NO. 21-940

In the
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,
v.
JARED MCCARTHY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* COLORADO, ALASKA, ARIZONA, THE DISTRICT OF COLUMBIA, FLORIDA, INDIANA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, NORTH CAROLINA, THE NORTHERN MARIANA ISLANDS, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WISCONSIN IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Supreme Court Rule 37.2(b), the State of Colorado respectfully moves for leave to file this *amicus curiae* brief. Petitioner consents. Respondent's consent has not been obtained because Colorado inadvertently gave fewer than ten days' notice of intent to file to Respondent. On January 25, 2022, Colorado notified Respondent via email and voicemail of its intent to file but has not received a response.

Because Respondent waived filing a response to the petition for a writ of certiorari, no prejudice will result from Colorado's delayed notice of intent to file. If the Court calls for a response, Respondent will have a full opportunity to address all issues raised in this brief.

The Amici States and their residents have a strong interest in enforcing impaired-driving laws by prosecuting those who drive under the influence of alcohol or drugs. This case calls into question the constitutionality of implied consent laws, upon which states rely to eradicate the harms caused by impaired drivers. These laws permit police officers to gather chemical evidence from an impaired-driving suspect and allow for alternative evidence if the driver refuses testing. Because chemical evidence is the lynchpin of impaired driving prosecutions, its absence at trial is significant. Refusal evidence is therefore an important tool in allowing states to hold impaired drivers accountable and to keep their public roads safe.

The Kentucky Supreme Court's decision not only deprives law enforcement of that important tool but also removes any incentive for impaired drivers to

comply with testing. These concerns, which are discussed in detail in the brief, provide important perspective on why this Court should grant certiorari.

Respectfully submitted,

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January 26, 2022

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.

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INTEREST OF AMICI CURIAE

Amici States and their residents[1] have a strong interest in enforcing impaired-driving laws by prosecuting those who drive under the influence of alcohol or drugs. In 2019 alone, 10,142 people lost their lives from an impaired-driving accident.[2] More than half of all drivers involved in accidents causing serious injury or death tested positive for at least one drug.[3]

This case calls into question the constitutionality of implied consent laws, which states rely on to eradicate the "frightful carnage" caused by impaired drivers. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). These laws permit police officers to gather chemical evidence from an impaired-driving suspect and allow for alternative evidence if the driver refuses testing. This Court has recognized that (1) chemical evidence is the lynchpin of impaired-driving prosecutions, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2167 (2016); and (2) if a driver refuses chemical testing, evidence of that refusal is "circumstantial evidence of consciousness of guilt." *Neville*, 459 U.S. at 561. Because the decision below removes the incentive for impaired drivers to comply with testing, guts the states' abilities to use refusal evidence, and

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[1] Counsel for all parties received notice of Amici States' intent to file this brief. *See* Sup. Ct. R. 37.2(a).

[2] Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Traffic Safety Facts, 2019 Data*, *Summary of Motor Vehicle Crashes* 1 (2021) (last year data available).

[3] Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., *Update to Special Reports on Traffic Safety During the COVID-19 Public Health Emergency: Fourth Quarter Data* 9 (2021).

creates unnecessary confusion among states with similar laws, the Amici States respectfully submit this brief in support of Petitioner Kentucky.

SUMMARY OF THE ARGUMENT

States may condition the privilege of driving on consent to a blood draw when there is probable cause for an impaired-driving offense. But drivers who change their mind about consent may refuse to submit to a blood draw, even if compelled by a warrant. This is especially true for recidivists, who typically present with higher BAC levels than first-time offenders and who therefore pose a greater risk to the public. It is also true for drivers under the influence of illegal drugs, who typically wish to avoid additional drug charges.

Rather than rely on compelled blood draws, which place all participants (including the driver, officer, and medical personnel) in danger, almost all states allow the admission of evidence that the driver refused a blood draw. While such evidence may circumstantially establish guilt, its critical function is to explain to juries the absence of chemical testing in impaired-driving prosecutions.

But the Kentucky Supreme Court's rule deprives prosecutors of the opportunity to use refusal evidence and thus confounds the state's interest in stamping out the danger of impaired drivers. In holding refusal evidence categorically inadmissible, the court failed to balance the compelling interests of the government against the minimal intrusion on the driver's privacy. This Court should grant certiorari to clarify that the admission of refusal evidence is reasonable under the Fourth Amendment.

ARGUMENT

I. States have a compelling public safety interest in presenting evidence that an impaired driver refused a blood test.

Impaired-driving laws have decreased accident, injury, and death on our Nation's highways. *See Birchfield*, 136 S. Ct. at 2169, 2178. Driving on a state's roads is a privilege, and imposing implied consent on such a privilege is one of the "broad range of legal tools" states may use to obtain evidence of a driver's impaired state. *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (plurality opinion). While states cannot criminalize the refusal to undergo a blood draw, *Birchfield*, 136 S. Ct. at 2184–86, this Court has long recognized that admitting evidence of a driver's refusal to honor the conditions attached to the privilege of driving on state roads offends neither due process nor the privilege against self-incrimination, *see South Dakota v. Neville*, 459 U.S. 553, 558–66 (1983) (concluding that the use of refusal evidence, whether warned or unwarned, follows the fundamental fairness required by due process); *McNeely*, 569 U.S. at 161 (reasoning that the availability of refusal evidence mitigated the states' interests in warrantless blood draws). But this Court has not definitively decided whether admitting refusal evidence offends the Fourth Amendment.

This court should grant certiorari and hold that it does not. Refusal evidence plays a key role in ensuring those who exercise the privilege of driving do so safely without exposing others to significant risk. Restricting its admissibility would weaken the states' ability to keep our public highways safe.

A. Refusal evidence is commonplace.

Rather than rely on compelled testing, almost all states have addressed the problem of impaired driving by allowing the prosecution to present evidence at the driver's criminal trial that they refused a blood test.

Thirty-eight states, the District of Columbia, and the Northern Mariana Islands permit the introduction of such evidence.[4] Many state courts have upheld the

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[4] Alaska Stat. § 28.35.032 (2021) (refusal evidence permitted, not distinguishing between blood and breath tests); Cal. Veh. Code § 23612(a)(4) (2021); Colo. Rev. Stat. § 42-4-1301(6)(d) (2021) (same); Conn. Gen. Stat. § 14-227a(e) (2021) (same); Del. Code Ann. tit. 21, § 2749 (2021) (same); D.C. Code § 50-1905(c) (2021) (same); Fla. Stat. § 316.1932(1)(c) (2021) (blood-test refusal admissible in evidence); 625 Ill. Comp. Stat. 5/11-501.2(b) (2021) (refusal evidence permitted, not distinguishing between blood and breath tests); Ind. Code § 9-30-6-3(b) (2021) (same); Kans. Stat. Ann § 8-1001(c)(4) (2021) (same); La. Stat. Ann. § 32:666A.(2)(c) (2021) (same); Me. Rev. Stat. Ann. tit. 29-A, § 2431(3) (2021) (same); Md. Code Ann., Cts. & Jud. Proc. § 10-309(a)(2) (2021) (same); Miss. Code Ann. § 63-11-41 (2021) (same); Mo. Rev. Stat. § 577.041(1) (2021) (same); Neb. Rev. Stat. § 60-6,197(6) (2021) (same); Nev. Rev. Stat. § 484C.240 (2021) (same); N.H. Rev. Stat. Ann. § 265-A:10 (2021) (same); N.Y. Veh. & Traf. Law § 1194,2.(f) (2021) (same); N.C. Gen. State § 20-16.2(a)(3) (2021) (same); N.D. Cent. Code § 39-20-08 (2021) (same); 9 N. Mar. I. Code § 7107(c) (2020) (same); 75 Pa. Cons. Stat. § 1547(e) (2021) (same); S.C. Code Ann. § 56-5-2946(B) (2021) (same); S.D. Codified Laws § 32-23-10.1 (2021) (same); Tex. Transp. Code Ann. § 724.061 (2021) (same); Utah Code Ann. § 41-6a-524 (2021) (same); Vt. Stat. Ann. tit. 23, § 1202(d)(6), (f) (2021) (refusal of breath test evidence and chemical test evidence permitted); Va. Code Ann. § 18.2-268.3(C) (2021) (refusal evidence permitted, not distinguishing between blood and breath tests); Wis. Stat. Ann. § 343.305(4) (2021) (same); Mont. Code Ann. § 61-8-1018(2) (2022) (refusal creates a rebuttable inference

that driver was intoxicated); *cf.* Mich. Comp. Laws § 257.625a(9) (2021) (refusal evidence is admissible "only to show that a test was offered to the defendant, but not as evidence in determining the defendant's innocence or guilt"); *cf.* 31 R.I. Gen. Laws § 31-27-2(c)(1) (2021) ("Evidence that the defendant had refused to submit to the test shall not be admissible unless the defendant elects to testify.").

When there is no statute addressing blood-test-refusal evidence, many state courts have still permitted it. *State v. Super. Ct. of State of Ariz. In & for Pima Cty.*, 744 P.2d 675, 679 (Ariz. 1987); *Weaver v. City of Fort Smith*, 777 S.W.2d 867, 869 (Ark. Ct. App. 1989); *State v. Rocha*, 335 P.3d 586, 591 (Idaho 2014); *State v. Cryan*, 833 A.2d 640, 649 (N.J. 2003); *State v. Storey*, 410 P.3d 256, 269–70 (N.M. Ct. App. 2017); *State v. May*, 111 N.E.3d 48, 53 (Ohio Ct. App. 2018) (citing *City of Westerville v. Cunningham*, 239 N.E.2d 40, 41 (Ohio 1968), for same proposition); *State v. Wright*, 691 S.W.2d 564, 565-66 (Tenn. Crim. App. 1984); *State v. Cozart*, 352 S.E.2d 152, 157 (W. Va. 1986) (overruling *State v. Adams*, 247 S.E.2d 475 (W. Va. 1978), which precluded admission of chemical-testing-refusal evidence), *abrogated on other grounds by State v. Nichols*, 541 S.E.2d 310 (W. Va. 1999).

Besides Kentucky, only three states disallow evidence that a driver refused a blood test; none of the disallowances are based on federal constitutional law. Iowa Code § 321J.6(2) (2021) (stating that rejecting a blood test does not constitute refusal; officer may then offer breath or urine test); Mass Gen. Laws ch. 90, § 24 (4)(e) (2021) (stating that refusal evidence is inadmissible); *Elliott v. State*, 824 S.E.2d 265, 267–68 (Ga. 2019) (refusal evidence violates state constitutional protection against self-incrimination). Oregon does not have a *per se* restriction on refusal evidence but conditions admissibility on the circumstances of the refusal. *State v. Smith*, 462 P.3d 310, 311 (Or. Ct. App. 2020) (refusal to physically cooperate with statutorily-required test is admissible as evidence; however withdrawal of consent to a breath, blood, or urine test is

use of this evidence against attacks under state evidentiary rules, state constitutions, and the Fifth Amendment. *Stevenson v. District of Columbia*, 562 A.2d 622, 624 (D.C. 1989) (per curiam) (evidentiary rules); *Hill v. State*, 366 So.2d 318, 325 (Ala. 1979) (state constitution); *State v. Parker*, 702 A.2d 306 (N.H. 1997) (Fifth Amendment). The federal statute criminalizing DUI on federal land also allows refusal evidence. 18 U.S.C. § 3118 (2021); *United States v. Love*, 141 F.R.D. 315, 319 (D. Colo. 1992) ("The prosecution may present evidence that Defendant refused to take a blood test."). And most importantly here, nine state courts hold that blood-test refusal evidence satisfies *Birchfield*'s Fourth Amendment framework. *See, e.g.*, *Fitzgerald v. People*, 394 P.3d 671, 672 (Colo. 2017).[5] Nearly all jurisdictions have

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inadmissible under the state constitution (explaining *State v. Banks*, 434 P.3d 361 (Or. 2019)).

Hawaii and Minnesota have no law—statute or precedent—addressing the admissibility of blood-test-refusal evidence. Oklahoma's statute allowing admission of refusal evidence, Okla. Stat. tit. 47, § 756, was declared unconstitutional under the state's single-subject rule. *See Hunsucker v. Fallin*, 408 P.3d 599, 610 (Okla. 2017). And Washington's statute allows refusal evidence only "when a search warrant, or an exception to the search warrant, authorized the seizure." Wash. Rev. Code § 46.61.517 (2021).

[5] *Commonwealth v. Bell*, 211 A.3d 761, 775–76 (Pa. 2019); *State v. Hood*, 917 N.W.2d 880, 892–93 (Neb. 2018); *State v. Rajda*, 196 A.3d 1108, 1119–21 (Vt. 2018); *State v. Levanduski*, 948 N.W.2d 411, 416–18 (Wis. Ct. App. 2020); *Storey*, 410 P.3d at 269–70; *People v. Vital*, 54 Misc. 3d 1209(A), 2017 WL 350797, at *1–2 (N.Y. Crim. Ct. 2017) (unpublished decision); *State v. Mulally*, 466 P.3d 1233, 2020 WL 4032827, at *15-18 (Kan. Ct. App. 2020) (unpublished decision); *Dill v. State*, 2017 WL 105073, at *2 (Tx.

therefore concluded that a driver's refusal to submit to a blood test is necessary and probative evidence.

B. Refusal evidence explains the absence of chemical evidence in impaired-driving prosecutions.

Chemical testing provides critical evidence for impaired-driving prosecutions. In a survey of 390 prosecutors from across the nation, nearly 75% reported that chemical evidence "is the single most convincing piece of evidence that can be presented to a jury."[6]

But when a driver refuses to submit to a blood test after earlier agreeing to do so as a condition of obtaining their license, the states have a very strong interest in a different type of evidence: the driver's refusal. Many drivers refuse chemical testing, including blood testing. In Colorado, for example, 31% of arrested drivers refused a blood test.[7] In cases of

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Ct. App. 2017) (unpublished decision); *cf. State v. Stanley*, 896 N.W.2d 669, 675–77 (S.D. 2017) (concluding that Fourth Amendment did not prohibit evidence that defendant refused a warrantless urine test).

[6] Robyn D. Robertson & Herb M. Simpson, Traffic Injury Research Foundation *DWI System Improvements for Dealing with Hardcore Drunk Drivers* xiii (2002); *see also* Holly Hinte, *Drunk Drivers and Vampire Cops: The "Gold Standard"*, 37 New Eng. J. on Crim. & Civ. Confinement 159, 163 (2011) (concluding that blood evidence "has strong evidentiary value[,] . . . appeals to the jury[,] . . . and . . . results in more pleas as opposed to litigation").

[7] James Hedlund, Governors Highway Safety Ass'n, *Drug Impaired Driving: A Guide for States* 31 (Glenn Davis et al. eds., 2d ed. 2017); *see also Birchfield*, 136 S. Ct. at 2169 ("On average,

drug-impaired driving, breath tests are valueless. *Birchfield*, 136 S. Ct. at 2184. In these cases, states have a particular interest in using the driver's refusal to submit to the blood draw as evidence because no other less invasive test can provide probative evidence.[8]

Without driver cooperation, some states have permitted forced blood testing. But most states only allow forced testing in a narrow set of circumstances. *See McNeely*, 569 U.S. at 161 ("[A] majority of states either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal . . . or prohibit nonconsensual blood tests altogether."). Drivers who do not consent to a blood test may be unwilling to submit to one even if compelled by a warrant, and forced blood draws should be disfavored because they place all participants—driver, officer, and medical personnel—in danger.[9]

Evidence that a driver changed their mind about consent explains the absence of chemical evidence in the case. "Juries expect scientific evidence of guilt . . . . Absent scientific data, such as chemical test results,

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over one-fifth of all drivers asked to submit to BAC testing in 2011 refused to do so.").

[8] *See* Pam Shadel Fischer, Governors Highway Safety Ass'n, *High-Risk Impaired Drivers: Combating a Critical Threat* 4 (Russ Martin ed., 2019) (noting a 300% jump in polysubstance-impaired-driving cases from 2013–2016 in Denver, Colorado).

[9] *See* Jacob M. Appel, *Nonconsensual Blood Draws and Dual Loyalty: When Bodily Integrity Conflicts with the Public Health*, 17 J. Health Care L. & Pol'y 129, 150–52 (2014) (describing the dangers and ethical issues brought about by a forced blood draw).

juries are more likely to return a verdict of not guilty."[10] Simply put, jurors know that law enforcement measures intoxication by blood-alcohol content, and juries expect that evidence in DUI prosecutions. So too with testing a person's blood for other substances in drugged driving prosecutions. *See Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (recognizing, in 1957, that blood tests had "become routine in our everyday life"). The result: in today's impaired-driving prosecutions, the unexplained absence of chemical testing can doom the case.[11]

While categorically preventing the introduction of refusal evidence harms the prosecution's case, the admission of such evidence does not unfairly prejudice defendants. Because the Fifth Amendment does not apply to this decision, *Neville*, 459 U.S. at 563, "a defendant can explain the basis for the refusal and the jury can consider the defendant's explanation for doing so," *State v. Rajda*, 196 A.3d 1108, 1120 (Vt. 2018); *see also State v. Hood*, 917 N.W.2d 880, 892 (Neb. 2018). A defendant may refuse to submit to blood testing for non-incriminating reasons, such as a defendant's hemophilia or fear of needles. The defendant may so argue to the jury. *Rajda*, 196 A.3d at 1120; *Hood*, 917 N.W.2d at 892. Even if the

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[10] Daniel Larin, *Reviewing the Evidence of the Stop and Arrest in a DUI Case*, *in* THE LEGALITY OF SEARCH AND SEIZURE IN DUI CASES (2010), 2010 WL 2511753, at *11; *see also* Catherine M. Guthrie, *The CSI Effect: Legitimate Concern or Popular Myth?*, 41-AUG Prosecutor 14, 14 (2007) (concluding that scientific evidence "is slowly becoming the American expectation").

[11] *See* Larin, *supra*, at *11 ("A case without a chemical test result is open for a defense attorney to attack everything . . . .").

defendant does not testify, counsel may argue to the jury that blood tests are uncomfortable or invasive. While refusal evidence may be "circumstantial evidence of consciousness of guilt," *Neville*, 459 U.S. at 561, its critical value lies in explaining the lack of evidence, not in substantiating the prosecution's case.

C. Refusal evidence is even more significant in the prosecution of drugged drivers.

The increasing rate of drugged-driving cases combined with the lack of uniform access to technology across jurisdictions underscores the importance of admitting refusal evidence. Because a breath test cannot show drug-related impairment, law enforcement will request that suspected drugged drivers consent to a blood test.

Should a drugged-driver refuse to consent, the *Birchfield* Court suggested that expedited warrants or exigent circumstances could provide necessary evidence to ensure impaired drivers are held responsible for endangering others on the road. 136 S. Ct. at 2184. But not all jurisdictions have an expedited warrant process: six states do not have statutes or court rules permitting electronic warrants.[12] Even in states that permit expedited warrants, not all

[12] Those states are Connecticut, Delaware, Massachusetts, Mississippi, Rhode Island, and West Virginia. *National Drunk Driving Statistics Map*, Responsibility.org, https://www.responsibility.org/alcohol-statistics/state-map/issue/electronic-warrants-e-warrants-authorization/ (last visited Jan. 10, 2022).

jurisdictions have the resources, technology, or judicial approval to implement them.[13]

For example, although Colorado has both legislation and court rules authorizing expedited warrants, "some rural judicial districts lack the IT infrastructure for electronic warrants."[14] In such jurisdictions, where law enforcement cannot obtain a blood-test warrant within the statutory timeframe, exigent circumstances will always exist—thereby creating the categorical exception to the warrant requirement which *Birchfield* prohibits. Even without technological limitations, the volume of warrants needed to compel a drug test for the rising numbers of drugged drivers threatens to overwhelm even well-resourced jurisdictions. In 2020, over 26 million people reported driving while impaired, and nearly half—12.5 million people—self-reported that they were under the influence of a drug.[15] Nationwide, over 1 million drivers were arrested for driving under the

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[13] *Id.*; *see also* AAA Foundation for Traffic Safety, *Enhancing Drugged Driving Data: State-Level Recommendations – Appendices* 2 (Dec. 2019) (sharing state-level information about e-warrant implementation), https://aaafoundation.org/wp-content/uploads/2019/12/AAAFTS_DD-Data-Barriers-Report-Appendices-12.23-FINAL.pdf (sharing state-level information about e-warrant implementation).

[14] *Enhancing Drugged Driving Data, supra*, at 20.

[15] Substance Abuse and Mental Health Services Administration, U.S. Dep't of Health and Human Servs., *2020 National Survey on Drug Use and Health* 1 (2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt35323/NSDUHDetailedTabs2020/NSDUHDetailedTabs2020/NSDUHDetTabs6-28pe2020.pdf.

influence in 2019.[16] And in Colorado, the arrest rate increased "by 90% for drivers impaired by cannabis and alcohol, and 17% for drivers impaired by cannabis and other substances between 2019 and 2020."[17]

The threat of drivers impaired by substances undetectable by warrantless breath tests[18] outstrips the developing infrastructure needed to obtain warrants for compelled blood tests. The *Birchfield* Court warned that "the impact on the courts would be considerable" if warrants were required for breath tests; the same concern now applies for drugged-driving arrests should refusal evidence become inadmissible. *Birchfield*, 136 S. Ct. at 2180. And again, even faced with a warrant, many drivers will still resist blood testing, especially if they wish to avoid additional charges for using an illegal drug. Refusal evidence is therefore a much more feasible alternative. *See, e.g.*, *State v. Storey*, 410 P.3d 256

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[16] *Crime in the United States: 2019*, FBI (last visited Jan. 10, 2022), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-29.

[17] Colo. Dep't of Transp., *CDOT & MADD Share Impaired Driving Stories to Remind Coloradans to Plan Ahead and Stay Safe During 420*, at 2 (2021). As of May 18, 2021, 36 states and four territories allow for the medical use of cannabis products, and 18 states, two territories, and the District of Columbia have enacted legislation to regulate cannabis for nonmedical use. Nat'l Conference of State Legislatures, *State Medical Cannabis Laws* (Jan. 4, 2022), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[18] Richard P. Compton, Nat'l Highway Traffic Safety Admin., *Marijuana-Impaired Driving – A Report to Congress* 9–10 (2017), https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf.

(N.M. 2017) (admitting refusal evidence against a marijuana-impaired driver); *State v. Rajda*, 196 A.3d 1108 (Vt. 2018) (same for an opioid-impaired driver).

D. Refusal evidence is important to prosecute repeat offenders.

The data on repeat offenders establishes that the state interest in removing these drivers from the road is particularly strong. A survey of the scientific literature on recidivist offenders found that the recidivist's "BAC at arrest is typically slightly higher than that of first offenders; they often have alcohol problems; and they commonly suffer from alcohol addiction."[19] The study also concluded that "drivers with prior DWIs are more likely to be involved in severe traffic crashes than" other drivers, and that the risk of alcohol-related crash increased "in near linear fashion" with the number of prior impaired-driving convictions.[20] These drivers are also more likely to be impaired by a combination of alcohol and drugs.[21]

Impaired drivers with prior convictions are particularly prone to refusing chemical testing.[22] One

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[19] Ralph K. Jones & John H. Lacey, *State of Knowledge of Alcohol-Impaired Driving: Research on Repeat DWI Offenders* 18 (2000).

[20] *Id.* at 3, 6; *see also High-Risk Impaired Drivers*, *supra*, at 5 ("[R]epeat offenders cause about one-third of all impaired driving deaths annually.").

[21] *High-Risk Impaired Drivers*, *supra*, at 5.

[22] *See* E. R. Haire, W. A. Leaf, D. F. Preusser & M. G. Solomon, Nat'l Highway Traffic Safety Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* 13 (2011) ("Most people who refuse would refuse anyway, especially repeat offenders who want to avoid conviction by all means.").

study found that the percentage of drivers refusing chemical tests is higher for repeat impaired-driving offenders, and that the percentage of refusal increased with the number of prior DWI offenses.[23] Another study found that *more than 50%* of repeat offenders refuse chemical testing.[24] The explanation: "Repeat offenders often benefit from refusing the BAC test because it clouds the case just enough to give them a slight advantage in court proceedings" and the "administrative penalties are not severe enough to deter refusals by repeat offenders."[25]

The Supreme Court of Kentucky's rule, therefore, deprives prosecutors of evidence in cases against repeat offenders, who pose a more severe danger to society than first-time offenders. States have an unquestionable interest in addressing recidivism, *Ewing v. California*, 538 U.S. 11, 29, (2003), and in prosecuting repeat offenders, the best evidence—chemical evidence—is often unavailable because of their higher rates of refusal.[26] The Kentucky Supreme Court's rule undermines the state's interest in stamping out this dangerous recidivism by removing a

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[23] Ralph K. Jones, Hans C. Joksch & Connie H. Wiliszowski, *Implied Consent Refusal Impact*, 78 (1991).

[24] *Research on Repeat DWI Offenders*, *supra*, 19; *see also* Robertson & Simpson, *supra*, at xiii ("92% of prosecutors reported that test refusal is more common among repeat offenders.").

[25] T.J. Zwicker, J. Hedlund & V.S. Northrup, *Breath Test Refusals in DWI Enforcement: An Interim Report* 21–22 (2005).

[26] *See also* Michael J. Stacchini, Case Comment, Nichols v. United States: *Narrowing the Sixth Amendment Guarantee to Counsel*, 75 BU. L. Rev. 1233, 1252 n.139 (1995) (collecting cases identifying the states interest in stamping out recidivism).

powerful alternative—evidence that the driver changed their mind about consenting to a chemical test.

E. If refusal evidence is inadmissible, drivers have little incentive to consent to testing.

As this Court recognized in *Birchfield*, "[i]f the penalty for driving with a greatly elevated BAC or for repeat violations exceeds the penalty for refusing to submit to testing, motorists who fear conviction for the more severely punished offenses have an incentive to reject testing." 136 S. Ct. at 2169.[27] After *Birchfield*, it is universally the case that the criminal penalty for impaired-driving convictions is higher than the administrative penalty for refusing a blood test because states may not criminalize that refusal. 136 S. Ct. at 2184–86.

If other states follow rule adopted below, drivers would have nearly zero incentive to comply with blood testing because doing so would result in (at most) the loss of a privilege or a small fine, but not criminal punishment.[28] Most drivers would accept a license suspension if it meant impeding a later criminal prosecution through lack of chemical evidence. Indeed, one state supreme court concluded that "no drunk driver would ever submit to a blood test" if refusal

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[27] *See also* Robertson & Simpson, *supra*, at xiv ("The sanctions for test refusal are far less severe than those for taking the test and failing it.").

[28] *See, e.g.*, Alaska Stat. § 28.35.032(g)(1)(A) (2021) ($1500 fine); Fla. Stat. § 327.35215(1) (2021) ($500 fine); Idaho Code § 18-8002(3)(a) (2021) ($250 fine); N.J. Stat. Ann. § 39:4-50.4a(a)(3) (2021) ($300–500 fine).

evidence was barred. *State v. Hood*, 917 N.W.2d 880, 892 (Neb. 2018).

And because the possible criminal DUI conviction based on refusal evidence outweighs any potential civil consequence, DUI attorneys will generally advise their clients not to submit to a test.[29] This advice has real world consequences: drivers who refuse chemical testing are convicted of a lesser offense at a higher rate than those who consent.[30]

F. Admitting refusal evidence is reasonable under the Fourth Amendment because of the states' compelling public safety interest.

When confronted with questions under the Fourth Amendment, this Court has consistently balanced the interests of the government against the level of intrusion on an individual's privacy interest. *United States v. Knights*, 534 U.S. 112, 118–19 (2001) ("The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

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[29] *See* Leonard R. Stamm, *Maryland Practice: DUI Handbook* § 3:1 (2021 ed.) (advising non-consent to chemical testing if the driver has a prior DUI or if driver believes that the test will be above the legal limit).

[30] Martindale-Nolo Research, *Refusing a DUI Chemical Test: What's Likely to Happen and How Much Will It Cost?,* https://www.lawyers.com/legal-info/criminal/dui-dwi/refusing-a-dui-chemical-test-whats-likely-to-happen-and-how-much-will-it-cost.html (last updated Dec. 10, 2015).

(quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))). And this Court has favored the balancing test rather than employing "a *per se* rule of unreasonableness." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001).

As set forth above, the states have a compelling interest to deter the serious problem of impaired driving. In contrast, the primary reason for admitting refusal evidence is because no blood draw has occurred, and the prosecution is left without scientific evidence to firmly establish the driver's level of impairment. Of course, where no draw has occurred, the privacy concerns of this Court in *Birchfield* are not present: the driver has not been subjected to an intrusive medical procedure and there can be no worry of the state obtaining "a wealth of additional, highly personal information." 136 S. Ct. at 2177–78. Additionally, it is unlikely that the threat of refusal evidence has any effect on an impaired driver's decision to consent to a search. It seems implausible that an impaired driver would prefer a blood test, which would conclusively establish his level of impairment, over the opportunity to refuse, which creates at best a rebuttable inference of guilt.

In holding that admitting refusal evidence, either as evidence of guilt or to explain the lack of scientific evidence, violates the Fourth Amendment, the Supreme Court of Kentucky created a *per se* rule of unreasonableness. Pet. App. 30. This "constitutional privilege" approach does not have roots in the Fourth Amendment but rather can be traced back to this Court's decision in *Griffin v. California,* 380 U.S. 609, 614 (1965). *See United States v. Moreno*, 233 F.3d 937, 940-41 (7th Cir. 2000) (discussing lower courts'

application of *Griffins* in some Fourth Amendment cases). In *Griffin*, this Court held that commenting on the refusal to testify is a "penalty imposed by courts for exercising a constitutional privilege" and runs afoul of the Fifth Amendment. 380 U.S. at 614.

However, because this Court has never applied *Griffin*'s rule in a Fourth Amendment analysis, the Supreme Court of Kentucky embarked on unchartered waters in doing so. *Griffin*'s *per se* rule is appropriate under the Fifth Amendment, because, as this Court has described, a defendant's privilege against self-incrimination is "absolute." *See Salinas v. Texas*, 570 U.S. 178, 184 (2013); *Carter v. Kentucky*, 450 U.S. 288, 300 (1981). By contrast, as discussed above, the Fourth Amendment has consistently been viewed through a lens of reasonableness.

A reasonableness—rather than an absolute—approach recognizes that the Fifth and Fourth Amendments protect different individual interests. The Fifth Amendment prohibits compelling a defendant to be "a witness against himself." U.S. Const. amend. V. So, the interest protected by the Fifth Amendment is a defendant's right to avoid self-incrimination. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). But using the defendant's silence to infer guilt would be antithetical to this interest because the government would accomplish indirectly that which it could not accomplish directly: incriminating the defendant through the exercise of the privilege against self-incrimination.

In contrast, the Fourth Amendment does not prohibit compelled self-incrimination, but rather prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Stated affirmatively, the interest

protected by the Fourth Amendment protects an individual's right to privacy. *See United States v. Chadwick*, 433 U.S. 1, 10 (1977) ("[A] fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests."). This difference precludes resolving the admission of refusal evidence on the basis of so-called constitutional privilege because admission does not—directly or indirectly—intrude on a defendant's privacy, especially where the evidence is used for the limited purpose of explaining the absence of scientific evidence.

And even if admitting refusal evidence somehow implicates the driver's privacy interest, the Supreme Court of Kentucky erred when failing to balance the compelling interest of the government against any minimal intrusion on the driver's privacy. This Court should grant certiorari and hold that admitting refusal evidence, which most jurisdictions permit, is reasonable under the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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