tests*, WKYT (Nov. 17, 2021), https://perma.cc/NX9J-D3EH.

This case demonstrates the problem all too well. Recall that in addition to noting that McCarthy smelled of alcohol and had open containers of beer in his car, Officer Fleury found two bottles of prescrip-

tion medication that belonged to McCarthy. A breath test would not have detected these medications. *See Birchfield*, 136 S. Ct. at 2184.

Although the decision below will undermine the entirety of Kentucky's implied-consent law, its effect will be felt most acutely in prosecutions of those who drive while impaired by drugs or by a combination of drugs and alcohol. The decision below essentially takes these prosecutions back in time. Before the advent of scientific testing, "prosecutors normally had to present testimony that the defendant was showing outward signs of intoxication, like imbalance or slurred speech." *See id.* at 2167. One 1920's court described the State's trial strategy this way: "[I]t is necessary for some witness to prove that some one or more of . . . [the] effects [of impairment] were perceptible to him." *Id.* (quoting *State v. Noble*, 250 P. 833, 834 (Or. 1926)).

Prosecutions in Kentucky for drug-impaired driving now resemble this bygone era. In the mine run of cases, Kentucky prosecutors can now offer only the observations of an arresting officer and, if available, extrinsic evidence of drug use. Not only will most cases now lack scientific evidence of drug impairment, but prosecutors cannot even comment on this hole in their cases. App.34–35. As a result, Kentucky juries—in 2021—are left to wonder why the Commonwealth does not have scientific evidence that jurors surely know can be easily obtained.

* * *

The decision below calls out for this Court's review. Kentucky's high court purported to follow *Birchfield* but ignored its plain language. It created a 9–1 split of authority. And it undermined the Commonwealth's ability to keep its roads safe from impaired drivers, especially those who use drugs.

II. The Court should decide whether a motorist's refusal of a blood draw can result in a mandatory minimum term of incarceration.

The Supreme Court of Kentucky further held that the Commonwealth cannot impose a mandatory minimum term of incarceration on repeat offenders who refuse a blood test. Here as well, the court read *Birchfield* much too broadly. It also deepened an existing split of authority, now 3–1, among state courts of last resort that state-court judges have asked this Court to decide. Certiorari should be granted on this issue too. *See* S. Ct. R. 10(b), (c).

1. When sentencing a convicted impaired driver in Kentucky, an "aggravating factor" exists if the defendant is a repeat offender who is shown to have refused a blood test. Ky. Rev. Stat. § 189A.010(11)(e). If the Commonwealth proves this aggravating factor, recidivists are subject to a mandatory minimum term of imprisonment that "shall not be suspended, probated, conditionally discharged, or subject to any other form of early release." Ky. Rev. Stat. § 189A.010(5)(b)–(d). For example, if a motorist refuses a blood draw and is convicted of impaired driving for the second time within 10 years, he or she is

subject to a six-month sentence, but "the mandatory minimum term of imprisonment shall be fourteen (14) days." Ky. Rev. Stat. § 189A.010(5)(b). For a driver convicted of four or more impaired-driving offenses within 10 years, he or she is subject to a sentence between one and five years, but "the mandatory minimum term of imprisonment shall be two hundred forty (240) days."[6] Ky. Rev. Stat. § 189A.010(5)(d); Ky. Rev. Stat. § 532.060(2)(d).

The court below found that these mandatory minimum terms of imprisonment for repeat offenders violate the Fourth Amendment under *Birchfield*. App.23–27. Its reasoning expands *Birchfield* considerably—and unjustifiably. Kentucky's high court rejected any suggestion that *Birchfield* addressed "only those state laws which attached separate criminal sanctions to refusals." *See* App.23. Of course, those are the only state laws that were before the Court in *Birchfield*. *Birchfield*, 136 S. Ct. at 2170–73. The court below even "[a]dmitted[]" that part of *Birchfield* supports applying it only to laws that criminalize refusing a blood draw. *See* App.23–24.

But other parts of *Birchfield*, the court below believed, support a broader reading. For example, the court determined that *Birchfield* "state[d] a broader objective in granting certiorari." App.24. This was a reference to *Birchfield*'s introductory statement that the Court granted certiorari "to decide whether mo-

---

[6] The previous sentencing scheme that applies to McCarthy differs slightly but not in a way that matters for purposes of the question presented. App.3–4 n.2, 12–13 n.7.

torists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their blood stream." *Birchfield*, 136 S. Ct. at 2172. The court below latched onto *Birchfield*'s "or otherwise penalized" language to conclude that its "guidance is not limited to statutes which create separate criminal charges for refusal alone."[7] App.24.

2. The Supreme Court of Kentucky was wrong to extend *Birchfield*. Everyone agrees that *Birchfield* addressed only statutes that criminalized refusing a blood draw. *Birchfield* made this point directly. It discussed whether the States "may criminalize the refusal to comply with a demand to submit to the required testing," *Birchfield*, 136 S. Ct. at 2172, and held that "motorists cannot be deemed to have consented to submit to a blood test on pain of *committing a criminal offense*," *id.* at 2186 (emphasis added). *Birchfield* elsewhere emphasized that "impos[ing] criminal penalties on the refusal to submit" to a blood test exceeds the "limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."[8] *Id.* at 2185.

---

[7] The court below did not consider that *Birchfield*'s "or otherwise penalized" language referred to one of the petitioners being fined and ordered to participate in a sobriety program and substance abuse evaluation. *Birchfield*, 136 S. Ct. at 2171. Another of the *Birchfield* petitioners had his driver's license suspended after an administrative hearing. *Id.* at 2172. *But see* App.18 n.11.

[8] The court below seized on this mention of "criminal penalties" to conclude that Kentucky's sentencing law is a criminal penalty

As outlined above, *Birchfield* held that laws that criminalize refusing a blood draw simply go too far and violate the Fourth Amendment. *Id.* at 2185–86. But *Birchfield* emphasized that less-drastic measures designed "to insist upon an intrusive blood test" remain constitutional. *See id.* Kentucky has not criminalized refusing a blood draw. Nor has it increased an offender's maximum sentence by even a day. All Kentucky law does is ensure that repeat offenders remain incarcerated for a minimum part of their sentence. The court below disputed none of this. App.25–26.

Kentucky's sentencing law is therefore different in kind from a law that establishes a standalone crime for refusing a blood draw. Under Kentucky's law, a blood-draw refusal becomes relevant only when sentencing a repeat offender for the events that prompted the refusal and only then to establish a minimum time of incarceration. Kentucky's law does not affect the maximum sentence that such a defendant can receive. It affects only the minimum time of incarceration on an otherwise-unchanged sentence. Attaching such a consequence to refusal is nothing like criminalizing refusal and thus does not overstep the "limit" established by *Birchfield*. *See Birchfield*, 136 S. Ct. 2185.

3. Kentucky's high court acknowledged that courts disagree about whether *Birchfield* prohibits a sentencing law like Kentucky's. App.26–27.

---

under *Birchfield*. App.24. But this reasoning simply takes *Birchfield* out of context.

On one side of the split—and against the court below—is *LeMeunier-Fitzgerald*.[9] There, Maine's high court upheld a sentencing provision analogous to Kentucky's law. "In Maine, a driver's refusal to comply with the statutory duty to submit to a blood test upon probable cause will result in an enhanced penalty, one that is well within the statutory maximum for any person charged with [impaired driving], only if the driver is ultimately convicted of [impaired driving] after that refusal." *LeMeunier-Fitzgerald*, 188 A.3d at 192. Applying *Birchfield*, Maine's court held:

> Because the mandatory minimum sentence applies only upon an [impaired-driving] conviction and the statute does not criminalize the mere act of refusing to submit to a blood test, and because it does not increase a driver's maximum exposure to a fine or sentence of imprisonment, the statute's setting of a mandatory minimum sentence if a driver is convicted of [impaired driving] after refusal to submit to a blood test despite probable cause is not a "criminal penalty on the refusal to submit to such a test" within the meaning of *Birchfield*.

---

[9] The decision below also included the Vermont Supreme Court's *Rajda* decision on this side of the split. App.26. *Rajda*'s interpretation of *Birchfield*, it is true, is irreconcilable with the decision below. *Rajda*, 196 A.3d at 1120 (*Birchfield*'s "concern was that the threat of criminal prosecution for the refusal itself was likely to coerce consent to an invasive blood test."). But *Rajda* did not consider a sentencing law like that at issue here. *Id.* at 1114–15.

Id. at 193 (quoting *Birchfield*, 139 S. Ct. at 2185) (cleaned up). This holding is directly contrary to the decision below.

On the other side of the ledger are decisions from state high courts in Pennsylvania and Wisconsin.[10] App.27. In *Commonwealth v. Monarch*, 200 A.3d 51 (Penn. 2019), the court considered Pennsylvania's law establishing a mandatory minimum sentence based on a defendant's refusal of blood testing. *Id.* at 53–54. Pennsylvania's high court held that "[u]nder *Birchfield*, it is clear the enhanced mandatory minimum sentences authorized by the statute are unconstitutional when based on a refusal to submit to a warrantless blood test." *Id.* at 57. The court explained that even though the defendant had not been subjected to "the separate criminal offense at issue in *Birchfield*, . . . the same analysis applies here." *Id.*

The Supreme Court of Wisconsin reached an analogous conclusion, albeit over two dissents urging this Court to decide the issue. In *State v. Dalton*, 914 N.W.2d 120 (Wis. 2018), a 4–3 majority held that "*Birchfield* dictates that criminal penalties may not be imposed for the refusal to submit to a blood test" and "[a] lengthier jail sentence is certainly a criminal penalty." *Id.* at 132. The court rejected Wisconsin's argument that "any increase in a sentence within the statutorily prescribed range does not morph a sen-

[10] The court below identified New Mexico's high court as also being on this side of the split. App.27 (citing *New Mexico v. Vargas*, 404 P.3d 416 (N.M. 2017)). But unlike here, New Mexico law makes refusal an element of the underlying offense. *Vargas*, 404 P.3d at 419; *Storey*, 410 P.3d at 266–67.

tencing consideration into a criminal penalty." *Id.* at 132–33. "[T]he fact that refusal is not a stand-alone crime" did not affect the Wisconsin court's analysis. *Id.* at 133.

This holding prompted two dissents, one of which emphasized that *Birchfield* "turn[ed] entirely on a mandatory criminal misdemeanor charge that North Dakota imposed for refusing to submit to a blood draw." *Id.* at 136 (Roggensack, C.J., dissenting). Wisconsin's Chief Justice asked this Court to "consider granting review herein" because "[t]hese issues need attention and can receive none further in Wisconsin courts." *Id.* at 137. The other dissent criticized the majority for "rewrit[ing] *Birchfield*" and "unnecessarily creat[ing] significant risk to the users of our public highways." *Id.* at 141 (Ziegler, J., dissenting). This dissent joined the Wisconsin Chief Justice's "call for the United States Supreme Court to assist the state courts with respect to this issue." *Id.*

In summary, the court below chose the wrong side in a clear split of authority. The Court should grant certiorari to clarify that *Birchfield* does not prohibit the States from establishing a mandatory minimum term of imprisonment for repeat offenders who refuse blood testing.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DANIEL CAMERON
Attorney General

BARRY L. DUNN
Deputy Attorney General

MATTHEW F. KUHN*
Solicitor General

Office of the Kentucky Attorney General
700 Capitol Ave., Ste.118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

*Counsel of record

BRETT R. NOLAN
Principal Deputy Solicitor General

JEFFREY A. CROSS
Deputy Solicitor General

MICHAEL R. WAJDA
Assistant Solicitor General

MARK D. BARRY
Assistant Attorney General