No. 21-374

In the Supreme Court of the United States

STEVEN EDWARD STRUVE, PETITIONER,

v.

STATE OF IOWA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

All agree that Iowa, like more than 20 other States, prohibits some uses of cellphones by drivers, but expressly allows others. In this case, the Iowa Supreme Court gave police essentially unfettered "authority to pull over and interrogate any driver seen glancing at a phone despite the State having *no idea* whether the driver is actually breaking the law." Pet. App. 33a (McDermott, J., dissenting). In attempting to defend this untenable outcome, the brief in opposition offers a sweeping reinterpretation of Fourth Amendment law under which officers may make an investigatory stop based solely on observed conduct that is fully consistent with lawful activity, so long as the conduct is also "consistent with unlawful[]" activity, even if officers cannot articulate a reason to believe the driver engaged in unlawful, rather than lawful, behavior. BIO 2. That rule would eviscerate the Fourth Amendment's "particularity" requirement and allow officers to stop virtually anyone in a range of commonplace situations—not only drivers in the 20-plus States with cellphone laws like Iowa's, but also pedestrians observed drinking from a cup (which could potentially contain alcohol), carrying a firearm in an open-carry jurisdiction (which could be unlicensed or carried by a felon), or wearing a backpack in an urban area (which could contain illegal drugs).

Iowa concedes, as it must, that the outcome below diverges from rulings of the Seventh Circuit and the North Dakota Supreme Court. The State then spills much ink attempting to explain away the split by focusing on differences in state texting-while-driving

laws. But the fundamental disagreement here is one of federal law: i.e., different views of the Fourth Amendment's reasonable-suspicion inquiry. Indeed, the Iowa Supreme Court acknowledged as much, by finding it unnecessary to define the exact scope of Iowa's texting-while-driving statute to resolve the Fourth Amendment question presented. In any event, the texting-while-driving laws at issue are far more similar than the State allows; many contain prohibitions and exceptions that are near-verbatim matches with Iowa's.

The question presented is critically important to millions of American drivers and warrants this Court's review.

A. The Lower Courts Are Sharply Divided.

There is a clear and entrenched division of authority on the question presented. See Pet. 10-17. Iowa's attempts to downplay this split fall flat.

1. Iowa contends the split is not widespread. BIO 8. But courts from at least ten jurisdictions have addressed this issue, including three opinions from the federal circuits or state high courts. Pet. 12-16. This Court routinely grants certiorari to review 2-1 splits.[1]

2. Iowa attributes this division in authority to differences in state statutes. BIO 9-10. But Iowa vastly overstates differences between the state laws. Laws in the 20-plus jurisdictions that ban some but not all uses of a cellphone while driving are often

[1] *E.g.*, *Boechler* v. *Comm'r* (No. 20-1472) (2-1 split); *City of San Antonio, Tex.* v. *Hotels.com* (No. 20-334) (2-1 split).

worded just like Iowa's,[2] with the same prohibitions and exceptions; for example, 18 States permit drivers to use a navigation system,[3] while 13 allow drivers to make and end calls.[4]

In any event, Iowa's focus on purported state-law variations cannot hide the underlying *legal* disagreement concerning the meaning of the Fourth Amendment's reasonable-suspicion standard.

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[2] Compare Iowa Code § 321.276(2) (2021) (prohibiting use of hand-held device to "write, send, or view an electronic message while driving"), with, *e.g.*, Ala. Code § 32-5A-350(b) (2019) ("using a wireless telecommunication device to write, send, or read a text-based communication"); Kan. Stat. Ann. § 8-15,111(b) (2020) (similar); Ky. Rev. Stat. Ann. § 189.292(2) (2021) (similar); La. Stat. Ann. § 32:300.5(A)(1) (2020) (similar).

[3] Ala. Code § 32-5A-350(e)(3); Alaska Stat. § 28.35.161(c)(2)(C) (2020); Fla. Stat. § 316.305(3)(b)(4) (2021); Kan. Stat. Ann. § 8-15,111(c)(5); Ky. Rev. Stat. Ann. § 189.292(3)(a); La. Stat. Ann. § 32:300.5(B)(2)(e); Mich. Comp. Laws § 257.602b(2) (2021); Miss. Code Ann. § 63-33-1(1)(d) (2019); Nev. Rev. Stat. § 484B.165(3) (2020); N.M. Stat. Ann. § 66-7-374(C)(2) (2020); N.C. Gen. Stat. § 20-137.4A(b)(3) (2020); N.D. Cent. Code § 39-08-23(2)(a)(2) (2021); Okla. Stat. tit. 47, § 11-901d(F)(3)(b) (2020); 31 R.I. Gen. Laws § 31-22-30(c)(4) (2020); S.C. Code Ann. § 56-5-3890(C)(6) (2021); Tex. Transp. Code Ann. § 545.4251(c)(2) (2021); Utah Code Ann. § 41-6a-1716(3)(b) (2021); Wis. Stat. § 346.89(3)(b)(2) (2021).

[4] Ala. Code § 32-5A-350(a)(1)-(2); Alaska Stat. § 28.35.161(c)(1); Ark. Code Ann. § 27-51-1504(a)(2) (2020); Fla. Stat. § 316.305(3)(b)(5)-(6); Kan. Stat. Ann. § 8-15,111(c)(3); Ky. Rev. Stat. Ann. § 189.292(3)(c); La. Stat. Ann. § 32:300.5(A)(1); Nev. Rev. Stat. § 484B.165(1)(b); N.D. Cent. Code § 39-08-23(2)(a)(1) & (4); 75 Pa. Cons. Stat. § 3316(a) (2020); Utah Code Ann. § 41-6a-1716(3)(a); Wis. Stat. § 346.89(3)(b)(4); Wyo. Stat. Ann. § 31-5-237(a)(iii) (2020).

The crux of the Iowa Supreme Court's decision is that officers are *not* "required to articulate observations consistent with illegal conduct to the exclusion of legal conduct" before initiating a traffic stop. Pet. App. 29a. By contrast, the dissent concluded there is no reasonable suspicion if police cannot "articulate a basis for the stop that suggested the driver actually engaged in forbidden (as opposed to permitted)" phone use. *Id.* at 43a (McDermott, J., dissenting). This disagreement centers on the Fourth Amendment, not the scope of state laws. Petitioner's question presented applies whenever a State prohibits some uses of a cellphone while driving but allows cellphones for "other purposes." See Pet. I, 2-4 The Iowa Supreme Court majority evidently shared this understanding of the relevant federal question, as evidenced by the fact that the Court found it unnecessary to decide "the specific contours of the [Iowa] statute" in resolving the Fourth Amendment issue. Pet. App. 17a, 18a & n.2.

United States v. *Paniagua-Garcia* rests not on the scope of Indiana law, but on a view of the Fourth Amendment irreconcilable with the Iowa Supreme Court's. *Paniagua-Garcia*'s holding is that there was no reasonable suspicion because the officer's observations were "consistent with any one of a number of lawful uses of cellphones." 813 F.3d 1013, 1014 (7th Cir. 2016). "No fact perceptible to a police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use." *Ibid.* That framing applies equally in this case, and the others in the split. Similarly, *State* v. *Morsette* concluded that "[b]oth proscribed and permitted activities appear

to encompass actions that may require finger-to-phone tapping," and so the mere fact that a defendant was observed using his phone could not—without more—create reasonable suspicion where state law allowed some uses but prohibited others. 924 N.W. 2d 434, 438 (N.D. 2019). Iowa does not even attempt to distinguish the North Dakota law in *Morsette* from Iowa's.

The Seventh Circuit and Iowa Supreme Court also disagree about how probability should factor into a reasonable-suspicion inquiry. In *Paniagua-Garcia*, the government argued that "it is always reasonable to suspect texting while driving when observing a driver typing on and looking at a phone." 813 F.3d at 1015. Judge Posner flatly rejected that argument, declining to accept the government's syllogism that, since *some* people text while driving, there was a sufficient chance *this particular defendant* was doing so. *Ibid.* The decision below, however, revives that flawed probabilistic analysis. See Pet. App. at 26a (empirical evidence showing "that a significant number of drivers continue to read and write text messages while driving * * * supports the commonsense inference that it is quite likely a driver is impermissibly using his phone").

That state laws are not all worded identically does not immunize the Fourth Amendment issue from further review. Minor differences in state laws have never prevented this Court from granting certiorari to resolve an important federal question. See Pet. 29 & n.7 (collecting cases); *New York State & Rifle & Pistol Ass'n, Inc.* v. *Bruen* (No. 20-843); *Carson* v. *Makin* (No. 20-1088).

B. The Decision Below Is Wrong.

Reasonable suspicion requires "a *particularized* and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981) (emphasis added). Here, the officers lacked reasonable suspicion because they did not observe any conduct indicating whether petitioner's use of his phone was lawful or unlawful.

1. Iowa first responds that that the officers needed only reasonable suspicion, and not probable cause. BIO 13-14. True. But reasonable suspicion still requires a "moderate chance." Wayne R. LaFave, 4 *Search and Seizure* § 9.5(b) (6th ed. 2020) (citation omitted). Iowa never showed facts to meet that threshold. The mere act of holding and manipulating a phone does not indicate that the user is texting, as opposed to engaging in permitted cellphone uses. See Pet. App. 43a-44a (McDermott, J., dissenting).

Iowa attacks a straw man in suggesting that petitioner would allow investigatory stops only "after the officer is sure of unlawful cellphone use." BIO 14. Not true. Petitioner's point is that an officer must articulate a reasonable basis for inferring that a driver engaged in an impermissible, rather than permissible, use. Pet. 19; accord Pet. App. 43a (McDermott, J., dissenting). Instead of responding directly, Iowa pivots, suggesting that an officer who sees a driver texting would have probable cause. BIO 13-14. But there are many circumstances that would create reasonable suspicion but not probable cause, such as a driver furtively hiding his phone after spotting an officer. Pet. 19-20. No such conduct was observed here.

The implications of Iowa's position are striking. Suppose a person is openly carrying a firearm in a jurisdiction where such conduct is allowed, subject to regulation or exceptions (e.g., no carry by convicted felons or without a permit). To an observer, lawful and unlawful open carry are indistinguishable. See *Northrup* v. *City of Toledo Police Dep't*, 785 F.3d 1128, 1133-1134 (6th Cir. 2015). Nonetheless, several circuits—including the Eighth Circuit, which contains Iowa—have correctly held, contrary to the Iowa Supreme Court's approach here, that officers lacked reasonable suspicion for investigatory stops where an officer relied solely on the observed possession of a firearm. See *Duffie* v. *City of Lincoln*, 834 F.3d 877, 883 (8th Cir. 2016); *Northrup*, 785 F.3d at 1132; *United States* v. *Black*, 707 F.3d 531, 540 (4th Cir. 2013); *United States* v. *Lewis*, 672 F.3d 232, 240 (3d Cir. 2012).

2. Iowa next contends this case is a logical extension of *Kansas* v. *Glover*. There are several problems with this argument. First, the reasonable-suspicion finding here rests on a far more tenuous foundation than in *Glover*. The officer in *Glover* "did *not* rely exclusively on probabilities," but rather had access to other probative facts (e.g., "the license plate was linked to a truck matching the observed vehicle"). 140 S. Ct. 1183, 1190 (2020) (emphasis added). Here, by contrast, the Iowa Supreme Court ultimately *did* rely exclusively on probabilities: The majority admitted the officers had articulated no basis for concluding whether petitioner's cellphone use was legal or illegal, but upheld the stop because "a large percentage of

drivers admit to reading or writing texts while driving." Pet. App 24a.

Second, the decision below undertakes the wrong statistical inquiry. See Pet. 21-26. Iowa's only response is that in *Glover*, this Court looked to statistics concerning the number of unlicensed registered owners who continue to drive, without asking how often another person might be driving. BIO 16-17. But empirical analysis is necessarily context specific. And because driving without a valid license is generally unlawful, the data in *Glover*, see 140 S. Ct. at 1188, supported an inference of unlawful behavior in a way that data about whether drivers text while driving and view that practice as dangerous, Pet. App. 24a-25a, do not. In *Glover*, moreover, the officer's "commonsense" inference was bolstered by the substance of Kansas law, which reflected a legislative judgment about the likelihood that "an individual with a revoked license may continue driving." *Glover*, 140 S. Ct. at 1188-1189. No similar legislative determination exists here.

Third, in *Glover*, the officers started the reasonable-suspicion analysis with clear knowledge of a critical fact: the owner of the vehicle had a revoked driver's license. Here, by contrast, the officers started with no threshold fact suggesting illegality. Their subsequent inference (that petitioner was texting because many drivers text while driving) was therefore different in kind than the inference in *Glover* (that the defendant was likely the driver because a high percentage of people *among those with suspended licenses* continue to drive).

Under *Glover*, "common sense" can support reasonable suspicion when it informs the *likelihood* of

unlawful activity. See *Glover*, 140 S. Ct. at 1187 (discussing facts supporting the inference that "the registered owner was *likely* the primary driver" (emphasis added) (citation omitted)); accord Pet. 23. Here, nothing about the observed facts speaks to the likelihood that petitioner was texting while driving. Thus, the officer's inference here was less a matter of "common sense" than an ill-informed hunch. See *United States* v. *Feliciana*, 974 F.3d 519, 524 (4th Cir. 2020) (no reasonable suspicion because "unlike the inference in *Glover*, the incidence of permitted and unpermitted commercial vehicles on the Parkway is not a matter of common sense").[5]

3. Iowa's final argument is that the "lack of exculpatory circumstances supported the reasonableness of the officers' suspicion." BIO 17. But the *government* bears the burden to show reasonable suspicion. See Pet. 17-18. Iowa improperly inverts this burden in arguing that the stop was permitted because "no facts available to the officers indicated Struve was engaged in one of the narrow, lawful cellphone uses." BIO 17-

[5] There is no merit to Iowa's half-hearted suggestion that *Morsette* "may have" rested on a legal principle superseded by *Glover*. BIO 11. Tellingly, the only relevant new principle the State extracts from *Glover* is that an officer may rely on "common sense," including inferences informed by everyday experiences, not just specialized training. Although *Morsette* mentioned in passing that there had been "[n]o testimony" about "any unique training [the officer] received," 924 N.W.2d at 440, the crux of the *Morsette* Court's reasoning was that the State had established no "link between [the officer's] observations and an objectively reasonable basis to suspect a violation." *Ibid.* Nothing in *Glover* undermines *Morsette*'s holding that reasonable suspicion is absent in such circumstances.

18.[6] While "the presence of additional facts might dispel reasonable suspicion," *Glover*, 140 S. Ct. at 1191, Iowa cannot turn that defendant's shield into a prosecutor's sword by invoking this proposition to remedy the deficiency in the government's affirmative case, where the officers never pointed to facts sufficient to create a reasonable suspicion in the first place. BIO 17.

C. This Case Is An Excellent Vehicle.

1. The State is wrong to suggest the reasonable-suspicion analysis here was driven by disagreements over the scope of state law. All parties agree, as did the majority and dissenting Justices below, that Iowa law expressly authorizes certain uses of a cellphone while driving, and prohibits others. See Pet. 6; BIO 6; Pet. App. 5a, 15a-16a (majority); *id.* at 34a-36a (principal dissent). Petitioner framed his question presented around that understanding, see Pet. I, which is consistent with the Iowa Supreme Court's interpretation of state law. See Pet. App. 5a, 17a (statute "allows drivers to use cell phone for some limited purposes while prohibiting most others"). Contrary to Iowa's suggestion that the opinions below turned on a "disagreement over statutory

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[6] Iowa suggests in passing that the observed facts were inconsistent with use of a navigation system because "most drivers would set the phone down while following turn-by-turn directions." BIO 18. That argument, unburdened by citation to any authority, was never made by the Iowa Supreme Court. For good reason: Iowa's law allows drivers to enter a destination address into their cellphone and to perform other navigation-related tasks (including checking directions or estimating time of arrival) which naturally involve holding a phone.

interpretation," BIO 5, the key disagreement between the majority and dissent was about the proper framing of the Fourth Amendment inquiry. See *supra* pp. 3-5.

The suggestion of an "unsettled question of [Iowa] statutory interpretation" (BIO 8) that would impede this Court's review is wrong. The majority found that it "need not decide" the exact scope of Iowa's statute, presumably because those details were *immaterial to the Fourth Amendment* analysis. Pet. App. 17a, 18a & n.2. The dissent agreed. Pet. App. 42a & n.7 (legality of the particular use here was "irrelevant for purposes of the reasonable suspicion analysis"). The majority did confirm, however, that the Iowa statute means what it says: i.e., some uses of cellphones are prohibited, while others are expressly allowed. Pet. App. 5a, 16a-18a. That understanding of state law squarely and cleanly tees up the federal question presented for this Court's review.[7]

2. Finally, Iowa complains that petitioner supposedly "advance[d] an interpretation in his petition that conflicts with a concession he made in the Iowa Supreme Court." BIO 5; see *id.* at 7. That is another red herring. What matters for this Court's review is how the Iowa Supreme Court understood the *federal* question presented, informed by that Court's understanding of state law. The pre-decisional colloquy between counsel and the Court during oral

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[7] The State's own arguments disprove its suggestion of material uncertainty about the scope of Iowa's law: the State relies on the scope of Iowa's texting-while-driving prohibition, as construed by the Iowa Supreme Court, in downplaying the split and supporting its merits arguments. *E.g.*, BIO 10, 18.

argument, on an issue the Court found unnecessary to resolve, is irrelevant. See Pet. App. 16a.[8] In addressing the Fourth Amendment question, this Court would take at face value the Iowa Supreme Court's understanding of the scope of the state statute, as does the petition.

[8] Indeed, to the extent that colloquy involved a concession by petitioner, the Iowa Supreme Court conspicuously *declined* to rely on it. Compare Pet. App. 16a-17a (noting petitioner's statement), with *id.* at 17a ("need not decide" the issue). The State overreaches in urging this Court to attribute significance to an issue the Iowa Supreme Court disregarded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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