No. 18-6162

In the Supreme Court of the United States

Lyanne Lemeunier-Fitzgerald,
Petitioner,
v.

State of Maine,
Respondent.

On Petition for a Writ of Certiorari
to the Maine Supreme Judicial Court

REPLY BRIEF IN SUPPORT OF CERTIORARI

Jamesa J. Drake
Counsel of Record
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105

Counsel for Petitioner

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INTRODUCTION

This case raises fundamental questions about the consent exception to the warrant requirement and what it means for a person to have voluntarily consented, as a matter of law. In *Birchfield*, this Court held that a person "cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2186 (2016). In *State v. Lemeunier-Fitzgerald*, 2018 ME 85, ¶ 32, 188 A.3d 183, the Maine Supreme Court held that Petitioner's consent was voluntary and not coerced even though she was warned by a police officer that she had a "duty" to submit to a test and that refusal would result in a mandatory minimum period of incarceration upon conviction.

The State says that this case is not worthy of this Court's attention because any "purported conflict" among the States is "illusory" or "shallow." BIO at 6. But, the Maine Supreme Court's belief that a police officer might wrest voluntary consent from a person on pain of mandatory jail time is deeply concerning in its own right. This has grave implications for all case types involving a defendant's allegedly voluntary consent, and it is reason enough for this Court to grant certiorari, vacate the decision in *Lemeunier-Fitzgerald*, and remand the case for proceedings consistent with, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (consent must be voluntary and free of coercion) and *Bumper v. North Carolina*, 381 U.S. 543, 548-49 (1968) (acquiescence is not voluntary consent).

Moreover, even assuming that the State's reading of the divide in authorities were correct, its argument that "a shallow 2-1 conflict" is "not worthy of this Court's

attention" is no reason to deny review. BIO at 7. This Court has previously granted review on the basis of a two-to-one circuit split. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 242 (10th ed. 2013); *see also e.g. Mission Product Holdings, Inc. v. Tempnology*, 139 S.Ct. 397 (2018) (Mem) (granting cert., two-to-one split); *Integrity Staffing Sols., Inc. v. Busk*, 135 S.Ct. 513, 516 (2014) (two-to-one split); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (one-to-one).

The remainder of this Reply addresses the State's argument that "even if Lemeunier-Fitzgerald were to prevail on her constitutional question, she would likely not be entitled to any remedy." BIO at 10. Petitioner offers two responses.

ARGUMENT

I. Petitioner's likelihood of success on remand from this Court is not a reason to deny certiorari.

First, the State's argument is far too speculative. The notion that this Court should not grant certiorari rests on the assumption that Petitioner will win on the merits before this Court. Not only does that presuppose too much at this juncture, but, it augurs in favor of, not against, corrective action by this Court.

This Court does not shy away from reviewing cases that distill a singular legal issue worthy of its attention, regardless of how a different, discrete issue, might be resolved by a lower court on remand. *See e.g. Collins v. Virginia*, 138 S.Ct. 1663, 1675 (2018) (concluding that the warrantless search did not fall within the automobile exception, but leaving "for resolution on remand whether [the officer's] warrantless intrusion…may have been reasonable on a different basis, such as the

exigent circumstances exception to the warrant requirement."); *Byrd v. United States*, 138 S.Ct. 1518, 1531 (2018) (concluding that the mere fact that a driver in lawful possession of a rental car is not listed on the rental agreement will not defeat his otherwise lawful expectation of privacy, and remanding for consideration of whether defendant was in "wrongful" possession of the car akin to a car thief and whether probable cause justified the search in any event); *Manuel v. City of Joliet, Ill.*, 137 S.Ct. 911, 920 (2017) ("Our holding – that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process – does not exhaust the disputed legal issues in this case. … [T]he parties disagree over the accrual date of [Petitioner's] Fourth Amendment claim… The timeliness of [Petitioner's] suit hinges on the choice between their proposed dates…we remand that issue to the court below."). Other examples are too numerous to cite.

II. Binding precedent favors Petitioner because the Maine Supreme Court has repeatedly acknowledged that the implied consent statute was designed to coerce motorists to submit to warrantless testing.

Second, the exceptions to the exclusionary rule are inapt. Petitioner would win on remand. The State argues that application of the good faith exception to the exclusionary rule would bar suppression of the evidence. BIO at 10. In support, the State cites to *Davis v. United States*, 564 U.S. 229, 232 (2011), which holds that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. As the State acknowledges, the Maine Supreme Court did not reach this question. BIO at 10.

Binding appellate precedent *supports* Petitioner's argument. For over forty years, this Court has held that, to be legally valid, a person granting consent must do so voluntarily, and not as "the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. Petitioner acquiesced to a warrantless blood draw after a police officer read Maine's "implied consent" warnings in accordance with Maine's "implied consent" statute. BIO 1-2; Pet. App. 2; 29-A M.R.S. § 2521 (2017).

The Maine Supreme Court has said repeatedly that the implied consent warnings are coercive by design. *See State v. Jones*, 457 A.2d 1116, 1121 (Me. 1983) ("The element of coercion in the statue was not unintended…. The Legislature did not contemplate that a driver facing an OUI charge could decide, perhaps with the advice of counsel, the best course of action *for him* under the circumstances….") (emphasis in original); *State v. Ayotte*, 333 A.2d 436, 439 (Me. 1975) ("A specific purpose [of the implied consent law] was to induce reluctant arrested drivers to submit to one of two statutorily approved methods of determining their blood-alcohol level by providing sanctions[1]…for refusal to submit to such a test."); *see also State v. Boyd*, 2017 ME 36, ¶ 13, 157 A.3d 748 ("Maine's statute, although still entitled 'Implied consent to chemical tests,'…now provides that a person 'shall' submit to testing….").

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1 The sanctions in effect now, under Maine Law, are set forth at length in the Petition for Certiorari at 3-5 (a person's refusal to submit to a warrantless blood draw is an aggravating factor at sentencing if the person is convicted of operating under the influence of intoxicants; in addition to other penalties, refusal to submit will subject the person to a mandatory minimum period of at least 96 hours' incarceration). The mandatory minimum period of incarceration upon conviction has a coercive effect on the listener.

The State cannot plausibly claim that it has only just now realized that the implied consent warnings had coercive elements. *See e.g. Birchfield*, 136 S.Ct. at 2168-69 ("Because the cooperation of the test subject is…highly preferable when a blood sample is taken, the enactment of laws defining intoxication…made it necessary for States to find a way of securing such cooperation. So-called 'implied consent' laws were enacted to achieve this result.").

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

Jamesa J. Drake
Counsel of Record
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105

Counsel for Petitioner