No. 14-10423

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER GAEDE, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition for Writ of Certiorari to the
Illinois Appellate Court

REPLY BRIEF TO BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Summary

Petitioner has shown that Illinois' implied consent statute is unconstitutional *both*: (1) because it omits a procedural safeguard that constitutional principles require, the right to request a warrant; and (2) because it includes a procedural mechanism that constitutional principles prohibit, punishment for asserting a right. (Pet. 10-13). Petitioner has also shown that the proposed rule would permit the State to achieve the same end (gathering evidence), through constitutional means, without denying the basic right to refuse warrantless State intrusion into the human body. (Pet. 20). And petitioner has shown that the proposed rule would not impede effective law enforcement. (Pet. 21-23).

In opposing review of this case, the State does not contest these arguments. Instead, the State submits a lengthy recitation of facts (Opp. 2-11), before arguing: (1) forfeiture (Opp. 15-18); and (2) harmless error (Opp. 18-20). As discussed below, the statutory challenge is not forfeited, harmless error does not apply when analyzing the constitutionality of a statute, and in any event, harmless error does not preclude this Court's review.

The State also argues, without regard to the lower court's reasoning, that its ultimate decision to uphold Illinois' implied consent statute is consistent with this Courts' precedent. (Opp. 11-15); *See People v. Gaede*, 2014 IL App (4th) 130346, ¶ 24 (reasoning that if there is no search, there can be no Fourth Amendment violation). As will now be discussed, in maintaining that the decision below is consistent with this Court's precedent, the State relies on *obiter dicta* in *McNeely*, the Fifth Amendment case of *Neville*, as well as inconsequential factual distinctions in *Camara*.

I.

The decision of the Illinois Appellate Court conflicts with this Court's precedent.

Missouri v. McNeely

In arguing that the decision below is consistent with this Court's precedent, the State first points to a passage by a plurality of this Court in *Missouri v. McNeely*, 569 U.S.___, 133 S.Ct. 1552, 1566 (2013), wherein the plurality described implied consent laws as "legal tools." (Opp. 11-12). The passage, however, is *obiter dicta*, as implied consent was not at issue in *McNeely*. *See Id.* at 1556-58. Nevertheless, the passage, and particularly the words "legal tools," have garnered significance far beyond what the plurality ever likely intended or anticipated, for although the tool of implied consent is legal in nature, it is not necessarily legal as a matter of law.

Yet courts across the country, inclined as they reasonably are to preserve this tool for local law enforcement, have relied on this language as being all but dispositive of the constitutionality of implied consent search schemes. *See, e.g.*, *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013); *Flonnory v. State*, 109 A.3d 1060, 1071 (Del. 2015). Indeed, the court below concluded that "the various opinions in *McNeely* make clear a majority of the Supreme Court justices do not question the constitutionality of implied-consent statutes." *People v. Gaede*, 2014 IL App (4th) 130346, ¶ 26 (citing *McNeely*, 133 S.Ct. at 1556, 1566, 1574).

Even if that is true, this Court has never held as much in the context of a Fourth Amendment challenge. The present case, being squarely on point, permits this Court to clarify whether the tool of implied consent is merely legal in nature or is in fact legal as a matter a law. For that reason, this Court should grant Certiorari.

South Dakota v. Neville

The State notes that the petition does not cite, distinguish, or ask this Court to overrule *South Dakota v. Neville*, 459 U.S. 553 (1983). (Opp. 12). Indeed it does not. This Court therein held that the admission of refusal evidence does not violate the *Fifth* Amendment privilege against self-incrimination because the act of refusing is not compelled by the State, and therefore, is not protected by the privilege. *Id.* at 564.

The challenge now before the Court is premised upon the Fourth Amendment. In short, petitioner argues that, absent a recognized warrant exception, individuals have the Fourth Amendment right to refuse consent to warrantless breath-analysis, and that Illinois' implied consent statute is unconstitutional because it authorizes punishment for doing nothing more than asserting that basic right. (Pet. 10-13). The supporting constitutional analysis, which was briefly described in the petition (Pet. 10-13), does not therefore conflict with this Court's decision in *Neville*.

The State also notes that this Court wrote in *Neville*, with respect to the suspension of driving privileges, that "'[s]uch a penalty for refusing to take a blood-alcohol test is unquestionably legitimate.'" (Opp. 12, quoting *Neville*, 459 U.S. at 560). The State omits from this quote, the last clause of the sentence: "such a penalty *** is unquestionably legitimate, *assuming appropriate procedural protections*." *Id.* at 560 (emphasis added). The lack of "appropriate procedural protections" is the alternative grounds for the present challenge to Illinois' implied consent statute.

As explained in the petition (Pet. 12-13), in addition to authorizing punishment for asserting a right, the statute is also unconstitutional because it omits a procedural safeguard that constitutional principles require—the right to request a warrant.

See 625 ILCS 5/11-501 (West 2012); *see also City of Los Angeles, Calif. v. Patel*, ___U.S.___, 135 S.Ct. 2443, 2452-53 (2015) (holding statute facially unconstitutional because it did not provide an opportunity to have a neutral decisionmaker review an officer's demand to search before the subject faced penalties for failing to comply).

If Illinois' statute afforded this fundamental procedural protection before individuals faced the statute's significant civil and criminal consequences for refusing consent, it would satisfy the basic requirements of the Fourth Amendment. Illinois' implied consent statute, however, does not include this appropriate and necessary procedural protection. For that reason, this Court should grant Certiorari and hold that the statute is procedurally defective.

Camara v. Mun. Court of City & Cnty. of San Francisco

As explained in the petition (Pet. 14), the decision below materially conflicts with this Court's decision in *Camara* in two critical respects, as Fourth Amendment rights can indeed be violated: (1) where an individual is punished for asserting them; and (2) where no search occurs. *Compare Gaede*, 2014 IL App (4th) 130346, ¶ 24 (reasoning that if there is no search, there can be no Fourth Amendment violation), *with Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967), *and Patel*, 135 S.Ct. 2443, 2452-53. The State argues that *Camara* is distinguishable in three ways. (Opp. 12-14). The distinctions, however, are inconsequential and do not vitiate the conflicts in the decision below.

First, the State notes that the punishment at issue in *Camara* was conviction of a crime, while we deal here with the admission of refusal evidence and the summary suspension of driving privileges. (Opp. 12-13). Petitioner again concedes, as noted

in the petition (Pet. 14), that conviction of a crime is more punitive. Nevertheless, "a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965).

Second, the State notes that the law at issue in *Camara* authorized criminal penalties for refusing consent even to suspicionless searches. (Opp. 13, citing *Camara*, 387 U.S. at 526). Suspicionless or not, the search scheme there, like the statute here, was unconstitutional because it did not include a warrant procedure, and therefore, "lack[ed] the traditional safeguards which the Fourth Amendment guarantees to the individual ***." *Id.*; *see also Patel*, 135 S.Ct. 2443, 2452-53.

Third, the State notes that *Camara* involved the "search of an apartment." (Opp. 13). The State then disputes petitioner's conclusion that investigative searches of the human body, for incriminating evidence, are constitutionally more significant than administrative searches of apartments, for housing code violations. (Opp. 13). The State argues the opposite is true. In support, it notes that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (Opp. 13, quoting *Payton v. New York*, 445 U.S. 573, 585 (1980)).

Even so, it is unlikely that our Founding Fathers could have ever imagined that the system of government they conceived on principles of personal liberty and individual freedom would one day permit the State to invade its citizens' bodies in search of incriminating evidence. Even more unimaginable would have been the idea that the State could not only perpetrate such invasions of the human body without a warrant and without even allowing warrant requests, but that the State could actually punish those who did not simply submit to such warrantless invasions.

II.

Regardless of a divisive split, the questions of federal law that are squarely presented by this case are of tremendous national significance.

The State suggests that there is no split among lower courts regarding the constitutionality of implied consent statutes. (Opp. 15). However, Minnesota's intermediate appellate court recently invalidated the state's refusal statute because it infringed on the fundamental right to refuse consent to a warrantless search. *See State v. Trahan*, No. A13-0931, 2015 WL 5927980, at *6-7 (Minn. Ct. App. Oct. 13, 2015); *see also Byars v. State*, 336 P.3d 939, 945-946 (Nevada, 2014) (invalidating implied consent statute because it did not allow motorists to withdraw consent).

Many other courts, while declining to expressly invalidate their state's statute, have held that implied consent is not an exception to the warrant requirement or that implied consent is not valid consent under the Fourth Amendment. *See, e.g.*, *State v. Wulff*, 337 P.3d 575, 582 (Idaho, 2014) (holding implied consent statute does not fall under the consent exception to the Fourth Amendment); *Weems v. State*, 434 S.W.3d 655, 665 (Tex. App. 2014) (holding implied consent is not an exception to the warrant requirement); *Williams v. State*, 771 S.E.2d 373, 376-377 (Georgia, 2015) (holding consent given in compliance with statute was not *per se* voluntary).

And regardless of a divisive split, as noted in the petition (Pet. 17-19), thousands of people are affected by implied consent laws each year, and in the wake of *McNeely*, the issue of implied consent is being litigated with increasing frequency in courts across the country. Inevitably contributing to the abundance of litigation is the uncertainty regarding two important questions of federal law that are squarely presented by this case: (1) do motorists generally have the Fourth Amendment rights

to refuse consent and demand a warrant; and (2) if so, can the State punish motorists for asserting these Fourth Amendment rights.

If left unresolved, the uncertainty regarding these fundamental principles of federal law will likely continue to produce evermore confusion and inconsistent judgments in courts across the country. To aid this largely unguided, yet pervasive, litigation and to assist states in implementing valid measures for addressing drunk driving, this Court should grant Certiorari and resolve the important constitutional questions that are squarely presented by this case.

III.

This case is indeed an ideal vehicle for addressing the constitutionality of implied consent statutes.

The State argues that the present case is a poor vehicle for resolving the constitutionality of implied consent statutes. (Opp. 15-18). Specifically, the State argues that the statutory challenge is forfeited, the record is insufficiently developed, and the constitutionality of the civil penalty cannot be directly resolved by this case.

The Statutory Challenge is Not Forfeited

The State argues that the present challenge to Illinois' implied consent statute was forfeited under state law because the challenge was not raised in the trial court. (Opp. 15-16, citing *People v. Almond*, 2015 IL 113817, ¶ 54). The State's reliance on *Almond* is misplaced. It is true that constitutional *issues* must generally be raised at trial to preserve the issue for review. *Almond*, 2015 IL 113817, ¶ 54. However, as noted in the petition (Pet. 9), Illinois law has long provided that "a constitutional challenge to a *statute* can be raised at any time." *E.g.*, *People v. Bryant*, 128 Ill.2d 448, 453-454 (1989) (emphasis added); *In re M.I.*, 2013 IL 113776, ¶ 39 (2013) (addressing

constitutional challenge to statute even where it was raised for the first time in a brief to the Illinois Supreme Court). And notably, the lower court reached the statutory challenge without pause. *Gaede*, 2014 IL App (4th) 130346, ¶ 24-27. As such, the statutory challenge was not forfeited, and is therefore properly before the Court.

The Record is Properly Developed

The State argues that because the challenge was not raised at trial, no factual record has been developed, and therefore, this Court cannot adequately assess the present challenge to Illinois' implied consent statute. (Opp. 16). Essentially, the State contends that the record is undeveloped as to the existence of exigent circumstances.

First of all, the record contains the requisite facts. Mr. Gaede was arrested for suspicion of drunk driving. The State requested his consent to breath analysis. He refused, believing it was his right to do so. The State punished him for refusing. Petitioner challenged the statute that authorized the punishment. In determining the constitutionality of the statute, two threshold inquiries are squarely presented: (1) do motorists generally have the Fourth Amendment rights to refuse consent and demand a warrant; and (2) if so, can the State punish motorists for asserting these Fourth Amendment rights. The record is, therefore, properly developed.

Second, under Illinois law, the State cannot physically compel individuals, who refuse consent, to submit to chemical analysis regardless of a warrant or exigent circumstances. *See, e.g., People v. Fisher*, 184 Ill.2d 441, 451 (1998). And the penalties for refusing consent can be imposed regardless of a warrant or exigent circumstances. *See* 625 ILCS 5/11-501.1 (e) (West 2012) (summary suspension); 625 ILCS 5/11-501.2(c) (West 2012) (refusal evidence). As such, the arresting officers here would have had no reason to seek a warrant, and thus, no reason to evaluate any potential exigencies.

Summary Suspension cannot be Directly Resolved by this Case

The State points out that this case does not permit the Court to resolve the constitutionality of both penalties authorized by Illinois' implied consent statute: (1) refusal evidence; and (2) summary suspension. (Opp. 17). Indeed that is true, as summary suspension cannot be directly resolved herein. However, given the bifurcated nature of the penalties (criminal and civil), it is procedurally unlikely, if not impossible, that a single case could squarely present both issues.

Nevertheless, resolving the constitutionality of the criminal penalty would provide much needed guidance regarding, if not largely resolve, the constitutionality of the civil penalty. If this Court granted Certiorari and affirmed that even in the present context "a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution[]" (*Harman*, 380 U.S. at 540), such a holding would seemingly be dispositive of the civil penalty. If, however, this Court upheld the current construction of Illinois' implied consent statute, such a holding would likely have the practical effect of endorsing all statutes with similar civil and criminal penalties. So although the constitutionality of summary suspension cannot be directly resolved by this case, that observation does not obviate the need for review.

Other Pending Petitions

The State also notes that there are several pending Petitions for Certiorari challenging statutes that make refusing consent a criminal offense. (Opp. 13, citing *Bernard v. Minnesota*, No. 14-1470; *Birchfield v. North Dakota*, No. 14-1468; *Beylund v. Levi*, No. 14-1507). The State argues that this case is not the appropriate vehicle for addressing the constitutionality of those statute. (Opp. 13).

That is not entirely accurate, for if this Court were inclined to hold that even in the context of implied content "a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution[]" (*Harman*, 380 U.S. at 540), thereby invalidating Illinois' statute, such a holding would seemingly be dispositive of the constitutionality of any statute that authorizes similar or more onerous penalties.

If on the other hand, this Court were inclined to invalidate only those statutes that make it a criminal offense to refuse consent to a warrantless search, but nevertheless wanted to clarify the constitutionality of the standard penalties described in *McNeely*, 133 S.Ct. at 1566, this Court could consolidate the present case with at least one of the other pending cases for plenary review. Either way, this case permits the Court to offer critical guidance on an issue of tremendous national significance. For that reason, this Court should grant Certiorari.

IV.

Harmless error does not apply to the constitutional analysis of a statute.

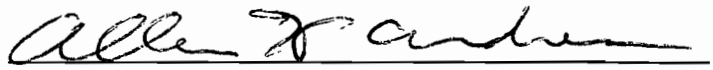
The State argues that any constitutional error was harmless. (Opp. 18-20). Harmless error, however, is irrelevant to the constitutional analysis of a statute. *See, e.g.*, *People v. Zeisler*, 125 Ill.2d 42, 46-47 (1988); *see also Chapman v. California*, 386 U.S. 18, 20-24 (1967) (discussing trial error); *Arizona v. Fulminante*, 499 U.S. 279, 295-302 (1991) (discussing trial error).

Moreover, harmless error does not preclude this Court's review, as the court below did not reach that question. *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988); *Neder v. U.S.*, 527 U.S. 1, 25 (1999); *Bullcoming v. New Mexico*, ___U.S.___, 131 S.Ct. 2705, 2719, n. 11 (2011); *see also Gaede*, 2014 IL App (4th) 130346, ¶ 27.

CONCLUSION

For the foregoing reasons, petitioner, Christopher Gaede, respectfully petitions for a Writ of Certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,



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NOTICE AND PROOF OF SERVICE

TO: Honorable William K. Suter, Clerk of the Supreme Court of the United States, Washington, D.C. 20543;

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Please take notice that we have mailed the original and ten copies of the enclosed Reply Brief to Brief in Opposition of Petition for Writ of Certiorari to the Clerk of the above Court. We have also sent via State of Illinois messenger service three copies to the Attorney General of Illinois, and three copies to the to the State's Attorneys Appellate Prosecutor, and mailed one copy to the Petitioner in an envelope deposited in a U.S. mail box in Springfield, Illinois on November 13th, 2015.

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COUNSEL OF RECORD FOR PETITIONER

SUBSCRIBED AND SWORN
to before me on this 13th day
of November, 2015.

NOTARY PUBLIC