No. 21-_____

In the
Supreme Court of the United States

ALDO DANIEL GASTELUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a search is "consensual" under the Fourth Amendment when a police officer directly orders an individual he is detaining to submit to the search, and the individual begins complying with the order, and the officer then says, 25 seconds later: "You don't mind, do you? You don't care?" and the individual continues to comply.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the lower court.

STATEMENT OF RELATED CASES

The related cases are *United States v. Gastelum*, 11 F.4th 898 (8th Cir. 2021); *United States v. Gastelum*, 4:18-cr-40020 (W.D. Ark.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aldo Daniel Gastelum respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit of the United States, which affirmed the judgment of the United States District Court for the Western District of Arkansas–Texarkana, which held that Petitioner voluntarily consented to the search of his automobile trunk.

OPINION BELOW

The opinion of the Eighth Circuit is reported as *United States v. Gastelum*, 11 F.4th 898 (2021) and is included as Appendix A to this petition. App. 1.

JURISDICTION

The judgment of the Eighth Circuit was entered on September 1, 2021. App. 1. On October 5, 2021, the Eighth Circuit entered an order denying Petitioner's Petition for Rehearing and Rehearing En Banc. App. 39. As a result, the Petition is timely if filed on or before January 3, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

On April 7, 2018, Arkansas State Trooper Bernard Pettit pulled over Corporal Gastelum based on an unsafe lane change. At the conclusion of that stop, prior to handing Corporal Gastelum's documents back, Trooper Pettit asked if Corporal Gastelum had any luggage in the trunk. Corporal Gastelum said he did, and Trooper Pettit responded: "Quick check of that and then we'll be done. All right, come on out for me and pop that trunk on your way out." App. 3.

Trooper Pettit then moved toward the rear of the vehicle and began whistling, while Corporal Gastelum searched for the trunk release handle. Trooper Pettit turned back and watched Corporal Gastelum, and said, "Them things are kind of hard to find, huh?" He then said: "You don't mind if I look back there, do you? You don't care, huh?"

Corporal Gastelum found the lever and popped the trunk, and stepped out of the vehicle. Twenty-five (25) seconds elapsed between Trooper Pettit's initial command ("Quick check of that and then we'll be done. All

right, come on out for me and pop that trunk on your way out.") and his "You don't mind, do you?" comment. App. 3–4, Video Link: https://www.youtube.com/watch?v=l9lJSQWKuPg.

Trooper Pettit searched the trunk, opened a bag, and found cocaine. App. 4. Corporal Gastelum moved to suppress. App. 4. The Government defended the legality of the search solely on consent grounds. App. 26.

The District Court denied the motion to suppress. App. 38. The District Court found that Trooper Pettit's utterance—"Quick check of that and then we'll be done. All right, come on out for me and pop that trunk on your way out."—did "appear to be a command," App. 36, but that his subsequent comments—"You don't mind if I look back there, do you? You don't care, huh?"—had the effect of "retracting" his command and turning the encounter into a voluntary request for consent. "Even if Trooper Pettit had impermissibly directed Defendant to consent to a search, he quickly retracted that directive and instead asked for permission, which Defendant was free to refuse." App. 36. The District Court did not explain what definition of "retraction" it was employing, or why it believed "Defendant was free to refuse" when he had, 25 seconds earlier, been directly ordered to comply.

A panel of the Court of Appeals for the Eighth Circuit affirmed by a 2-1 margin. The majority stated that "Trooper Pettit's initial comment about the trunk is problematic," App. 11, but held that because there were no threats or use of force, the "tone" of the interaction was "relaxed," App. 11, the traffic stop was on a

highway during daylight hours, and Gastelum "never objected" and "stood by silently" when Trooper Pettit began searching the trunk, the interaction as a whole was consensual. App. 12.

The panel majority further held that Trooper Pettit's "You don't mind? You don't care?" statements—made *after* he had already given the command to submit to a search and *after* Corporal Gastelum was already in the act of complying with that command—were "follow-up questions seeking permission to search." App. 13.

Judge Kelly dissented. App. 14. She would have held that Corporal Gastelum simply submitted to Trooper Pettit's command, and that no reasonable officer would have thought otherwise. App. 15–20.

Judge Kelly cited *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) for the proposition that when a police officer asserts his authority to compel a person to submit to a search, the search cannot thereafter be justified as "consensual," because citizens are obligated to obey police officer's commands. App. 15–16.

Judge Kelly would have held that "once an officer has issued a command, it is unreasonable to believe that a person can consent to a follow-up request if the officer has not clearly communicated in some manner that the issued command is no longer in effect." App. 17.

Since Trooper Pettit's initial statement was "a command," and Corporal Gastelum immediately began

complying with it, Trooper Pettit's "You don't mind?" comments "did little more than confirm that Gastelum was continuing to do as he was told":

> These questions did nothing to reverse course and correct Gastelum's understanding that he must comply. And again, Gastelum was actively complying with the prior command to pop the trunk when Trooper Pettit asked these follow-up questions. Without any clear indication from Trooper Pettit that he could do anything but continue to comply, Gastelum continued to submit to Trooper Pettit's claim of lawful authority to search the vehicle *without* consent.

App. 18 (italics in original).

Judge Kelly explained that the friendliness and relaxed tone of an interaction "cannot overcome the simple fact that Trooper Pettit gained access to the car trunk by ordering Gastelum to open it":

> Gastelum's age, intelligence, education, and military service all indicate that he would recognize a command from law enforcement when he heard one and obey it. And however cordial Trooper Pettit's tone was, his follow-up questions simply did not clarify (either explicitly or implicitly) that Gastelum could refuse consent to the search of his car trunk after he had already been ordered to open it.

App. 19.

> If Trooper Pettit had been clear that he was in fact retracting a command, perhaps a

> person in Gastelum's shoes would have felt comfortable doing as the court suggests [and refusing to submit]. But with a command having been issued just 20 seconds prior, a typical person would not have risked escalating a police encounter by assuming that a follow-up question—such, as "You don't mind?" or "You don't care?" meant they could suddenly disobey what a law enforcement officer had seconds before directly ordered.

App. 20.

Corporal Gastelum timely petitioned for rehearing en banc. On October 5, 2021, the Court of Appeals denied the petition. App. 39.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision conflicts with the Supreme Court's ruling in *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968), and creates a split with every other Court of Appeals, and with multiple state Supreme Courts. *Bumper* holds that when a police officer gives a citizen an order, the citizen's compliance with that order cannot be taken as evidence of consent. The Eighth Circuit's ruling conflicts with *Bumper* the holdings of every other Court of Appeals and numerous state Supreme Courts, and by finding "voluntary consent" in a citizen's compliance with the direct order of an armed, uniformed police officer holding the citizen detained.

This is an issue of extraordinary importance, because traffic stops are the single most common locus of police-citizen interaction, and the practice by police of using traffic stops as opportunities to conduct searches without probable cause is widespread and proliferating. The Eighth Circuit's ruling threatens to make driving a Fourth Amendment-free zone. An officer could do just as Trooper Pettit did, and, during any traffic stop, give an order to the driver to open the trunk and submit to a search of the vehicle and luggage, without any probable cause. The driver's compliance with the order would then, under the Eighth Circuit's ruling, be taken as dispositive evidence of "consent." Drivers facing such orders would have only two choices: (a) submit to the order and thus give up their Fourth Amendment rights, or (b) physically resist the order (because the Eighth Circuit's rule is that a "relaxed" interaction with "calm" compliance and no "threats or force" will be deemed evidence of consent) and thus risk being subjected to the use of force and charges of resisting or obstruction.

The application of the Fourth Amendment to searches conducted during traffic stops has been the focus of numerous cases of this Court, as this Court has demonstrated a willingness to police the boundaries of the Fourth Amendment, and a recognition that traffic-stop searches often test and sometimes exceed those limits. The ruling below cries out for this Court's intervention, and is necessary to maintain uniformity among the Courts of Appeals.

A. This Court's Ruling in *Bumper*: Compliance with an Officer's Order Is Not "Voluntary Consent"

In *Bumper v. North Carolina*, 391 U.S. 543 (1968), this Court held that a citizen's "mere acquiescence to a claim of lawful authority" cannot be a basis for a finding of consent. *Bumper* is a seminal case that has been applied in numerous factual contexts by numerous federal and state courts as set forth herein. The clear and unambiguous rule of law established by *Bumper* is that when a citizen complies with an order given by a law enforcement officer to permit a search, the government may not thereafter be heard to claim, in litigation regarding the legality of the search, that the citizen's compliance with the order constituted "voluntary consent."

B. Giving a Citizen an Order, Watching Him Comply, and then Saying "You Don't Mind, Do You?" Is Not "Retraction" of the Order

The Court of Appeals and the District Court held that Trooper Pettit's statements—"You don't mind? You don't care, huh?"—made 25 seconds *after* he gave Corporal Gastelum an unambiguous direct order to open the trunk and submit to a search, and made *while he was watching* Corporal Gastelum comply with that order, constituted a "retraction" of the initial command. Thus, they reasoned, Corporal Gastelum's compliance with the command was actual voluntary consent and not "mere acquiescence."

Judge Kelly, in dissent, disagreed:

> In my view, once an officer has issued a command, it is unreasonable to believe that a person can consent to a follow-up request if the officer has not clearly communicated in some manner that the issued command is no longer in effect. Otherwise, the person will simply continue to acquiesce, compelled to submit to the officer's initial claim of lawful authority. And that is exactly what happened here.

App. 17.

Judge Kelly is correct. A police officer's command, once issued, remains binding until the officer says otherwise. A citizen's obligation to obey an officer's command remains binding until the officer says otherwise. Trooper Pettit's "You don't mind? You don't care, huh?" comment is *not* a retraction. It does *not* tell Corporal Gastelum that the direct command issued 25 seconds earlier is no longer binding. It does *not* tell Corporal Gastelum that he no longer has to obey. Indeed, quite the opposite: it conveys the officer's observation that Corporal Gastelum's compliance, already in progress as he looked for the trunk release button, was *too slow* ("Them things are hard to find, huh?"), with the readily apparent implied threat of force if he didn't hurry up. A young man on the side of an Arkansas highway understands *exactly* what a police officer is conveying when he follows up an order with "You don't *mind*, do you, son?" He's not retracting anything; quite the contrary. He is saying: "You'd best hurry up and do what I told you to do."

The concept of "retraction" has been explored by various courts in multiple contexts, and the consensus view is clear: **There is no such thing as an "implied retraction."**

For example, in the perjury context, the First Circuit rejected a defendant's argument that his first statement was "negated" or "amended" by his second statement: "In order effectively to recant a prior perjurious statement, the declarant must make an outright retraction and repudiation [and] must explain unambiguously and specifically the respects in which his earlier answer was false." *United States v. Sebaggala*, 256 F.3d 59, 64 (1st Cir. 2001).

In the contracts context, the Seventh Circuit has explained that a contract repudiation can be retracted, but the retraction must be "clear and unequivocal," and a party's post-repudiation conduct evincing an apparent willingness to abide by the contract is *not* sufficient and will *not* constitute an implied retraction. *Arlington LF, LLC v. Arlington Hosp., Inc.*, 637 F.3d 706, 715 (7th Cir. 2011).

In the settlement context, the Sixth Circuit—looking to Black's Law Dictionary—explained that a settlement term requiring "retraction" of a party's allegations requires the "act of taking or drawing back," or "an official statement that something one said previously is not true," and must be express—in contrast to a "waiver," which may be implied.

In the labor-law context, when an employer, in collective bargaining, claims an *inability* to pay what the

union seeks, it must by statute furnish financial information to the union, an obligation that continues until the employer expressly retracts the inability-to-pay claim. The Ninth Circuit has explained that purported retraction is effective only "if the employer makes it unmistakably clear to a union that it has abandoned its plea of poverty." *Int'l Alliance of Theatrical Stage Emp., Local 15 v. NLRB*, 957 F.3d 1006, 1014 (9th Cir. 2020) (explaining standard and finding that the employer's statement, "This is not an inability to pay," constituted clear retraction).

C. Reasons Why the "Compliance Is Not Consent" Rule Is So Important

A citizen is obligated to comply with a police officer's orders. The Eighth Circuit's ruling transmutes compliance with a police officer's order into "voluntary consent" presents frightening implications. Trooper Pettit, holding Corporal Gastelum detained on the roadside, gave Corporal Gastelum an order in the exercise of his lawful power and authority: "Come on out of the vehicle and pop that trunk on your way out." Corporal Gastelum complied with the order. A person is obligated to comply with such an order; if the person refuses to comply, the officer is legally entitled to use violence to compel him. In a nutshell: if an officer pulls you over and orders you to pop the trunk, get out of the car, and submit to a search, you'd better do it. There's nothing voluntary about it. If a police officer can detain a person, then give them an order to submit to a search, and then claim that the fact that the person

complied with the order calmly and *didn't* physically resist renders the search "consensual," then we have entered an Alice in Wonderland Fourth Amendment world that the Framers would not recognize.

Consider the implications if a defendant's non-resistant compliance with a police officer's command were to be taken as evidence of "voluntary consent." Every single compelled search conducted without physical resistance would ipso facto be "voluntary," and the burden would be on the defendant to physically resist, lest his failure to do so be held up as evidence of a voluntary consent. The legal proposition that controls the analysis of this issue in this appeal is long-settled and unquestionable: When a police officer, holding a person detained, orders that person to do something, that person's compliance with the order is acquiescence to a command. It is not "voluntary consent." The prospect of a constitutional world in which it was otherwise is frightening to contemplate.

D. The Consensus of the Other Courts of Appeals: Compliance with an Officer's Order Is Not "Voluntary Consent"

1. First Circuit

In *United States v. Barnes*, 506 F.3d 58, 63 (1st Cir. 2007), the court held that the defendant's production of evidence was involuntary because it was procured by officers' statements that they intended to search him, and that such acquiescence is not consent when a

person is "confronted by the officials claiming valid authority."

2. Second Circuit

In *United States v. Sanchez*, 635 F.2d 47, 59 (2d Cir. 1980), the court held: "[I]f the law enforcement agents have represented to the defendant that they have authority to search whether or not he consents, a permissive statement by the defendant cannot be deemed a voluntary consent."

3. Third Circuit

In *Bolden v. S. Penn. Transp. Auth.*, 953 F.2d 807, 824 (3d Cir. 1991) (en banc), the court held: "If the party conducting the search claimed the authority to search without consent, that factor weighs against a finding of voluntary consent. . . . Acceptance of SEPTA's argument in cases involving law enforcement searches would mean that no person ordered by the police to submit to a search could claim that the search was unconstitutional unless the person refused to submit or at least voiced an objection. Caselaw does not support this position."

4. Fourth Circuit

In *Trulock v. Freeh*, 275 F.3d 391, 398–402 (4th Cir. 2001), the court held: "Consent is involuntary when a subject believes law enforcement will conduct a search, by way or force, if the subject does not provide consent;

i.e., law enforcement will conduct a search with or without the subject's consent. . . ."

In *United States v. Neely*, 564 F.3d 346, 350–51 (4th Cir. 2009) the court held that a subject's words and actions "only *after*" being ordered to submit to a search cannot constitute post-hoc consent (emphasis in original).

5. Fifth Circuit

In *United States v. Jaras*, 86 F.3d 383, 390 (5th Cir. 1996), the court held: "[C]onsent may [not] reasonably be implied from [ ] silence or failure to object [where an officer] did not expressly or impliedly ask for consent to search."

United States v. Gonzalez, 842 F.2d 748, 754 (5th Cir. 1988), the court held: "acquiescence cannot substitute for free consent."

6. Sixth Circuit

In *Harris v. Klare*, 902 F.3d 630, 639–41 (6th Cir. 2018), the court held the putative consent was involuntary when the officer directed the defendant to approach him, saying, "would you step over here," the defendant complied with the directive and did not resist, and the defendant was not informed he had the right to refuse consent to the search.

7. Seventh Circuit

In *United States v. Nafzger*, 965 F.2d 213, 216 (7th Cir. 1992), the court held: If a law enforcement officer claimed lawful authority to search by showing a search warrant, and the subject "acquiescence[d] to the claim of authority invoked by flashing the search warrant, [this did not amount to] voluntary consent."

8. Ninth Circuit

In *United States v. Winsor*, 846 F.2d 1569, 1572–73 (9th Cir. 1988) (en banc), the court held: "[W]hen [police] knock[] on the door and command[] that it be opened under claim of lawful authority," and the subject complies, it is not voluntary consent.

In *United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990), the court held: "[T]he government may not show consent to enter from the defendant's failure to object to the entry. To do so would be to justify entry by consent and consent by entry. This will not do."

In *United States v. Bautista*, 362 F.3d 584, 591–92 (9th Cir. 2004), the court held: "Mrs. Bautista opened the door in response to a police demand. Furthermore, Mrs. Bautista said nothing when the door first opened. When Officer Novasky asked for her name, she simply stood there, seemingly frozen, and neither responded to the officers nor invited them inside the room. Although she did not attempt to close the door on the officers, she did back up, which forced Officer Novasky to place a foot on the edge of the door to hold

it open. Mrs. Bautista's action, or, more precisely, inaction, cannot establish consent. . . . Mrs. Bautista did invite the officers into the room as she backed away from the door. This 'invitation,' however, must be viewed in light of the officer's actions that preceded it, rather than in a vacuum, and cannot fairly be portrayed as voluntary consent to the officer's entry."

In *Liberal v. Estrada*, 632 F.3d 1064, 1083 (9th Cir. 2011), the court held that, because the defendant was seized during a traffic stop, was not told he had the right to refuse consent, and the officers' conduct and statements would have caused a reasonable person to believe that refusing the request to search would have led to adverse consequences, "For those reasons, we hold that Plaintiff's consent to the search of his car was not voluntary."

9. Tenth Circuit

In *United States v. Shrum*, 908 F.3d 1219 (10th Cir. 2018), the court held that where the police first seized the defendant's home and excluded him from it, and told him they would "hold onto it" until their investigation was "concluded," and then asked for the defendant's consent to search, the defendant's response, "That's fine," did not constitute consent: "Defendant understood he did not have much say in the matter or much of a choice. Of course, the concept of choice, i.e. the right to say yes or no, is inherent in the definition of consent. Cf. *United States v. Jones*, 701 F.3d 1300, 1314 (10th Cir. 2012). The Government cannot meet its

burden 'by showing no more than acquiescence to a claim of lawful authority.'" (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968)).

10. Eleventh Circuit

In *United States v. Tovar-Rico*, 61 F.3d 1529, 1535–36 (11th Cir. 1995), the court held that where a defendant first acquiesces to an official police show of authority, a subsequent statement of consent to search is not voluntary: "We entertain no doubt that Tovar opened the door in response to a 'show of official authority' and cannot be deemed to have consented to the agents' entry or to have voluntarily consented to the search." Additionally, in *United States v. Edmondson*, 791 F.2d 1512, 1514, 1515 (11th Cir. 1986), the defendant's response of stepping back and putting his hand on his heads in response to the demand, "FBI. Open the door," was merely "acquiescence to a show of official authority," not consent for the agents to enter.

11. D.C. Circuit

In *United States v. Most*, 876 F.2d 191, 199 (D.C. Cir. 1989), the court rejected the government's argument that a search based on an officer's show of authority was consensual, because "for constitutional purposes nonresistance may not be equated with consent."

12. The Consensus of State Supreme Courts: Compliance with an Officer's Order Is Not "Voluntary Consent."

The Eighth Circuit's decision conflicts with on-point decisions of multiple state Supreme Courts both within and without the Eighth Circuit, including: *State v. Pals*, 805 N.W.2d 767, 781–84 (Iowa 2011) (reversing conviction and holding that consent to a vehicle search during a traffic stop was involuntary where the officer did not inform the defendant that he had the right to refuse consent, and implied (as Trooper Pettit stated outright) that the traffic stop would not be concluded until the officer had searched the vehicle); *State v. Ahern*, 227 N.W.2d 164, 165 (Iowa 1975) (finding mere acquiescence and not voluntary consent where officer told subject, who was detained at premises' entry, that "he was going to search the place"); *State v. Young*, 425 S.W.2d 177, 181–82 (Mo. 1968) (reversing conviction, explaining: "Boyd wanted to look in the trunk and asked defendant to open it. Although defendant got the keys from the ignition and personally opened the trunk it is apparent from what the officers said the defendant said, aside from what defendant's own unrebutted testimony was on the point, that this did not constitute free and voluntary consent on the part of the defendant under the circumstances. When this happened there were three Joplin policemen, their automobiles, and police dog present representing the authority and compulsion of the law. Under the circumstances defendant was doing no more than submitting to the will of the police in what must have appeared to him to have been

a firm determination on the part of the authorities to look in the trunk."); *Latta v. State*, 88 S.W.3d 833, 839–40 (Ark. 2002) (rejecting acquiescence to show of authority, or "implied consent," as justifications for putative consent search); *Holmes v. State*, 65 S.W.3d 860, 866 (Ark. 2002) (same); *State v. Medicine*, 865 N.W.2d 492, 496–97 (S.D. 2015) (defendant did not voluntarily consent to blood draw where officer told defendant that he had already consented to blood draw by operation of law and then reinforcing that assertion by asking defendant to surrender to authority he purportedly had previously granted); *State v. Reed*, 920 N.W.2d 56, 68 (Wis. 2018) (resident's putative consent was not voluntary and was mere acquiescence to authority, where resident had tried to leave without talking to officer, resident complied with officer's directive to return and to lead him to the apartment, and resident attempted to prohibit officer's entry by attempting to shut apartment door in officer's face, but officer pushed open the door); *State v. Boyd*, 156 A.3d 748 (Me. 2017) (finding that suspect's "amenability and acquiescence without objection to the officer's direction/command" is insufficient as a matter of law to show voluntary consent as opposed to mere acquiescence, and suppressing evidence, where DUI suspect was arrested and brought to station for breath test, when machine malfunctioned, a paramedic was brought in to take a blood sample, and defendant was calm and cooperative throughout and never refused or resisted); *State v. Valenzuela*, 371 P.3d 627, 634 (Ariz. 2016) (defendant's consent was invalid where police officer informed him "that Arizona law required him to submit

to and complete testing to determine [alcohol] or drug content"); *State v. Gonzalez*, 136 A.3d 1131 (R.I. 2016) (reversing conviction and suppressing evidence and finding mere acquiescence and not voluntary consent where officers said to co-occupant, "Where's [defendant]?" and co-occupant looked upstairs at door to defendant's room, and did not object to police entry); *Commonwealth v. Carr*, 458 Mass 295, 936 N.E. 2d 883 (Mass. 2010) (finding mere acquiescence and not voluntary consent and ordering suppression where officer entered room and "told occupants he wanted to search" and they did not object); *Krause v. Com.*, 206 S.W.3d 922, 926 (Ky. 2006) (Defendant's consent to warrantless search of his residence was coerced by police officer's deception when officer confronted defendant and his roommate at 4:00 a.m. with fabricated story that a young girl had just been raped and he needed to look around residence in order to determine if it was the place that the girl had described); *Com. v. Rogers*, 827 N.E.2d 669, 675–76 (Mass. 2005) (finding mere acquiescence and not voluntary consent and ordering suppression where officers walked up to residence and asked, "Where's Danny?" and resident pointed inside, and the officers thereupon entered. "In the circumstances of this case, the Commonwealth has failed to demonstrate that Officer Ellsworth's question concerning the defendant's whereabouts was not a demand for entry, and that Rose's response thereto was anything other than 'mere acquiescence' to a claim of authority."); *People v. Anthony*, 761 N.E.2d 1168, 1193 (Ill. 2001) (defendant did not voluntarily consent to search where police officers called him over from 50 feet away,

he was clearly apprehensive, the police officers asked him to keep his hands out of his pockets, the defendant denied having any weapons on his person, and the police asked to search him and the defendant "assumed the position" of an arrestee); *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (defendant's consent was not voluntary because he merely submitted to claim of lawful authority when police officer asked for permission to search his vehicle after traffic stop; officer advised defendant that he was being let off with only verbal warning for traffic violation but, without any break in conversation, implied that defendant was not free to go until he answered additional questions, and then asked if defendant had any illegal contraband in vehicle and whether officer could search vehicle); *State v. Trainor*, 925 P.2d 818, 829 (Haw. 1996) (defendant did not voluntarily consent to pat-down, even though officer gave initial admonition that defendant was free to leave and was not under arrest, where officer's queries escalated from ostensibly casual to focused, inquisitorial, and intrusive, officer engaged in show of authority by identifying herself as police officer assigned to detect presence of narcotics at airport, ascertaining defendant's identity, and inspecting his airline ticket and driver's license); *Oliver v. United States*, 618 A.2d 705, 709–10 (D.C. 1993) (consent to search not voluntary where defendant had similar encounter with same detectives in the past, present search was substantially similar to prior search in that both started with "substantially similar questions culminating" in a search, defendant had refused to consent in prior search, and officers nevertheless subjected him to a search); *Penick*

v. State, 440 So.2d 547, 558 (Miss. 1983) (putative consent to search was involuntary when police officer walked defendant into police station at airport, there was no reasonable ground to place defendant under arrest, he was not under arrest at the time of the search, and no warning of any kind as to his rights was given before he was told to undress); *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975) (in non-custodial situations where the police requests to make a search, "if the State seeks to rely on consent as the basis for a search, it has the burden of demonstrating knowledge on the part of the person involved that he had a choice in the matter"); *People v. Johnson*, 440 P.2d 921 [68 Cal.2d 629, 632] (Cal. 1968) (defendant did not voluntarily consent where police entered his hotel room and ordered him to turn around and open his mouth); *Lavigne v. Forshee*, 307 Mich. App. 530, 533, 861 N.W.2d 635, 638 (2014) (denying qualified immunity to officer in section 1983 suit for Fourth Amendment violation where officer claimed she thought she had consent because "neither Diane nor Kimberly asked the officers to leave the home or objected to her entry"); *State v. Guzman*, 164 Or. App. 90, 99, 990 P.2d 370 (1999) (finding mere acquiescence and not voluntary consent, and suppressing evidence, where officer told suspect, "We need to go over to your house and take a look around," then put suspect in the back of a police car and drove him to the house, and deeming irrelevant the officer's contention that the suspect thereupon gave consent: "By the time that defendant purportedly consented to the search while in the car, [Officer] Oatley had already informed him that the

search was going to occur."); *State v. Lowe*, 144 Or. App. 313, 318, 926 P.2d 332 (1996) (no voluntary consent to field sobriety tests where officer " 'had' [the] defendant get out of the car" because "[t]hat is the language of a command"); *State v. Will*, 131 Or. App. 498, 506, 885 P.2d 715 (1994) (finding mere acquiescence and not voluntary consent where officer stated that "he would be seizing the narcotic paraphernalia" and thereupon entered the house, and defendant did not object or resist); *State v. Freund*, 102 Or. App. 647, 796 P.2d 656 (1990) (finding mere acquiescence and not voluntary consent where officer said he "was there to pick up marijuana plants" on the premises and "wanted to do it as calmly and efficiently as possible" is illustrative, and explaining that the officer's statement told defendant that she had no choice whether a search would occur; her only option was whether the search and seizure was to be 'calm and efficient' "); *State v. Jorgensen*, 526 N.E.2d 1004, 1005 (Ind. Ct. App. 1988) (affirming suppression where factual basis for prosecution's argument for consent was that "Vonda did not object at any time after being told the officers intended to search").

Extraordinary Importance of this Issue

The Eighth Circuit's ruling—that "voluntary consent" to a search exists where an officer *first* issues a direct command to submit to the search, then subsequently, *after* the subject begins complying with the command, says "You don't mind, do you?"—creates an entirely novel doctrine that has no parallel in any caselaw or legal authority, and, as noted, runs contrary

to the rulings of numerous courts that have considered similar circumstances. No case has ever suggested that a person can voluntarily consent to a search that he has just been directly ordered to submit to. On the contrary, the entire jurisprudence of consent searches is built on the distinction between a command and a request for consent. The panel majority erases that distinction by endorsing the practice of issuing an order, waiting for compliance, then asking "Do you *mind* doing what I just ordered you to do?"

This issue is of great national importance. Traffic stops are by far the most common police-citizen interaction, and car searches conducted following traffic stops have been the factual setting for much of this Court's significant Fourth Amendment jurisprudence for the past fifty years. See, e.g., Caleb Mason, *Jay-Z's 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, 56 St. Louis U. L.J. 567 (2012) (collecting cases). Providing clear rules adumbrating the permissible boundaries of that practice is a critical task for this Court, and this Court has not hesitated to step when such adumbration is necessary. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978); *Delaware v. Prouse*, 440 U.S. 648 (1979); *California v. Brendlin*, 551 U.S. 249 (2007); *New York v. Belton*, 453 U.S. 454 (1981); *Arizona v. Gant*, 556 U.S. 332 (2009); *Davis v. United States*, 564 U.S. 229 (2011); *Whren v. United States*, 517 U.S. 806 (1996); *California v. Acevedo*, 500 U.S. 565 (1991); *California v. Carney*, 471 U.S. 386 (1985); *Schneckloth v. Bustamonte*, 412

U.S. 218 (1973); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Rodriguez v. United States*, 575 U.S. 348 (2015).

The "order first, then ask if they mind" practice endorsed by the panel majority would have widespread and dramatic implications for police-citizen encounters. Police would be free in every traffic stop to simply order the vehicle occupants to submit to a full search of the car and their bags ("Come on out and pop the trunk on your way out"), wait for the occupants to begin complying, then add, "You don't mind, do you?" As Judge Kelly correctly recognized, a reasonable citizen would not interpret the added "You don't mind?" as a retraction of the command: "a typical person would not have risked escalating a police encounter by assuming that a follow-up question—such, as 'You don't mind?' or 'You don't care?' meant they could suddenly disobey what a law enforcement officer had seconds before directly ordered."

The "order first, then ask if they mind" practice endorsed by the panel majority would therefore put citizens to the Hobson's choice of either *refusing* to comply with a police officer's command, thus risking becoming the object of forcible compulsion, or *submitting* to the officer's command, thus risking being held to have voluntarily consented. Unless repudiated by this Court, "Get out and submit to a search . . . [Pause and watch the subject begin complying]. . . . You don't *mind*, do you?" could become standard practice at every single traffic stop in the Eighth Circuit.

This case is therefore akin to others in which this Court has been willing to step in and reaffirm constitutional limits on police practices when those police practices stretch those limits to the breaking point. Cf., e.g., *Carpenter v. United States*, ___ U.S. ___ [138 S.Ct. 2206] (2018) (obtaining historical cell-phone location data from cell-phone carriers); *Riley v. California*, 573 U.S. 373, 387–91 (2014) (searching phone contents incident to arrest); *Missouri v. Seibert*, 124 S.Ct. 2601, 2608–09 (2004) (engineering a "two-step" interrogation technique designed to evade *Miranda*); *Kyllo v. United States*, 533 U.S. 27, 36–37 (2001) (pointing thermal imaging cameras at houses); *United States v. Jones*, 565 U.S. 400 (2012) (warrantless attachment of GPS trackers to cars); *Florida v. Jardines*, 569 U.S. 1 (2013) (bringing a drug-sniffing dog up to a house's front door to sniff the air during a putative "knock and talk").

The "order first, then ask if they mind" practice at issue here is of a piece with the practices in the above cases, and as it did in those cases, this Court should step in here. To bless as "consensual" a procedure by which an officer directly orders a detained citizen to submit to a search, and then, once the citizen begins complying, says "You don't mind? You don't care?" is to strip the concept of consent of all meaning.[1] Our Fourth Amendment deserves better.

[1] There is no other context in our legal system in which any court would call such an interaction "consensual." One need only consider the thought experiment of transposing the colloquy at issue in this case into the context of, for example, consent to sex.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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