No. 14-10423

In the Supreme Court of the United States

CHRISTOPHER M. GAEDE, PETITIONER,

v.

ILLINOIS, RESPONDENT.

On Petition for a Writ of Certiorari to the Illinois Appellate Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether implied-consent laws that require motorists to consent to breath testing to determine their blood-alcohol concentration if they are arrested for a drunk-driving offense — and that allow evidence of a motorist's refusal to consent to such testing to be admitted against him at a subsequent drunk-driving prosecution — are constitutional.

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BRIEF IN OPPOSITION

In *Missouri v. McNeely*, 133 S. Ct. 1552, 1563 (2013), this Court held that the natural dissipation of alcohol in the bloodstream does not establish a *per se* exigency that categorically justifies warrantless blood testing of a drunk-driving suspect's blood alcohol concentration (BAC). The plurality opinion stressed, however, that the Court's holding would not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses," noting that the States possess "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 1566. In particular, the plurality explained that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* These laws, as the plurality recognized, "impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, 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.*

Petitioner argues that, despite the plurality's understanding, the unstated effect of *McNeely*'s holding was to invalidate these implied-consent laws. But nothing in *McNeely* nor any of this Court's other precedent compels that conclusion, and no lower court has embraced it. Regardless, because *McNeely* involved forced

blood testing, rather than the far less invasive breath testing requested here, it is unclear whether *McNeely* applies at all.

In any event, this case is a particularly poor vehicle for resolving the issue. After petitioner was arrested on probable cause of drunk driving, he refused to consent to a breath test to determine his BAC. As a result, under Illinois law, his driver's license was summarily suspended for twelve months and evidence of his refusal was admitted against him at his subsequent drunk-driving prosecution. But in the those proceedings, petitioner did not move to exclude the evidence of his refusal or otherwise litigate a constitutional challenge to that provision of the implied-consent statute. He thus failed to develop the factual record necessary for assessing what is a core premise of his argument: that he had a Fourth Amendment right to refuse to consent to a warrantless breath test. And because there is no indication in the record that petitioner ever challenged the summary suspension of his license — let alone in the criminal proceedings below — this case does not implicate the license-suspension provision at all.

Finally, any error in admitting evidence of petitioner's refusal to take a breath test was harmless beyond a reasonable doubt, as the remaining evidence of his guilt was overwhelming. For all of these reasons, the Court should deny certiorari.

STATEMENT

Following a jury trial in the Circuit Court of Macon County, Illinois, petitioner was convicted of driving while under the influence of alcohol, in violation

of 625 ILCS 5/11-501(a)(2), and was sentenced to twenty-four months of court supervision. Pet. App. A1. The state appellate court affirmed, Pet. App. A12, and the Illinois Supreme Court denied leave to appeal, Pet. App. C1.

1. Illinois law, like the laws of all other States and the federal government, provides that "[a]ny person who drives or is in actual physical control of a motor vehicle upon the public highways of this State shall be deemed to have given consent * * * to a chemical test or tests of blood, breath, or urine for the purpose of determining the content of alcohol * * * in the person's blood if arrested" for the offense of driving under the influence of alcohol. 625 ILCS 5/11-501.1(a); see *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) ("all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense"); 18 U.S.C. § 3118(a) ("Whoever operates a motor vehicle in the special maritime and territorial jurisdiction of the United States consents thereby to a chemical test or tests of such person's blood, breath, or urine, if arrested for any offense arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction.").

As is "typical[ ]" of the implied-consent laws nationwide, *McNeely*, 133 S. Ct. at 1566, Illinois law provides that a motorist's refusal to submit to a chemical test after being arrested for drunk driving shall result in the "summary suspension" of his driving privileges for twelve months. 625 ILCS 5/11-501.1(c)-(e); 625 ILCS 5/6-208.1(a)(1). Moreover, as is true of most States and the federal government, Illinois

law further provides that "[i]f a person under arrest refuses to submit to a chemical test under the provisions of Section 11-501.1, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person under the influence of alcohol * * * was driving or in actual physical control of a motor vehicle." 625 ILCS 5/11-501.2(c)(1); see *McNeely*, 133 S. Ct. at 1566 ("most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution"); 18 U.S.C. § 3118(b) ("refusal may be admitted into evidence in any case arising from such person's driving while under the influence of * * * alcohol").

2. On a late February evening in 2012, Officer Randy Clem of the Decatur Police Department stopped petitioner's motorcycle because it matched the description of a motorcycle involved in a recent hit-and-run accident with an unattended, parked vehicle. Pet. App. A2; see R. Vol. III at 102-103. Officer Clem noticed the smell of alcohol on petitioner's breath and that his eyes were bloodshot and glassy. Pet. App. A2; R. Vol. III at 89. Petitioner denied having been in an accident. *Ibid.*

Officers Chris Snyder and Steve Hagemeyer arrived at the scene shortly thereafter. *Ibid.*[1] Officer Snyder observed several fresh scrapes on petitioner's motorcycle and noticed that the lens cover for the motorcycle's right turn signal was missing. *Ibid.* Petitioner claimed that the lens cover had been missing for a long

[1] Officer Hagemeyer was Officer Snyder's training officer; Officer Snyder was in the third phase of his field training. R. Vol. III at 109. Officer Hagemeyer was certified by the National Highway Traffic Safety Administration (NHTSA) to teach DUI classes at the police academy. *Id.* at 161.

time and told Officer Snyder that it would not be found at the accident scene. *Id.* at A2-3. Officer Snyder noted that petitioner's breath smelled of alcohol, his eyes were bloodshot and glassy, and his speech was slurred. *Id.* at A2.[2]

Based on these observations, Officer Snyder conducted three field-sobriety tests. *Id.* at A3. On the horizontal gaze nystagmus (HGN) test, petitioner exhibited six (out of six) cues of intoxication, indicating that he was under the influence of alcohol. *Ibid.*; see R. Vol. III at 125.[3] Petitioner also performed poorly on the walk-and-turn and one-legged-stand tests. Pet. App. A3. For the walk-and-turn test, petitioner was instructed to take nine heel-to-toe steps, in a straight line, with his arms by his side, and to then turn around, while leaving his front foot on the line,

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[2] Officer Hagemeyer likewise noted that petitioner's speech "seemed thick tongued or slurred." R. Vol. III at 190-191.

[3] The Illinois Supreme Court has held that "HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible for the purpose of proving that a defendant may have consumed alcohol and may, as a result, be impaired." *People v. McKown*, 924 N.E.2d 941, 955 (2010). The court described the methodology of conducting an HGN test as follows:

> [T]he officer first questions the subject to determine whether he or she has any medical condition or is taking any medication that might affect the results of the test. If not, the officer performs a preliminary test to determine whether the pupils of the subject's eyes are of equal size and whether the eyes "track" equally as an object is moved, at eye level, from side to side. If so, the HGN test itself is performed. The officer looks for three "clues," assessing each eye separately. The three clues are lack of smooth pursuit, distinct nystagmus at maximum deviation, and the onset of nystagmus at an angle less than 45 degrees. One point is assigned for each clue that is present in either eye. Thus, the maximum score is six, which would indicate all three clues present in both eyes. A score of four or more is considered "failing" and indicative of alcohol impairment.

Id. at 945; see also R. Vol. III at 120-127 (Officer Snyder describing his method of performing HGN test). Officer Snyder testified that he was trained to perform the HGN test, in accordance with NHTSA standards, in the police academy. R. Vol. III at 119. He had also previously observed Officer Hagemeyer conduct the test in the field. *Ibid.* Officer Hagemeyer observed Officer Snyder as he administered the HGN test to petitioner and testified that Officer Snyder "gave proper instructions and conducted the test as he was trained," in accordance with NHTSA standards. *Id.* at 164-165. Petitioner did not challenge the admissibility of the HGN test results at trial.

and take nine heel-to-toe steps in the opposite direction, counting each step as he went. R. Vol. III at 128-129.[4] Petitioner exhibited three cues of impairment: he failed to turn in the proper manner, he failed to step heel-to-toe three times on the way back, and he raised his arms from his side for balance. *Id.* at 130. For the one-legged-stand test, petitioner was instructed to stand with his feet together, arms at his side, and to then raise one foot six inches off the ground and count aloud in the manner of one-one-thousand, two-one-thousand, *etc.* *Id.* at 131. In performing this test, petitioner's "body swayed" and he "raised his arms for balance" and "set his foot down * * * nine times" in 30 seconds. *Id.* at 132. At the conclusion of these tests, Officer Snyder placed petitioner under arrest for driving under the influence of alcohol. Pet. App. A3. Officer Snyder then searched petitioner and discovered the missing lens cover in petitioner's shirt pocket. *Ibid.* Paint transfers on the lens cover matched the paint color of the parked vehicle that had been involved in the hit-and-run accident. *Ibid.*

Petitioner was transported to the Macon County jail and placed in the intoxication room for a twenty-minute video-recorded observation. *Ibid.*; R. Vol. III at 138-139; see 20 Ill. Admin. Code 1286.310(a). During that time, Officer Hagemeyer administered the walk-and-turn and one-legged-stand tests a second time, and petitioner again performed poorly. Pet. App. A3; see R. Vol. III at 140.[5]

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[4] Officer Hagemeyer, who observed Officer Snyder as he instructed petitioner how to perform the walk-and-turn and one-legged-stand tests, testified that Officer Snyder instructed petitioner appropriately. R. Vol. III at 164-165.

[5] Officer Hagemeyer testified that these field-sobriety tests were conducted a second time solely because, during the initial testing, petitioner was standing too close to Officer Clem's squad car for his feet to be visible on the video-recording. R. Vol. III at 180.

On the walk-and-turn test, petitioner "missed heel-to-toe three times on the first nine" steps, "used his arms for balance," "swayed," and "did not turn correctly." *Ibid.* On the one-legged-stand test, petitioner "used his arms for balance," "swayed," and "set his foot down several times." *Id* at 141. He eventually "refused to continue the test." *Ibid.*

Officer Snyder then read petitioner the "Warning to Motorist" form, which informed petitioner that if he refused to consent to a chemical test of his BAC, his driving privileges would be suspended. Pet. App. A3; R. Vol. III at 141-143; R. Vol. I at C7. At the end of the observation period, Officer Snyder asked petitioner if he would consent to a chemical breath analysis, and petitioner refused. Pet. App. A3; R. Vol. III at 143. With no objection from petitioner, the Warning to Motorist form was admitted into evidence. R. Vol. III at 142. Petitioner likewise made no objection to Officer Snyder's testimony about his refusal to submit to the breath test, *id.* at 143, or to the prosecutor's subsequent comments on this evidence during closing argument, *id.* at 250.

Petitioner testified that he had consumed two beers earlier in the evening, between 5:00 and 6:00 p.m., at the Wild Dog bar. R. Vol. III at 221-223. Although he later went to another bar, Flashback's Lounge, he testified that he did not have anything to drink there because it would go against his "code" to drink more than two beers when he was driving his motorcycle. R. Vol. III at 222-224.[6] As he was leaving Flashback's, a woman asked him to give her a ride on his motorcycle. *Id.* at

[6] Three witnesses testified on petitioner's behalf that they had not seen him drink more than two beers that evening, and that he had refused additional drinks because of his code. *Id.* at 204-218; see also Pet. App. A4.

225-226. Petitioner obliged, but he quickly "realized that she was not in her right mind." *Id.* at 226. As they entered a nearby parking lot, the woman said "something about her boyfriend" and tried to get off the motorcycle while it was moving. *Id.* at 227. She eventually got off the motorcycle, even though it was still "slightly moving," and petitioner proceeded to drive home. *Id.* at 228. He denied being involved in an accident in the parking lot. *Id.*

Petitioner testified that he refused to consent to the breath test after his arrest because he "figured it was [his] prerogative to do so," and because he "just felt like that it * * * wasn't going to be in [his] favor." *Id.* at 231 ("I knew I had drank a couple of beers at the Wild Dog. I didn't know how that was going to show up.").

In closing argument, the prosecutor noted that multiple officers at the scene smelled alcohol on petitioner's breath, and that petitioner failed three standardized field-sobriety tests. *Id.* at 248-250. The prosecutor also argued that it was "[v]ery telling[ ]" that petitioner refused to take a breath test when he knew that his refusal would result in the suspension of his driver's licence. *Id.* at 250. The prosecutor acknowledged that petitioner "didn't have to" take the test, but he noted that petitioner himself had testified that he did not take the test because he knew "'[i]t wasn't going to be in [his] favor.'" *Id.* Petitioner's refusal to take the breath test, the prosecutor argued, "evidence[d] * * * his belief in his own guilt." *Id.*

The jury returned a verdict finding petitioner guilty of driving while under the influence of alcohol. Pet. App. A4. Petitioner filed a motion for a new trial or

for judgment notwithstanding the verdict, arguing simply that he "was not proved guilty beyond a reasonable doubt." R. Vol. I at C104. The trial court denied the motion. R. Vol. IV at 3.

3. On appeal, petitioner argued that Illinois's implied-consent statute unconstitutionally punished him for asserting his Fourth Amendment right to refuse to consent to a warrantless breath test by allowing evidence of his refusal to be used against him at trial. Pet. App. A4. And he argued that he was entitled to a new trial because the evidence of his refusal contributed to his conviction. *Id.* at A12. The state appellate court rejected petitioner's constitutional contention and affirmed his conviction. *Id.* at A7-12.

At the outset, the court rejected petitioner's "false premise" that one "always has a constitutional right to refuse a [warrantless] breath test." *Id.* at A7, A10. The court acknowledged that "a breath test * * * is a search within the meaning of the [F]ourth [A]mendment." *Id.* at A7 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-617 (1989)). And the court noted that warrantless, nonconsensual *blood tests* cannot be justified categorically in drunk driving cases under a theory that such cases present *per se* exigencies due to the natural dissipation of alcohol in the bloodstream. *Id.* at 9 (citing *McNeely*, 133 S. Ct. at 1563). But the court recognized that, even if *McNeely* applied to breath testing, the constitutionality of performing such tests without a warrant or consent would have to be assessed "'case by case based on the totality of the circumstances.'" *Id.* at 9 (quoting *McNeely*, 133 S. Ct. at 1563).

That case-by-case approach, the Court held, doomed petitioner's facial challenge. As the court observed, because petitioner refused to consent to a breath test — and because the officers did not administer one over his objection — "no warrantless, nonconsensual search" was performed, and thus petitioner's Fourth Amendment rights "could not have been violated." *Id.* at A9-10. In other words, "[b]ecause the implied consent statute allowed [petitioner] to refuse the police officer's request to take the warrantless chemical breath test, [the court could not] find the statute facially unconstitutional." *Id.* at A10 ("a statute is only facially unconstitutional if the statute can never be constitutionally applied").

The court likewise rejected petitioner's contention that the implied-consent statute "unconstitutionally * * * punish[ed] him for exercising his [Fourth Amendment] right to refuse chemical analysis" by summarily suspending his driving privileges and allowing evidence of his refusal to be admitted against him at trial. *Id.* at A10. Again, the court noted that petitioner's argument was "built on [the] false premise" that one "always has a constitutional right to refuse a [warrantless] breath test," a premise inconsistent with this Court's holding in *McNeely* that the constitutionality of warrantless blood tests in drunk-driving cases must be assessed on a case-by-case basis. *Ibid.*

Finally, the court "noted [that] the various opinions in *McNeely* make clear [that] a majority of [this Court's] justices do not question the constitutionality of implied-consent statutes." *Ibid.* In particular, the court quoted the passage from *McNeely*'s plurality opinion that referred approvingly to the implied-consent

statutes of "all 50 States," which "typically" provide for the "immediate[ ] suspen[sion] or revo[cation]" of a motorist's driving privileges upon his or her refusal to consent to a chemical test after being arrested for a drunk-driving offense and, in "most States[,] allow the motorist's refusal * * * to be used as evidence against him in a subsequent criminal prosecution." *Id.* at A11 (quoting *McNeely*, 133 S. Ct. at 1566).[7]

REASONS FOR DENYING THE PETITION

I. The decision below is consistent with this Court's precedent.

The state appellate court's holding that Illinois's implied-consent statute does not facially violate the Fourth Amendment is consistent with this Court's precedent. Indeed, the plurality opinion in *McNeely* referred approvingly to such laws. See *McNeely*, 133 S. Ct. at 1566. In responding to the contention that *McNeely*'s limits on warrantless blood testing would "undermine the governmental interest in preventing and prosecuting drunk-driving offenses," the plurality stressed that the States retained "a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconseneual blood draws." *Id.* Among those tools, this Court noted, were "implied consent laws that require motorists * * * to consent to BAC testing if they are arrested [for] a drunk-driving offense" and "impose significant consequences when a motorist withdraws consent," including the "immediate[ ] suspen[sion] or revo[cation]" of the motorist's

[7] Because petitioner "failed to establish [that] his constitutional rights were violated," the state appellate court did not conduct a harmless error analysis. See Pet. App. A12 (declining to "address [petitioner's] argument" that the alleged unconstitutionality of the implied-consent statute "contributed to his conviction") (internal quotation marks omitted).

driving privileges and the admissibility of "the motorist's refusal to take a BAC test" as "evidence against him in a subsequent criminal prosecution." *Id.*

With respect to the consequence of allowing evidence of refusal at a subsequent prosecution — a provision adopted by "most States" and the federal government, see *id.*; 18 U.S.C. § 3118(b) — the *McNeely* plurality cited with approval the Court's prior decision in *South Dakota v. Neville*, 459 U.S. 553, 554 (1983), which held that the admission of such refusal evidence did not violate the Fifth Amendment. See *McNeely*, 133 S. Ct. at 1566. As relevant here, *Neville* held that "requir[ing] suspects and defendants to make difficult choices" in "the criminal process" does not amount to unconstitutional "coercion." 459 U.S. at 923. Likewise, with respect to summary-suspension provisions, *Neville* reiterated that "[s]uch a penalty for refusing to take a blood-alcohol test is unquestionably legitimate." *Id.* at 560 (citing *Mackey v. Montrym*, 443 U.S. 1 (1979)). The petition does not cite, much less distinguish or ask the Court to overrule, *Neville.*

Instead, petitioner contends that the decision below conflicts with *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523 (1967), see Pet. 14, which held that a law criminalizing refusal to consent to a warrantless, suspicionless inspection of a building violated the Fourth Amendment. 387 U.S. at 526-527, 540. But *Camara* is distinguishable in at least three critical respects. First, and most importantly, the law at issue in *Camara* made it a *criminal offense* to refuse to consent to a warrantless search. Illinois's implied-consent law, in contrast, imposes an administrative penalty and an evidentiary consequence for

refusing to consent.[8] Second, the law at issue in *Camara* imposed criminal penalties for refusing to consent even to *suspicionless* searches, see 387 U.S. at 526-527, whereas Illinois's implied-consent statute imposes its administrative and evidentiary consequences of refusal only where a motorist has already been arrested on probable cause, see 625 ILCS 5/11-501.2(c)(1).

Third, although petitioner contends that the "search of an apartment" in *Camara* was "much less constitutionally significant than the investigative searches of the human body * * * at issue here," Pet. 14, the converse is true. This Court has stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (internal quotation marks omitted). Motor vehicles, on the other hand, "are justifiably the subject of pervasive regulation by the State. Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York v. Class*, 475 U.S. 106, 113 (1986). And the breath testing requested here was minimally invasive and implicated relatively insignificant privacy concerns. See *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) ("The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term."). "Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a

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[8] Petitioner notes that several States do make it a criminal offense to refuse to consent to BAC testing, see Pet. 15, but Illinois is not one of them, and so this case is not the appropriate vehicle for addressing the constitutionality of those statutes. Several petitions for certiorari challenging criminal refusal statutes are pending. See, *e.g.*, *Bernard v. Minnesota*, No. 14-1470; *Birchfield v. North Dakota*, No. 14-1468; *Beylund v. Levi*, No. 14-1507.

minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in [a person's] bloodstream and nothing more." *Skinner*, 489 U.S. at 625. Indeed, for this reason, it is not clear that *McNeely* applies to warrantless breath testing in the first instance, let alone that it invalidates implied-consent laws that allow evidence of a motorist's refusal to consent to such testing to be used against him in a subsequent prosecution. Cf. *McNeely*, 133 S. Ct. at 1558 (forced blood draw "involve[s] a compelled physical intrusion beneath [a person's] skin and into his veins" and thus constitutes "an invasion of bodily integrity [that] implicates an individual's most personal and deep-rooted expectations of privacy") (internal quotation marks omitted).

Finally, although petitioner does not appear to invoke the unconstitutional conditions doctrine, the license-revocation and evidence-admission consequences of Illinois's implied-consent statute clearly pass muster under that doctrine. This Court has held that "the government may not deny a benefit to a person because he exercises a constitutional right," *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013), "unless the government has a vital interest in doing so," *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990). Illinois has a vital interest in preventing and prosecuting drunk driving. See *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). And the administrative and evidentiary consequences that Illinois imposes on motorists who refuse to consent to BAC testing after being arrested on probable cause of drunk

driving have a "nexus and rough proportionality" to that vital interest and are thus proper. *Koontz*, 133 S. Ct. at 2595.

II. There is no lower court split on the constitutionality of implied-consent statutes.

There is no split among the lower courts over the constitutionality of implied-consent statutes like Illinois's. Petitioner cites no case, and respondent is aware of none, holding that either the license-suspension or evidence-admission consequence of a motorist's refusal to consent to BAC testing (whether of blood or breath) is unconstitutional.[9] This lack of disagreement strongly counsels against granting certiorari. See Sup. Ct. R. 10.

III. This case is a poor vehicle for addressing the constitutionality of implied-consent statutes.

Even if the question presented otherwise warranted certiorari, this case would provide a particularly poor vehicle for resolving it.

First, petitioner failed to challenge the implied-consent statute in the state trial court. Notably, he did not move to exclude evidence of his refusal to consent to a breath test, nor did he object when such evidence was admitted or commented on by the prosecutor. See R. Vol. III at 142-143, 250. Although not argued below, this failure constituted a forfeiture of the issue under state law. See *People v. Almond*, 2015 IL 113817, ¶ 54 (limited exception to general rule that "party must raise

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[9] Indeed, even among the lower courts that have addressed the distinct issue of whether *criminal* refusal statutes survive *McNeely*, there is no disagreement; all courts that have confronted such statutes have upheld them, in holdings that necessarily would extend to the far less burdensome administrative and evidentiary consequences of refusal imposed under Illinois's statute. See, *e.g.*, *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *pet. for cert. pending*, No. 14-1470; *State v. Birchfield*, 858 N.W.2d 302 (N.D. 2015), *pet. for cert. pending*, No. 14-1468; *Beylund v. Levi*, 859 N.W.2d 403 (N.D. 2015), *pet. for cert. pending*, No. 14-1507.

[issue] at trial and in a written post[-]trial motion" to preserve it for appeal applies only to "constitutional issues that were *previously raised at trial* and could be raised later in a postconviction petition") (emphasis added).

More importantly, whether the issue is forfeited or not, petitioner's failure to litigate it in the trial court means that no factual record has been developed that would allow this Court to adequately assess his claim. Petitioner's contention that the implied-consent statute unconstitutionally punished him for exercising his Fourth Amendment rights rests on the premise that he had a right to refuse to consent to a warrantless breath test. But *McNeely* held that the legality of a warrantless, nonconsensual blood test in a drunk-driving case "must be determined case by case on the totality of the circumstances." 133 S. Ct. at 1563. Thus, even assuming that *McNeely* applies to warrantless *breath* testing, its holding recognizes that "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.* at 1561. But "[t]he relevant factors in determining whether a warrantless search is reasonable * * * will no doubt vary depending on the circumstances of the case." *Id.* at 1568. Because petitioner failed to litigate this issue in the trial court, the record does not provide an adequate basis for this Court to conduct the detailed, fact-specific inquiry that *McNeely* requires. Accordingly, "that inquiry ought not to be pursued here where the question is not properly before this Court." *Id.*

Second, while petitioner asserts that this case presents "the ideal vehicle" for assessing the constitutionality of the implied-consent statute's license-suspension and evidence-admission provisions, Pet. 18, this case implicates only the latter. This case arises from the appeal of petitioner's conviction for driving while under the influence of alcohol. He did not challenge the summary suspension of his license in those proceedings, and indeed could not have done so. Rather, a motorist must file a separate petition to rescind a summary suspension in the appropriate circuit court within 90 days of receiving notice of the suspension. See *People v. McClure*, 843 N.E.2d 308, 311 (Ill. 2006) (citing 625 ILCS 5/2-118.1(b)). There is no indication in the record that petitioner ever filed a petition to rescind the summary suspension of his license.

Nor do the facts of this case otherwise implicate the constitutionality of the summary-suspension provision. For instance, because petitioner did not consent to a breath test, there can be no argument that informing him that his refusal would result in the suspension of his driver's license unconstitutionally coerced his consent. Cf. *State v. Haynes*, 355 P.3d 1266, 1275 (Idaho 2015) (noting defendant's argument that threat of $250 civil penalty and one-year suspension of driver's license for refusing to consent to breath test "vitiated her consent"). Petitioner asserts that this fact cuts in favor of granting certiorari, because it would allow the Court to avoid a "fact-intensive inquiry into the voluntariness of consent." Pet. 18. But such "fact-intensive inquir[ies]" are precisely what Fourth Amendment analysis requires. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (noting that Fourth

Amendment jurisprudence "ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry").

IV. Any constitutional error was harmless.

Finally, the Court should deny certiorari because any error in admitting evidence of petitioner's refusal to take a breath test was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 24 (1967). Setting aside that evidence, the remaining evidence that petitioner drove while under the influence of alcohol was overwhelming.

"A DUI conviction may be sustained based solely on the testimony of the arresting officer, if credible." *People v. Janik*, 537 N.E.2d 756, 761-62 (Ill. 1989). Here, the jury heard credible testimony from three arresting officers that petitioner's breath smelled of alcohol, his eyes were bloodshot and glassy, and his speech was slurred. Pet. App. A2; R. Vol. III at 89, 113-114, 190-191. All of these observations are "relevant evidence of physical and mental impairment." *People v. Elliott*, 785 N.E.2d 545, 549 (Ill. App. Ct. 2003).

In addition, petitioner failed three field-sobriety tests — the HGN test, the walk-and-turn test, and the one-legged-stand test. He exhibited six out of six cues of intoxication on the HGN test. R. Vol. III at 125; see *McKown*, 924 N.E. 2d at 945 ("four or more [cues] is considered 'failing' and indicative of alcohol impairment"). And he twice performed poorly on both the walk-and-turn test and the one-legged-stand test. See Pet. App. A3; R. Vol. III at 130, 132, 140-141.[10] "[T]he HGN test is

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[10] Contrary to petitioner's contention, these were not mere "technical failures." Pet. 7. As Officer Hagemeyer explained at trial, these tests are "divided attention," "psychophysical test[s] that

the single most accurate field test to use in determining whether a person is alcohol impaired." *State v. Bresson*, 554 N.E.2d 1330, 1332 (Ohio 1990) (citing Nat'l Highway Transp. Safety Admin., Dep't of Transp., *Improved Sobriety Testing*, at 4 (1984)). And the combination of these tests has long been recognized as "the most accurate and effective method of detecting impairment." *People v. Robinson*, 812 N.E.2d 448, 456 (Ill. App. Ct. 2004) (citing Nat'l Highway Transp. Safety Admin., Dep't of Transp., *Psychophysical Tests for DWI Arrests*, No. DOT–HS–802–424, at 39 (June 1977)).

Moreover, petitioner admitted to having had two beers earlier in the evening. See Pet. App. A4; R. Vol. III at 221-223. And though he testified that he consumed nothing further, his credibility was severely undermined at trial. The jury heard evidence that petitioner denied having been in an accident that evening — indeed, he continued to deny that fact at trial — despite clear evidence to the contrary. Pet. App. A2. The jury likewise heard evidence that petitioner was adamant at the scene that his motorcycle's lens cover had been missing for a long time and had not been damaged as a result of any accident that evening, before the arresting officers discovered it in his shirt pocket. *Id.* at A2-3. Finally, the fact that petitioner was involved in an accident with a parked vehicle itself suggests that his ability to operate a motor vehicle was impaired.

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require a person to use their mind and * * * body at the same time." R. Vol. III at 170. The person's ability to properly follow instructions is thus a critical part of the test. *Id.* at 171. Moreover, aside from petitioner's inability to properly follow the test instructions, he was unable to complete either the walk-and-turn test or the one-legged-stand test without "swaying" or raising his arms for balance. R. Vol. III at 130-132, 140-141.

On the other hand, the evidence of petitioner's refusal to consent to a breath test following his arrest was a relatively minor part of the State's case. True, the prosecutor urged the jury to infer from this evidence petitioner's consciousness of guilt, but the jury just as easily could have drawn that inference from petitioner's refusal to complete the second one-legged-stand test that he was asked to perform, R. Vol. III at 141, and from his dishonesty and evasiveness with the officers at the scene. In any event, contrary to petitioner's suggestion, the prosecutor did not argue to the jury that petitioner failed to prove his innocence by refusing to take a breath test. See Pet. Br. 8 n.2, 12.[11]

At bottom, the officers' observations of petitioner's breath, eyes, and speech; the evidence that petitioner failed three separate field-sobriety tests (two of which were administered twice); and petitioner's admission to having consumed alcohol earlier in the evening, his generally poor credibility, and his involvement in an accident with a parked vehicle provided overwhelming evidence that he was under the influence of alcohol. And, in light of that evidence, there is little question that, were the state appellate court to confront the question on remand, it would find "beyond a reasonable doubt that [the evidence of petitioner's refusal to take a breath test] did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

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[11] Petitioner contends that the Illinois Appellate Court allowed prosecutors to make such an argument in *People v. Johnson*, 19 N.E.2d 1233 (Ill. App. Ct. 2004), see Pet. 8 n.2, 12, but he fails to note that the Illinois Supreme Court reversed that holding, concluding that "remarks * * * suggest[ing] that [a] defendant failed to prove his innocence to the police officer by failing to take the breath test[ ] were improper." *People v. Johnson*, 842 N.E.2d 714, 723 (Ill. 2005).

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 14-10423

In the Supreme Court of the United States

CHRISTOPHER M. GAEDE, PETITIONER,

v.

ILLINOIS, RESPONDENT.

CERTIFICATE OF FILING AND SERVICE

The undersigned, a member of the Bar of this Court, certifies that, in compliance with Rules 29 and 33.2, she caused to be filed an original and ten copies of respondent's **Brief in Opposition** with the Clerk, Supreme Court of the United States, Washington, DC 20543, and that she also caused to be served one copy of the same to the following:

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by depositing the same in the United States mail box at 100 West Randolph Street, Chicago, Illinois 60601, on this 3rd day of November 2015, first-class postage prepaid and addressed.

All parties required to be served have been served

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