No. 17-1575

In the Supreme Court of the United States

ALWASI YONG, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Statutes:

Other Authorities:

Other Authorities—Continued: **Page(s)**

REPLY BRIEF FOR THE PETITIONER

Courts, commentators, and every Justice of the Pennsylvania Supreme Court agree: federal and state courts are intractably "split[]," Pet. App. 21a, about whether the Fourth Amendment allows an officer to detain or search an individual without probable cause or reasonable suspicion, simply because another nearby officer happens to have the requisite knowledge, even if she never communicated it to the acting officer. See Pet. 12-24. Tellingly, respondent makes no real effort to contest that split. Instead, it strains to limit this case to its facts, suggesting any split is not implicated here.

But far from being "narrow" or "virtually *sui generis*," Opp. 7, the opinion below held a search or seizure may "still [be] constitutional," even if "the arresting officer does not have the requisite [level of suspicion] and was not directed to so act [by an officer with such suspicion]." Pet. App. 30a. That decision is irreconcilable with rulings from numerous federal circuit and state high courts. *E.g.*, *United States* v. *Massenburg*, 654 F.3d 480 (4th Cir. 2011); *State* v. *Cooley*, 457 A.2d 352 (Del. 1983); *Haywood* v. *United States*, 584 A.2d 552 (D.C. 1990); *Montes-Valeton* v. *State*, 216 So. 3d 475 (Fla. 2017). It also squarely conflicts with this Court's precedent limiting Fourth Amendment analysis to "the facts known to the arresting [or searching] officer at the time of the arrest [or search]." *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004).

Even respondent apparently concedes the decision here is appropriately classified with cases from at least eight other federal circuit or state high courts, in

which "one officer on the scene unquestionably had probable cause or reasonable suspicion, but another officer seized the defendant." Opp. 1-2. Three of those eight, respondent admits, reached the opposite "outcome[]" as here. *Id.* at 2. Respondent dismisses those three as "distinguishable." *Ibid.* But if factual variation sufficed to defeat certiorari despite (at least) a 6-3 split on the underlying law, rare indeed would be the Fourth Amendment case warranting this Court's review.

The underlying legal question is frequently recurring and unquestionably important. Even during the short time this petition has been pending, additional courts have ruled and acknowledged a split about uncommunicated information. *E.g.*, *Lum* v. *Koles*, No. S-16057, 2018 WL 4517974 (Alaska Sept. 21, 2018) (rejecting as "unpersuasive" cases allowing imputation); *United States* v. *Gorham*, 317 F. Supp. 3d 459, 471-475 (D.D.C. 2018) (recognizing "courts of appeals * * * are divided," and following *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972), and *United States* v. *Meade*, 110 F.3d 190 (1st Cir. 1997)).

On the merits, respondent now is apparently prepared to concede the Fourth Amendment *generally* bars an officer from detaining or searching an individual without probable cause or reasonable suspicion, even where another officer happens to have the requisite (but uncommunicated) knowledge. Respondent instead seeks an exception based on a *post-hoc* determination that the officer with probable cause would "have been derelict in his duties" if he had not "inevitably and imminently ordered" the search or seizure. Pet. App. 29a-30a. Respondent makes no effort to ground that loophole in the Fourth

Amendment's guarantee of "[t]he right of the people to be secure * * * against unreasonable searches and seizures." Nor could it. An illegal search or seizure is not magically rendered lawful by the hypothetical possibility that another search or seizure could later have been conducted lawfully. See *Massenburg*, 654 F.3d at 494-495 (cases have offered "no convincing defense" of aggregation rule).

Lacking any persuasive defense of the decision here, respondent is left to argue—for the first time *ever* in this litigation—that even if the arrest here violated the Fourth Amendment, the evidence at issue was admissible under the inevitable-discovery exception to the exclusionary rule pursuant to *Nix* v. *Williams*, 467 U.S. 431 (1984). But the scope of the exclusionary rule (under the inevitable-discovery doctrine or otherwise) is distinct from whether a *Fourth Amendment* violation occurred, and the exclusionary-rule exception was neither pressed nor passed on below. To the contrary, respondent assured the Pennsylvania Supreme Court the exclusionary rule was "irrelevant." Resp. Pa. Sup. Ct. Reply Br. 3. The speculative possibility that Pennsylvania courts on remand might entertain a forfeited inevitable-discovery defense—an issue Yong never had an opportunity to litigate—provides no basis for denying review.

A. This Case Implicates An Entrenched Split On An Important And Recurring Question

Respondent does not, and cannot, dispute the acknowledged disagreement among federal circuit and state high courts. See, *e.g.*, Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. Rev. 663,

669-678 (2014); Pet. 12-13. Instead, respondent argues the decision below was sufficiently "narrow and fact-specific" that it does not implicate the split. Opp. 8. That is incorrect. The Pennsylvania Supreme Court addressed the precise question presented here:

> [W]hether an investigating officer's knowledge of facts sufficient to create probable cause to arrest may be imputed to a second officer, who arrests the suspect, when the two officers are working as a team, but there is no evidence the investigating officer with probable cause directed the arresting officer to act.

Pet. App. 2a; accord *id.* at 24a-25a; cf. Pet. I. The court below acknowledged that issue implicates "circuit splits." Pet. App. 21a. Contrary to respondent's contention, the reasoning and result below "conflict with decisions of other federal [and] state courts." Opp. 8.

1. Respondent concedes *United States* v. *Massenburg*, 654 F.3d 480 (4th Cir. 2011), *Montes-Valeton* v. *State*, 216 So. 3d 475 (Fla. 2017), and *State* v. *Cooley*, 457 A.2d 352 (Del. 1983), "did not allow imputation" of the knowledge of a fellow "officer with probable cause or reasonable suspicion." Opp. 10. Respondent's effort to distinguish those cases on their facts fails. If Yong were tried in the Fourth Circuit, Delaware, or Florida, binding precedent would have compelled the conclusion that his Fourth Amendment rights were violated. That conflict alone warrants this Court's review.

Although the court below acknowledged *Massenburg*'s "concerns" about broadly interpreting the collective-knowledge doctrine, Pet. App. 27a; see

also Opp. 10, it explicitly "amplifi[ed]" that doctrine (Pet. App. 27a), in conflict with *Massenburg*'s core holding "that the doctrine has a limited domain: officers acting on the information and instructions of other officers," 654 F.3d at 492. *Massenburg* is unequivocal: The collective-knowledge doctrine only allows courts "to substitute the knowledge of the *instructing officer or officers* for the knowledge of the *acting officer*." *Id.* at 493. "[I]t does not * * * apply outside the context of communicated alerts or instructions." *Ibid.*

The Pennsylvania Supreme Court's block quote from *Massenburg* conveniently omits this language, and for good reason. *Massenburg* forecloses the holding below that a "seizure [may] still [be] constitutional" even if "the arresting officer does not have the requisite [level of suspicion] and was not directed to so act." Pet. App. 30a.

Even comparing the two cases' facts confirms *Massenburg* would demand a different result here. *Massenburg* refused to impute the observing officer's knowledge (i.e., a bulge in the defendant's pocket) to the frisking officer. 654 F.3d at 483, 491-496. As here, *Massenburg* might have upheld the frisk on the theory that the observing officer would inevitably have frisked the suspect. But the Fourth Circuit entertained no such speculation, instead holding that the observing officer's failure to communicate meant that knowledge of the bulge could not be considered in the Fourth Amendment analysis. See *id.* at 493. In sharp contrast, the Pennsylvania Supreme Court rested exclusively on Officer McCook's uncommunicated knowledge. Pet. App. 30a.

The same is true for *Montes-Valeton* and *Cooley*. In both cases, the officer with probable cause (i.e., knowledge that a defendant was driving while intoxicated at the time of a collision) would likely "have been derelict in his [or her] duties" (Pet. App. 29a-30a) by failing to ensure the defendant's intoxication level was tested. See *Montes-Valeton*, 216 So. 3d at 477; *Cooley*, 457 A.2d at 353-354. Yet in stark contrast to the decision below, *Montes-Valeton* and *Cooley* rejected the argument that the observing officer's knowledge could save otherwise unlawful actions by other officers lacking individualized suspicion.[1] *Montes-Valeton*, 216 So. 3d at 479 (court may not uphold an otherwise unlawful search or seizure based on "uncommunicated information known solely by other officers"); accord *Cooley*, 457 A.2d at 354-356. As *Montes-Valeton* explains, "[w]ithout the communication to the arresting officer of some information that initiates the arrest, the predicate for application of the fellow officer rule is lacking." 216 So. 3d at 479.

The conflict between the Florida Supreme Court's decision in *Montes-Valeton* and the line of cases including *Ragsdale* and the decision below is particularly intolerable, given that *Ragsdale* dates from an era that makes it binding authority in the Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762

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[1] Contrary to respondent's suggestion, the officer lacking probable cause "who directed the arrest" in *Cooley*—Officer McDerby—*was* present "at the [accident] scene." Cf. Opp. 10 (suggesting McDerby was at "police station"); see also *Cooley*, 457 A.2d at 353, 355.

(1994) (certiorari granted to resolve conflict between Eleventh Circuit and Florida Supreme Court).

2. The same flaws doom respondent's effort to distinguish cases declining to aggregate "where no single officer had the requisite probable cause or reasonable suspicion." Opp. 8. Whether knowledge is possessed by one officer or dispersed among several, the legal question is identical: Is the Fourth Amendment inquiry limited to "the facts known to the arresting [or searching] officer at the time of the arrest [or search]," *Devenpeck*, 543 U.S. at 152, or may it also consider uncommunicated information known by others? See, *e.g.*, *United States* v. *Ellis*, 499 F.3d 686, 690 (7th Cir. 2007) ("improper to impute * * * knowledge" where "there was no communication"). The Court's resolution of that question in this case would resolve the uncontested split in cases where no one officer possesses the requisite level of suspicion.

Respondent's discussion of *Haywood* v. *United States*, 584 A.2d 552 (D.C. 1990), is particularly flawed. Opp. 8. In relevant part, *Haywood* proceeded on the assumption that the observing officer who testified at the suppression hearing had "sufficient [knowledge] to warrant a seizure." *Haywood*, 584 A.2d at 556. The court nonetheless held that evidence should be suppressed, because the government presented "no evidence" about "the facts within [the] knowledge" of the *arresting* officer. *Ibid.* As in *Haywood*, the government here presented no relevant evidence about the arresting officer's knowledge. To the contrary, Officer Gibson—like the arresting officer in *Haywood*—"did not testify at the suppression hearing." *Ibid.* The decision below is irreconcilable with *Haywood*'s holding that an arrest must be "based

on information which *the arresting officer himself*" possesses, so a "court may not rely on facts which were available to other officers at the scene unless that information was *communicated to the arresting officer*." *Id.* at 557.[2]

3. As the wealth of authority cited in the petition demonstrates, see Pet. 12-24, *Massenburg*, *Montes-Valeton*, *Cooley*, and *Haywood* are just the tip of the iceberg. The question whether one officer's uncommunicated knowledge can save another team member's otherwise-unlawful search or seizure is far from "*sui generis*," and the division among lower courts confirms the decision below *is* "open to serious question." Opp. 7; cf. 2 Wayne R. LaFave, *Search & Seizure* § 3.5(c) (5th ed. 2018) (questioning "how far *Ragsdale* may be pushed"). Indeed, the decision here is already being cited as precedent for rejecting defendants' Fourth Amendment arguments. See *Commonwealth* v. *White*, No. 3146 EDA 2017, 2018 WL 4041689, at *5 n.5 (Pa. Super. Ct. Aug. 24, 2018);

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[2] Respondent is demonstrably wrong to suggest the record is "muddled" (Opp. 4) in relevant ways, about whether Officer McCook communicated with or directed Officer Gibson to act. As even respondent ultimately concedes, at every stage of these proceedings, the lower courts limited their review to the "suppression hearing record." Opp. 5 n.1 (quoting Pet. App. 42a); accord Pet. App. 30a (Supreme Court majority opinion's holding was predicated on understanding that "arresting officer d[id] not have the requisite knowledge and was not directed to so act"); accord *id.* at 25a ("there is no evidence the knowledge-holding officer gave a command to the officer who lacked probable cause"). Ultimately, even respondent does not suggest this Court could or should look beyond the suppression record. Pet. 8, 9 n.1. Under Pennsylvania law, views about what the "testimony presented at [petitioner's] *trial* suggest[ed]" are irrelevant. Opp. 5 n.1 (quoting Pet. App. 54a).

Commonwealth v. *Bullins*, 2018 WL 3946333, at *4 (Pa. Super. Ct. Aug. 17, 2018). As Justice Donohue's dissent foresaw, the majority's rule threatens to "swallow probable cause requirements" by "permit[ting] uncommunicated knowledge of one police officer to justify an arrest conducted by another officer." Pet. App. 31a, 34a.

B. Respondent's Unpreserved Inevitable-Discovery Defense Is No Obstacle To This Court's Review

As respondent concedes, the Pennsylvania Supreme Court addressed a single question: "whether [the] police violated the Fourth Amendment by performing an unreasonable search and seizure." Opp. 11; accord Pet. App. 30a (concluding "seizure [wa]s * * * *constitutional*" (emphasis added)). Nonetheless, in a last-ditch effort to avoid further review, respondent now argues that "[e]ven if the arrest had been illegal," the exclusionary rule would not apply, citing the "inevitable discovery" exception in *Nix*. Opp. 11-12. This effort fails.

The remedial question of whether the exclusionary rule should apply is very different from the merits inquiry of whether the Fourth Amendment was violated. See generally *Utah* v. *Strieff*, 136 S. Ct. 2056, 2060-2061 (2016). *Nix* recognized an exception to the exclusionary rule as a remedy for Fourth Amendment violations, where the evidence "inevitably would have been discovered by lawful means." 467 U.S. at 444. By its terms, *Nix*'s "inevitable discovery doctrine" is only relevant if evidence was obtained "unconstitutional[ly]." *Strieff*, 136 S. Ct. at 2061. The inevitable-discovery doctrine is therefore distinct—

theoretically and practically—from the substantive scope of the Fourth Amendment's protection from unreasonable searches and seizures.[3]

Here, the Pennsylvania Supreme Court addressed only the question of the Fourth Amendment's scope. See Pet. App. 2a, 24a-25a, 30a. It never used the phrase "inevitable discovery" nor cited *Nix*. For good reason. At the suppression hearing, the prosecution did not raise the inevitable-discovery doctrine, relying exclusively on a collective-knowledge rationale to argue no Fourth Amendment violation occurred. See Pet. App. 78a-79a. Nor did respondent do so in its merits brief in the Superior Court. And the sole question respondent raised in seeking Pennsylvania Supreme Court review was whether "the Fourth Amendment *** permit[s] a member of a close group of officers working as a team to act on the collective knowledge of that team, absent a directive or instruction issued by an officer who possesses probable cause." Resp. Pa. Sup. Ct. Pet. for Allowance of Appeal 2; accord Resp. Pa. Sup. Ct. Br. 4. Indeed, respondent *expressly* told the Pennsylvania Supreme Court "the exclusionary rule *is irrelevant*" here because, in its view, "there was no Fourth Amendment

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[3] Importantly, the exclusionary rule is not the only remedy for Fourth Amendment violations. Even where the inevitable-discovery doctrine applies, remedies may be available under "42 U.S.C. § 1983 or state tort law." *United States* v. *Johnson*, 380 F.3d 1013, 1017-1018 (7th Cir. 2004). Therefore, respondent is wrong to suggest that reversing the judgment below would have "no practical effect" in "any case with analogous facts," Opp. 12. Cf., *e.g.*, *Lum*, No. S-16057, 2018 WL 4517974 (rejecting invocation of collective-knowledge doctrine in civil action).

violation in the first place." Resp. Pa. Sup. Ct. Reply Br. 3 (emphasis added).[4]

It is thus far from clear that Pennsylvania courts could or would entertain an inevitable-discovery defense on remand. See Pa. R. App. P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); *Commonwealth* v. *Shabezz*, 166 A.3d 278, 288 n.6 (Pa. 2017) (Commonwealth's alternative argument in Fourth Amendment case was waived for failure to preserve below).[5]

Even if preserved, *Nix*'s inevitable-discovery doctrine is not a natural fit for the facts here. To be sure, the court below stated that "the challenged conduct would have inevitably been undertaken." Pet. App. 29a. But it did so on the basis of dubious inferences, and without briefing on these fact-intensive questions. If nothing else, the suggestion that "Officer McCook would * * * have been derelict in his duties had he * * * failed to arrest Yong or to order his arrest," Pet. App. 29a-30a, ignores that McCook chose not to arrest Yong days earlier after observing

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[4] Respondent did argue that the possibility that petitioner would have been "arrested by another officer who possessed direct knowledge of probable cause" showed "the Superior Court's restraint on the collective knowledge doctrine" was "unreasonable" and "put[] form over substance." Resp. Pa. Sup. Ct. Br. 10-11; see also *id.* at 5. But that is a far cry from preserving the doctrinally separate issue of the exclusionary rule's scope.

[5] Nor could respondent invoke the inevitable-discovery exception to the exclusionary rule in defending the judgment below in *this* Court. See *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 397-398 (2015) (finding argument "forfeited" because it was "never presented to any lower court").

his brief alleged participation in a drug deal—handing money from the buyer to the seller. Cf. *United States* v. *Heath*, 455 F.3d 52, 60-61 (2d Cir. 2006) ("[R]elatively weak evidence of the right to arrest is not sufficient, without further findings, to establish that an officer would, in fact, have made an arrest").

In any event, this Court routinely reviews cases despite the existence of potential alternative grounds for affirmance on remand. See, *e.g.*, *Rosemond* v. *United States*, 572 U.S. 65, 83 (2014); *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012). That the Commonwealth might attempt to resurrect a long-since-forfeited inevitable-discovery exemption does not dilute the urgent need for this Court to resolve the split on this important and recurring Fourth Amendment question.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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