No. 18–_____

In the
Supreme Court of the United States

Tarell McIlwain,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a police officer makes a lawful custodial arrest, the Fourth Amendment permits a warrantless search of the arrestee's person to protect officer safety and prevent the destruction of evidence. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2482–84 (2014). In this case, a New York City police officer had probable cause to arrest Petitioner for littering, a local offense punishable by a maximum sentence of one day in jail, but had not in fact arrested Petitioner, and planned only to issue him a citation. Nonetheless, the officer searched Petitioner's person, found a gun in his waistband, and, only then, placed Petitioner under arrest.

Relying on *United States v. Diaz*, 854 F.3d 197 (CA2 2017), the Court of Appeals upheld the search as incident to arrest, reasoning that the officer had probable cause to arrest before the search and effected an arrest afterward. That rule, *Diaz* acknowledged, stands in direct conflict with *People v. Reid*, where the New York Court of Appeals held that "[a] search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." 26 N.E.3d 237, 239 (N.Y. 2014).

The question presented, which divides the Second Circuit and the New York Court of Appeals, among others, is: Can the warrantless search of a person be justified as incident to arrest where, at the time of the search, no arrest has been made and none would have occurred but for the results of the search?

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OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Second Circuit appears at Pet. App. 1a–2a. The oral ruling of the United States District Court for the Southern District of New York appears at Pet. App. 3a–24a. The District Court's written order appears at Pet. App. 25a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. §3231 and entered judgment on March 19, 2018. The Court of Appeals had jurisdiction under 28 U.S.C. §1291 and summarily affirmed on February 20, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The **Fourth Amendment** 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

This petition presents an acknowledged split between the Second Circuit and the New York Court of Appeals (not to mention dozens of other federal courts of appeals and state high courts) on an important, recurring question of Fourth Amendment law: Can the warrantless search of a person be justified as incident to

arrest where, at the time of the search, no arrest has been made and none would have occurred but for the results of the search?

The search-incident-to-arrest exception to the Fourth Amendment's warrant requirement is the most common justification for unconsented-to warrantless searches. 3 W. LaFave, *Search & Seizure* § 5.2(b), at 132 (5th ed. 2016). Indeed, "the label 'exception' is something of a misnomer," as "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). The exception permits, in the case of a lawful custodial arrest, a full search of the arrestee's person and the area within his immediate control, that is, "the area from which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). The exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Accordingly, an incident search requires an actual arrest, not just probable cause to make one: "[I]t is the fact of custodial arrest which gives rise to the authority to search." *United States v. Robinson*, 414 U.S. 218, 236 (1973). *See also, e.g.*, *Thornton v. United States*, 541 U.S. 615, 630 (2004) (Scalia, J., concurring) ("The fact of prior lawful arrest distinguishes the arrestee from society at large.").

Despite the clarity and simplicity of this rule, many courts have gone badly astray. Like the Court of Appeals below, these courts uphold as "incident to arrest" searches based on mere probable cause, as long as an arrest—even one triggered by the fruits of the search—follows. Typically, in these cases, a police officer observes a

minor criminal offense (public drinking, a traffic infraction) most often handled with a citation rather than an arrest. The officer elects to search the person and discovers evidence of a more serious crime (drugs, a gun). Prompted by that discovery, the officer then places the person under arrest. Unlawful when made (because untethered to an actual arrest), the search is retroactively transformed into a permissible "search incident to arrest"—even though the arrest would never have occurred but for the search. As one court has correctly and concisely observed, in these circumstances, "to say that the search was incident to the arrest does not make sense." *People v. Reid*, 26 N.E.3d 237, 239 (N.Y. 2014). Yet most courts follow this approach. *See United States v. Johnson*, 913 F.3d 793, 803–04 (CA9 2019) (Watford, J., concurring) (citing J. Deahl, *Debunking Pre-Arrest Incident Searches*, 106 Cal. L. Rev. 1061, 1086–87 (2018)).

The culprit is a single sentence, in dictum, buried at the end of *Rawlings v. Kentucky*: "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." 448 U.S. 98, 111 (1980). When read in context, this dictum (not necessary to the disposition of any claim in the case, as explained below) does not disturb the longstanding principle that an incident search requires an arrest at the time of the search. Nor does it contemplate the use of a post-search arrest to authorize the search itself. Any doubts on this score should have been resolved by *Knowles v. Iowa*, 525 U.S. 113 (1998), which established that, where it is clear that no arrest is to take place (there, because the

officer had already issued a citation), probable cause to arrest does not permit an incident search. Nonetheless, confusion persists.

This petition frames the conflict in starkest terms. An officer saw Petitioner drinking alcohol from a plastic cup, then dropping the cup, on a Manhattan street, violations of New York City law punishable by one day in jail. The officer intended to issue Petitioner a summons for littering but not, as Respondent conceded below, to arrest him. Before issuing the summons, the officer sought consent to search Petitioner's person. When Petitioner refused, the officer searched him anyway and found an inoperable gun in his waistband. Only after he found the gun (and only because he found the gun) did the officer place Petitioner under arrest. The Court of Appeals summarily affirmed the search on the basis of *United States v. Diaz*, 854 F.3d 197 (CA2 2017), *cert denied*, 138 S. Ct. 981 (2018), which holds that an officer with probable cause to arrest may search a person incident to arrest, as long as a formal arrest follows the search. This holding, the Second Circuit has acknowledged, stands in direct conflict with the decision of the New York Court of Appeals in *Reid*, which had invalidated an incident search under *Knowles* on identical facts: an officer with probable cause to arrest but no intent to do so searched a suspect, found a weapon, and arrested him.

The split between the Second Circuit and the New York Court of Appeals is reason enough to grant certiorari. *See, e.g.*, *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). But the conflict implicated here runs much wider, dividing the federal courts of appeals and the state courts of last resort. Several state high

courts split with their regional circuit: among others, California and Idaho (both going Petitioner's way) split with the Ninth Circuit; Wisconsin (going Respondent's way) with the Seventh. This widespread, intractable conflict requires this Court's intervention.

This is an ideal vehicle to review this wide, entrenched split. The facts are undisputed: The officer had probable cause to arrest Petitioner, but had not arrested him at the time of the search, and would not have arrested him except for the results of the search. No other exception to the Fourth Amendment's warrant requirement (consent, reasonable suspicion) supports the search. Petitioner has pressed *Reid* at each stage of this case, and if *Reid* controls, it is outcome-determinative, as Respondent agreed below. Further percolation is unnecessary. Dozens of courts have addressed the question presented and the arguments on both sides have been fully ventilated.

On the merits, the Second Circuit is wrong. A search must be incident to an actual arrest, not just probable cause to make one, because only an arrest implicates the historical and doctrinal rationales for the exception. Only an arrestee, not a mere suspect, has been subjected to the "physical dominion" of the law, the intrusion that authorizes the lesser intrusion of a search. *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1928) (Cardozo, J.). And only a custodial arrest implicates the interests in officer safety and evidence preservation with sufficient force to sustain the exception. *See Robinson*, 414 U.S. at 234–35; *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Moreover, the Circuit's rule—that probable cause

authorizes an incident search, but only if an arrest follows—contravenes the bedrock Fourth Amendment principle that the lawfulness of a search is judged "at its inception." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). No case of this Court's supports the proposition that an illegal search can be salvaged, after the fact, by a subsequent arrest. The petition should be granted.

1. Just after midnight on Sunday, April 16, 2017, NYPD Officer Daniel Wadolowski was on patrol, in uniform but in an unmarked car, in Upper Manhattan. Pet. App. 5a–6a, 34a–36a. His assignment was to "enforce quality of life" laws, for example, those prohibiting "littering," "open containers," and "public urination." Pet. App. 5a–6a, 35a. After exiting his patrol car, Wadolowski saw Petitioner drop a plastic cup on the sidewalk, spilling the liquid inside. Pet. App. 6a, 36a–38a, 81a. As he approached Petitioner, Wadolowski could smell liquor on Petitioner's person. Pet. App. 6a, 40a–41a. Unprompted, Petitioner said, "you got me, I was drinking," and handed Wadolowski his identification card. Pet. App. 6a, 40a–41a, 74a–75a.

Wadolowski asked Petitioner to walk with him to his patrol car, and Petitioner, who was "cooperative," "compliant," and "followed" Wadolowski's "instructions," agreed. Pet. App. 7a, 41a, 87a. Wadolowski intended to issue Petitioner a summons for littering, in violation of N.Y.C. Admin. Code §§16–118(1)(a) and (8), an offense punishable by a maximum of one day's jail and a $250 fine. Pet. App. 42a, 82a–83a. As Respondent conceded below, Wadolowski did not intend to arrest Petitioner, either for littering or for public consumption of alcohol,

N.Y.C. Admin. Code §§10–125(b) and (e) (an offense also punishable by a maximum of one day's jail, and a $25 fine). Pet. App. 154a. Using an app on his smartphone, Wadolowski began running a pedigree check to determine whether Petitioner had any outstanding warrants. Pet. App. 7a, 42a–43a. Had Petitioner been subject to an open warrant (he wasn't), Wadolowski would have arrested him. Pet. App. 7a, 42a.

While Wadolowski was running Petitioner's pedigree information, Petitioner, again unprompted, said: "I got nothing. I got nothing." Pet. App. 7a, 43a. This statement "raised" Wadolowski's "suspicion" that Petitioner "might be having some type of weapon on him." Pet. App. 7a, 43a. Wadolowski asked: "[D]o you mind if I pat you down real quick?" Pet. App. 7a, 43a. Petitioner did mind: "I don't consent to any searches," he said. Pet. App. 7a, 43a. Wadolowski repeated that he was going to pat Petitioner down, but Petitioner raised his hands up slightly and refused again: "You're not going to search me." Pet. App. 7a, 43a–44a. Wadolowski reached for Petitioner's waist, brushing Petitioner's coat back and disclosing a firearm in Petitioner's waistband. Pet. App. 7a, 44a. Wadolowski grabbed Petitioner's arms, pinned them, handcuffed Petitioner, and placed him under arrest.

At the time he searched Petitioner and discovered the firearm, Wadolowski had not placed Petitioner under arrest. Pet. App. 7a. Nor did Wadolowski intend to do so, either for littering or public consumption of alcohol, as Respondent conceded at the conclusion of the suppression hearing below:

> THE COURT: [I]s that factual premise correct ... , which is ... [Wadolowski] didn't have a present intention to arrest for either offense as of the snapshot before the search?

[THE GOVERNMENT]: Yes, we will concede that point. Pet. App. 154a.

2. A grand jury in the United States District Court for the Southern District of New York returned a one-count indictment charging Petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. §922(g)(1). Petitioner moved to suppress the firearm. As relevant, he argued that, even assuming probable cause to arrest him, the search was not permissible because he was not in fact under arrest, and "but for the search there would have been no arrest. ... [T]he search incident to arrest doctrine is inapplicable where, as here, officers would not have arrested ... [Petitioner] for littering or public consumption of alcohol, and no arrest would have taken place but for the search revealing a firearm." D. Ct. Dkt. No. 14, at 6. For at proposition, Petitioner cited *Reid*, which holds: "[T]he 'search incident to arrest' doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to be applied." 24 N.Y.3d, at 620.

Petitioner acknowledged that the Second Circuit had rejected his argument, and *Reid* in particular, in *Diaz*, which holds: "[A]n officer ... who has probable cause to believe that a person has committed a crime ... may lawfully search that person pursuant to the search-incident-to-arrest doctrine, provided that a 'formal arrest follow[s] quickly on the heels of' the frisk," and that it is "irrelevant whether, at the time of the search, [the officer] intended to arrest [the suspect] or merely to issue him a citation." 854 F.3d, at 209 (citing *Rawlings*, 448 U.S., at 111). *See also id.*, at

208 (concluding, "contrary to" *Reid*, that "whether or not an arrest was impending at the time of the search" is irrelevant).

In an oral ruling, the District Court (Engelmayer, J.) denied Petitioner's motion to suppress, concluding that the frisk was a permissible search incident to arrest. Pet. App. 4a–24a. The District Court credited Wadolowski's testimony that he saw Petitioner drop the plastic cup, supplying probable cause to arrest for littering. Pet. App. 13a–14a. *See* §16–118(1)(a) ("No person shall litter, ... throw or cast, ... any ... rubbish and refuse of any kind whatsoever, in or upon any street."). The District Court likewise found that Wadolowski—having seen Petitioner drop a plastic cup full of liquid, smelled liquor on Petitioner's person, and heard Petitioner's admission that he "was drinking"—had probable cause to arrest for public consumption of alcohol. Pet. App. 21a–23a. *See* §10–125(b) ("No person shall drink or consume an alcoholic beverage, or possess, with intent to drink or consume, an open container containing an alcoholic beverage in any public place."). Because Wadolowski had probable cause to arrest at "the time of the search," and in fact arrested after the search, "[t]he search was therefore justified as incident to arrest for either offense." Pet. App. 24a.

The District Court deemed it immaterial that the search preceded the arrest: "[W]hen an arrest takes place, the search can occur before or after the arrest," and "need only be 'substantially contemporaneous with the arrest.'" Pet. App. 11a (citing *Rawlings*, 448 U.S., at 111, and quoting *Shipley v. California*, 395 U.S. 818, 819 (1969)). Bound by *Diaz*, the District Court agreed that Wadolowski "need not have

formed the subjective intent to arrest at the time the search [was] conducted." Pet. App. 11a. Rather, it was "enough that facts amounting to probable cause were known to the officer at the time of the arrest." Pet. App. 11a.

Following a bench trial on stipulated facts, the District Court found Petitioner guilty. D. Ct. Dkt. No. 33. The District Court sentenced Petitioner to 21 months' imprisonment and three years' supervised release. D. Ct. Dkt. No. 48.

3. The Court of Appeals (Parker, Chin, and Sullivan, JJ.) summarily affirmed. 1a–2a. The Court agreed that "the search was justified as incident to arrest because the officer had probable cause to believe [Petitioner] had littered (an arrestable offense in New York) and was arrested shortly after the search, pursuant to our decision in [*Diaz*]." Pet. App. 1a. The Court concluded that "*Diaz* therefore controls and binds our decision in this case." Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

The Second Circuit is in open conflict with the New York Court of Appeals on a basic Fourth Amendment question that affects countless police-citizen encounters every day. There is a wider, entrenched split on the question whether a search may be justified as incident to arrest where the search prompts the arrest, and not the reverse. This petition offers an ideal vehicle to resolve the conflict. The issue is preserved, the facts are uncontroverted, and the answer is outcome-determinative. As Judge Watford has explained, *see Johnson*, 913 F.3d at 803–07 (concurring op.), the Second Circuit's rule invites discriminatory policing and contravenes bedrock Fourth Amendment principles. The petition should be granted.

I. The Second Circuit (*Diaz*) And The New York Court Of Appeals (*Reid*) Are In Direct Conflict.

Diaz acknowledged that it created a square split with *Reid*. 854 F.3d, at 208. Commentators have noted the split. *See, e.g.*, 3 W. LaFave, *Search & Seizure* § 5.4(a), at 44 n.18 (5th ed. Supp. 2017) (*Diaz* "reject[s] *Reid*"); Hon. B. Kamins, *Court of Appeals and Second Circuit Disagree on Searches Incident to an Arrest*, N.Y. State Bar Ass'n, N.Y. Criminal Law Newsletter, Summer 2017, at 7 (*Diaz* "squarely conflicts with" *Reid*), *available at* goo.gl/9LD6aY. This petition presents the *Diaz*/*Reid* split: below, the Second Circuit summarily affirmed in light of *Diaz*.

The conclusion is inescapable. *Diaz*, this case, and *Reid* all involve analogous facts. In all three cases, a police officer developed probable cause to arrest a person for a criminal offense (in *Diaz*, public drinking; in this case, public drinking and littering; in *Reid*, driving while intoxicated). All three officers testified that, notwithstanding probable cause, they did not intend to arrest the offenders, only to issue summonses. Nonetheless, each officer searched the person, resulting in the discovery of a weapon. Only after discovering those weapons (and only because they discovered those weapons) did the officers arrest. That is, in all three cases, at the time of the challenged search, there was probable cause to arrest, but no actual or impending arrest. *Compare Diaz*, 854 F.3d at 200–01 *with* Pet. App. 5a–8a *and Reid*, 26 N.E.3d, at 238. In *Diaz* and in this case, the search was upheld; in *Reid*, the search was held unlawful.

The conflict arises from the courts' disparate interpretations of *Knowles*. *Reid* read *Knowles* to mean that "the 'search incident to arrest' doctrine, by its nature,

requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the 'search incident' exception is to be applied." 26 N.E.3d, at 240. In sharp contrast, *Diaz* expressly rejected this analysis: "[W]e conclude that, contrary to the *Reid* court's interpretation, *Knowles* does not require case-by-case determinations as to whether or not an arrest was impending at the time of the search." 854 F.3d, at 208. Rather, *Diaz* held, a search is permissible if probable cause to arrest precedes it, and an actual arrest closely follows, regardless of the officer's intent. Thus, on identical facts, the Second Circuit and the New York Court of Appeals have reached conflicting holdings on a question of federal constitutional law based on incompatible readings of *Knowles*.

This Court has several times granted certiorari to resolve conflicts between a federal circuit court and a state supreme court within the same circuit. *E.g.*, *Wos v. E.M.A.*, 133 S. Ct. 1391, 1396 (2013) (Fourth Circuit and North Carolina Supreme Court); *Seling v. Young*, 531 U.S. 250, 260 (2001) (Ninth Circuit and Washington Supreme Court); *Hagen v. Utah*, 510 U.S. 339, 409 (1994) (Tenth Circuit and Utah Supreme Court); *Walton v. Arizona*, 497 U.S. 639, 647 (1990) (Ninth Circuit and Arizona Supreme Court); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (Sixth Circuit and Michigan Supreme Court). *See* this Court's Rule 10(a). Indeed, this Court has previously granted certiorari to resolve a split between the Second Circuit and the New York Court of Appeals. *See Allen*, 442 U.S. 140.

The conflict between the opinion below and *Reid* cries out for review. Until this Court acts, the scope of New Yorkers' Fourth Amendment rights will vary according to the courthouse in which their case proceeds, sowing confusion, encouraging forum-shopping, and promoting disparate treatment of identically-situated arrestees. A criminal defendant subject to a pre-arrest incident search will win a suppression motion in state court under *Reid* but lose in federal court under *Diaz*, a disparity that creates undesirable prosecutorial incentives. In this very case, federal prosecutors took over a state prosecution, exploiting *Diaz* to defend a search that would not have passed muster in state court. *See* Pet. App. 154a (Respondent conceding search's invalidity under *Reid*). Likewise, consider a criminal defendant who wins a suppression motion under *Reid* in state court, then brings a 42 U.S.C. §1983 suit against the officer for an unlawful search. If that suit is filed in (or removed to) federal court, the officer will prevail under *Diaz*, even though a state court has already held the search unconstitutional. *See Kamins*, *supra*, at 9.

The problem is not theoretical. New York's lower courts must follow the New York Court of Appeals, not the Second Circuit, in the event of a conflict between the two. *People v. Lugo*, 233 A.D.2d 197, 198 (1st Dep't 1996). Panels of the Appellate Division thus continue to apply *Reid*, including in post-*Diaz* cases. *E.g.*, *People v. Simmons*, 151 A.D.3d 628, 628–29 (1st Dep't 2017); *People v. Mangum*, 125 A.D.3d 401, 401–03 (1st Dep't 2015). Conversely, the Second Circuit and the New York federal District Courts continue to apply *Diaz*. *E.g.*, *United States v. Dupree*, ___ F. App'x ___, ___, 2019 WL 1785591, at *1 (CA2 Apr. 24, 2019) (upholding pre-arrest

incident search based on probable cause to arrest for jaywalking); *United States v. Witty*, 2017 WL 3208528, at *10 (E.D.N.Y. July 26, 2017) (same, based on probable cause to arrest for unlawful presence in park after dark).

II. *Diaz* Deepens The Entrenched Split On The Question Whether A Search May Be Justified As Incident To Arrest Where, But For The Search, There Would Have Been No Arrest.

If this petition presented only a conflict between the Second Circuit and the New York Court of Appeals, that would be reason enough to grant review. In fact, the question presented is the subject of a deep, entrenched split among the federal and state courts. *See, e.g.*, J. Deahl, *supra*, at 1086–87; M. Perry, *Search Incident to Probable Cause: The Intersection of* Rawlings *and* Knowles, 115 Mich. L. Rev. 109, 110 (2016); W. Logan, *An Exception Swallows A Rule: Police Authority to Search Incident to Arrest*, 19 Yale L. & Pol'y Rev. 381, 406 (2001).

In the federal courts, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, relying on *Rawlings*, all adopt the position that an incident search may precede and prompt an arrest. *See United States v. Bizier*, 111 F.3d 214, 217 (CA1 1997) ("whether a formal arrest occurred prior to or followed 'quickly on the heels' of the challenged search does not affect the validity of the search"); *United States v. Lawlor*, 406 F.3d 37, 41 n.4 (CA1 2005) (relying on *Bizier* post-*Knowles*); *United States v. Miller*, 925 F.2d 695, 698 (CA4 1991) ("[defendant's] formal arrest occurred almost immediately after [officer] searched her belongings ... [t]he search of [defendant's] bag, therefore, was incident to her formal arrest"); *United States v. Patiutka*, 804 F.3d 684, 688 (CA4 2015) (relying on *Miller* post-

Knowles); *United States v. Hernandez*, 825 F.2d 846, 852 (CA5 1987) ("it is immaterial that the arrest occurred later in time than the search incident to that arrest"); *United States v. McGruder*, 2001 WL 563889, at *1 n.1 (CA5 2001) (unpub.) (relying on *Hernandez* post-*Knowles*); *United States v. Montgomery*, 377 F.3d 582, 586 (CA6 2004) ("the search-incident-to-a-lawful-arrest rule ... permits an officer to conduct a full search of an arrestee's person *before* he is placed under lawful custodial arrest"); *United States v. Chartier*, 772 F.3d 539, 546 (CA8 2014) (rejecting argument that "drugs found after the search could not retroactively justify the search" because "probable cause for arrest existed even before the search, and ... 'the formal arrest followed quickly on the heels of the challenged search'"); *United States v. Smith*, 389 F.3d 944, 951 (CA9 2004) ("A search incident to arrest need not be delayed until the arrest is effected. ... So long as an arrest that follows a search is supported by probable cause independent of the fruits of the search, the precise timing of the search is not critical."); *United States v. Lugo*, 170 F.3d 996, 1003 (CA10 1999) ("A legitimate 'search incident to arrest' need not take place after the arrest."); *United States v. Banshee*, 91 F.3d 99, 102 (CA11 1996) ("because there was probable cause for the arrest before the search and the arrest immediately followed the challenged search, the fact that [defendant] was not under arrest at the time of the search does not render the search incident to arrest doctrine inapplicable"); *United States v. Goddard*, 312 F.3d 1360, 1364 (CA11 2002) (relying on *Banshee* post-*Knowles*); *United States v. Powell*, 483 F.3d 836, 839–42 (CADC 2007) (*en banc*) (rejecting defendant's argument that custodial arrest must precede incident search).

In the state courts, the highest courts of Alabama, Connecticut, the District of Columbia, Florida, Iowa, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, South Carolina, South Dakota, Vermont, and Wisconsin likewise interpret *Rawlings* to authorize pre-arrest incident searches. *See Adams v. State*, 815 So. 2d 578, 582 (Ala. 2001) ("Because [officer], before conducting the search, had probable cause to arrest [defendant], and because the search and the arrest were sufficiently contemporaneous, [officer's] search of [defendant's] front pants pocket was a valid search incident to an arrest."); *State v. Clark*, 764 A.2d 1251, 1268 n.41 (Conn. 2001) ("A formal arrest need not always chronologically precede the search incident to lawful arrest in order for the search to be valid."); *United States v. Lewis*, 147 A.3d 236, 243 (D.C. 2016) (*en banc*) (*Gant* incident search of vehicle "can be lawful even if the search precedes arrest"); *Jenkins v. State*, 978 So. 2d 116, 126 (Fla. 2008) ("it is permissible for a search incident to arrest to be conducted prior to the actual arrest"); *State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001) (although defendant "was not formally arrested until after the 'pat down' search that revealed the bag of unsmoked marijuana," "the timing" was "not fatal" because "a search incident to an arrest need not be made *after* a formal arrest"); *Williams v. Commonwealth*, 147 S.W.3d 1, 8 (Ky. 2004) ("it is immaterial that a search of the person without a search warrant may precede his arrest"); *State v. Surtain*, 31 So. 3d 1037, 1046 (La. 2010) (officer "was authorized to conduct a full search of the defendant's person incident to the arrest for which probable cause existed, even though the defendant had not yet been formally placed under arrest"); *State v. O'Neal*, 921 A.2d 1079,

1087 (N.J. 2007) ("The fact that the police searched and removed the drugs before placing defendant under arrest does not alter the outcome. ... It is the right to arrest rather than the actual arrest that must pre-exist the search."); *State v. Bone*, 550 S.E.2d 482, 488 (N.C. 2001) ("a search may be made before an actual arrest and still be justified as a search incident to arrest"); *State v. Linghor*, 690 N.W.2d 201, 204 (N.D. 2004) ("In certain circumstances, [an incident] search can even precede an arrest."); *State v. Freiburger*, 620 S.E.2d 737, 740 (S.C. 2005) ("A warrantless search which precedes a formal arrest is valid if the arrest quickly follows."); *State v. Smith*, 851 N.W.2d 719, 725–26 (S.D. 2014) (affirming search that preceded arrest by 27 minutes because "[t]he arrest ... does not need to occur prior to the search"); *State v. Guzman*, 965 A.2d 544, 550–51 (Vt. 2008) ("It is of no significance that police did not formally arrest defendant before conducting the search."); *State v. Sykes*, 695 N.W.2d 277, 283 (Wis. 2005) ("A search may be incident to a subsequent arrest if the officers have probable cause to arrest before the search.").

In contrast, the Seventh Circuit and the highest state courts of California, Idaho, Maryland, Massachusetts, New York, Tennessee, and Virginia all hold that an arrest must precede an incident search, or at least be impending.

For example, in *Ochana v. Flores*, the Seventh Circuit held that in order to conduct an incident search of an arrestee's vehicle, "the occupant of the vehicle must actually be held under custodial arrest." 347 F.3d 266, 270 (CA7 2003). There, police observed Ochana asleep at the wheel of his car at an intersection and ordered him to step to the rear of the car. *Id.*, at 268. While one officer questioned Ochana,

the other searched the car, found a bag containing a white powdery substance inside a backpack, concluded that the bag contained a controlled substance, and handcuffed Ochana, placing him under arrest. *Id.*, at 268–69. In Ochana's subsequent §1983 action alleging an unlawful search, the Seventh Circuit held that the search of Ochana's car could not be justified as incident to arrest because there was "insufficient evidence that Ochana was under custodial arrest at the time of the search. ... He was not told that he was under arrest; he was not handcuffed or frisked; and no sobriety test was conducted." *Id.*, at 270. Consequently, even though there was probable cause to arrest Ochana for obstructing traffic, *id.*, at 271, and he was arrested, the search was not incident.

Likewise, in *People v. Macabeo*, the California Supreme Court held that the search of a person's cell phone was not incident to arrest because the person was not under custodial arrest at the time of the search, even though the officers had probable cause to arrest before the search, and did in fact arrest afterward. 384 P.3d 1189, 1195–97 (Cal. 2016).[1] Police officers stopped Macabeo for riding his bicycle through a stop sign, an infraction under California law. *Id.*, at 1191. During the stop, they seized and searched Macabeo's cell phone. *Id.*, at 1192. After the officers found child pornography, they arrested Macabeo. *Ibid.* The California Supreme Court held that the search of the cell phone could not be justified as incident to arrest because "Macabeo was not under arrest when officers searched his

[1] *Riley*, 134 S. Ct. 2473, which holds that the Fourth Amendment prohibits a warrantless search of a cell phone incident to arrest, was not dispositive in *Macabeo* because the State had asserted good-faith reliance on pre-*Riley* precedent.

phone." *Id.*, at 1195. *Macabeo* rejected the state's argument, based on *Rawlings*, that "the officers *could have* arrested defendant for failing to stop his bicycle at a stop sign, and then searched his phone incident to that arrest." *Id.*, at 1195. That "expansive understanding of *Rawlings*, that probable cause to arrest will always justify a search incident so long as an arrest follows," was "inconsistent" with *Chimel* and "in tension with the reasoning in" *Knowles*. *Macabeo*, 384 P.3d, at 1195–96. *Rawlings*, the court cautioned, "does not stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows." Rather, *Macabeo* correctly understood *Rawlings* to mean only that "[w]hen a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search." *Id.*, at 1196. Because there were no "objective indicia" to suggest that the officers would have arrested Macabeo for the stop-sign infraction, *Knowles* controlled: "once it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative." *Id.*, at 1197.

The Idaho Supreme Court's decision in *State v. Lee*, 402 P.3d 1095 (2017), is in accord. There, a police officer developed probable cause to arrest Lee for driving with a suspended license and, after Lee parked his car and began to walk, stopped Lee to question him. *Id.*, at 1098–99. During questioning, the officer frisked Lee's pockets and felt a large bulge consisting of several cylindrical items and a longer object that felt like a pocketknife. *Id.*, at 1099. After removing the cylindrical

containers and what was indeed a pocketknife, the officer handcuffed and detained Lee (but did not arrest him), telling Lee that he would be issued a citation for driving without privileges. *Ibid.* The officer then opened the cylindrical containers, found marijuana and a powdery residue, and arrested Lee for possessing a controlled substance. *Ibid.*

Relying on *Reid* and *Macabeo*, the Idaho Supreme Court held that the search of the cylindrical containers could not be justified as incident to arrest because, at the time of the search, Lee was not under arrest and the officer had determined only to issue him a citation for driving without privileges: "[A] search incident to arrest is not reasonable when an arrest is not going to occur." 402 P.3d, at 1105. *Lee* explained that a court should determine "if an arrest is going to occur based on the totality of the circumstances," "including the officer's statements." 402 P.3d, at 1105. "While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of circumstances as to whether an arrest is to occur." *Ibid.* Because the officer's statement that Lee would receive only a citation for the vehicular offense established that no arrest would have occurred but for the discovery of the narcotics, the search that yielded the narcotics could not be sustained as incident to arrest. *Id.*, at 1105–06.

And in *Lovelace v. Commonwealth*, following a GVR in light of *Knowles*, the Virginia Supreme Court held that a search could not be sustained as incident to arrest where, at the time of the search, the defendant had been detained for an

open-container violation, but had not been placed under custodial arrest. 522 S.E.2d 856 (Va. 1999). There, an officer saw Lovelace drinking from a liquor bottle in public, detained him, patted him down, and discovered a bag of crack. *Id.*, at 857. The officer "acknowledged that he had not arrested Lovelace and did not have him in custody when he searched Lovelace," and "did not actually arrest Lovelace until after he retrieved the bag from the defendant's pocket. *Ibid.* The court concluded that *Knowles* controlled. Because (as in *Macabeo*) state law permitted only the issuance of a summons for the offense, not an arrest, the court rejected the state's argument "that existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [the officer] to search him." *Id.*, at 860, After *Knowles*, the court explained, "an 'arrest' that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search." *Ibid.*

Other state-court decisions from Maryland, Massachusetts, and Tennessee embrace the same reasoning. *See, e.g.*, *Bailey v. State*, 987 A.2d 72, 95 (Md. 2010) ("It is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search."); *Belote v. State*, 981 A.2d 1247, 1252 (Md. 2009) ("Where there is no custodial arrest," the "underlying rationales for a search incident to arrest do not exist."); *State v. Funkhouser*, 782 A.2d 387, 408 (Md. Ct. Spec. App. 2001) ("[N]o decision to arrest Funkhouser had been made and ... the seizure and search of the 'fanny pack' was no mere incident of an arrest already in motion .... It was, rather, the finding of

suspected drugs in the 'fanny pack' that was the precipitating or catalytic agent for Funkhouser's arrest .... This was an arrest incident to search."); *Commonwealth v. Craan*, 13 N.E.3d 569, 575 (Mass. 2014) ("Where no arrest is underway, the rationales underlying the exception do not apply with equal force. Indeed, to permit a search incident to arrest where the suspect is not arrested until much later, or is never arrested, would sever this exception completely from its justifications and effectively create a wholly new exception for a search incident to probable cause to arrest."); *State v. Crutcher*, 989 S.W.2d 295, 301 n.8 (Tenn. 1999) ("We decline to hold that a search may be upheld as a search incident to arrest merely because a lawful custodial arrest 'could have' been made.").

In sum, petitioner has identified a deep, entrenched split. This Court has repeatedly recognized a need for uniform Fourth Amendment doctrine. *See, e.g.*, *Riley*, 134 S. Ct., at 2491; *Thornton*, 541 U.S., at 623. Without this Court's intervention, confusion over the proper interpretation and application of *Knowles* will persist, with officers and people in the nation's two most populous states (New York and California), among others, subject to divergent rules in their federal and state courts. This Court's action is necessary.

III. This Is An Ideal Vehicle And The Question Presented Is Important.

This petition offers an ideal vehicle to resolve the division in the lower courts. Petitioner has preserved his objection to the warrantless search of his person at each stage of the litigation, raising *Reid* and arguing that an incident search requires a completed or ongoing arrest. The answer is outcome-determinative

because no other exception to the warrant requirement applies. Moreover, the uncontroverted facts tee up the question with unusual clarity. Respondent conceded that at the time of the search, Wadolowski did not intend to arrest petitioner for his open-container violation, only to issue him a summons, and that if *Reid* applied, the search would be invalid. Pet. App. 154a. Indeed, the facts here allow this Court to explore all aspects of the conflict. Within the larger split on the timing of an incident search is a nested sub-split concerning the relevance of an officer's intent to arrest or not. *Compare Lewis*, 147 A.3d, at 239, 243–45 (holding that officer intent is irrelevant and collecting similar cases from the Tenth Circuit, the Wisconsin Supreme Court, and several state intermediate appellate courts) *with Reid*, 26 N.E.3d, at 240 ("Where no arrest has yet taken place, the officer must have intended one if the 'search incident' exception is to be applied.") *and Lee*, 402 P.3d, at 1105 ("While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of circumstances as to whether an arrest is to occur."). This Court will have the freedom to craft a rule that accommodates consideration of officer intent or not.

Further percolation is unnecessary. Almost all of the federal courts of appeals and almost half of the state courts of last resort have weighed in, and the issue has received extended treatment in several cases, including the divided *en banc* opinions of the D.C. Court of Appeals (*Lewis*) and the D.C. Circuit (*Powell*). Nor, absent this Court's intervention, will the conflict between the Second Circuit and

the New York Court of Appeals dissipate. The Second Circuit denied rehearing in *Diaz*. Subsequently, the federal courts have continued to apply *Diaz* and the state courts have continued to apply *Reid*. *See supra* § I.

And the question is important. Incident searches abound, and far outnumber searches pursuant to warrant. *Riley*, 134 S. Ct., at 2482. Moreover, the majority position creates perverse outcomes in the many cases of low-level criminal offenses most often handled with citations rather than arrests. Take New York City: between 2001 and 2013, police officers issued 7.3 million petty offense summonses, most for crimes such as public drinking, public urination, bicycling on the sidewalk, and so on. S. Ryley *et al.*, *Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in "Broken Windows" Policing*, N.Y. Daily News (Aug. 4, 2014), *available at* nydn.us/1zNnMAe. Arrests for such offenses are rare. (Indeed, criminal enforcement of these laws is disfavored. *See* N.Y.C. Admin. Code §14–155.) But under the Second Circuit's rule, New York City police officers may search any of these millions of people "incident to arrest"—even though, as here, no actual arrest is ever contemplated—and, if the search yields contraband, arrest for the more serious offense. That is an invitation to discriminatory policing. *See* Ryley, *supra* (noting that 81 percent of those receiving summonses between 2001 and 2013 were African-American or Latino); NYC Dep't of Investigation, Office of Inspector General for the NYPD, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Arrests, and Felony Crime in New York City, 2010–2015*, at 37 (2016) ("Precincts with higher proportions of black and Hispanic residents, males aged 15–20, and

[public housing] residents had generally higher rates of quality-of-life enforcement."), *available at* goo.gl/enpLSn. Judge Watford has made the same point. *Johnson*, 913 F.3d, at 807 (Watford, J., concurring) (noting "the serious potential for abuse that ... exists when officers possess unfettered discretion as to whom to target for searches," and observing that "'people of color are disproportionate victims of this type of scrutiny'") (quoting *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (SOTOMAYOR, J., dissenting)).[2]

IV. *Diaz* And The Order Below Are Wrongly Decided.

On the merits, *Diaz* and the order below are incorrect, as Judge Watford's thorough *Johnson* concurrence explains. 913 F.3d, at 803–07. In holding that probable cause to arrest justifies an incident search, as long as a formal arrest follows, the panel disregarded two fundamental Fourth Amendment rules.

First, *Diaz* ignored that an incident search requires an actual arrest, not mere probable cause to make one: "It is the fact of the lawful arrest which establishes the authority to search." *Robinson*, 414 U.S., at 235. That precept has deep historical and doctrinal roots. As then-Judge Cardozo summarized the common-law rule: "Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." *Chiagles*, 142 N.E., at 584. *See also, e.g.*, *Carroll v. United States*, 267 U.S. 132, 158 (1925) ("When a man is legally

[2] This Court denied certiorari in *Diaz*, after Respondent raised two vehicle problems (lack of preservation and an alternate ground for affirmance) not present here. *See* Brief in Opposition 23–28, *Diaz v. United States*, No. 17–6606 (U.S. Jan. 2, 2018).

arrested for an offense, whatever is found upon his person or within his control which it is unlawful for him to have and which may be used to prove the offense may be seized."). That is, the incident search has been understood, as an historical matter, as permissible in light of the greater intrusion of arrest. Moreover, the interests advanced by the exception—officer safety and evidence preservation, *see Chimel*, 395 U.S., at 762–63—have weight sufficient to sustain *Robinson*'s categorical rule (any arrest supports an incident search) only in the context of a custodial arrest. As to officer safety, "a custodial arrest involves 'danger to an officer' because of 'the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.'" *Knowles*, 525 U.S., at 117 (quoting *Robinson*, 414 U.S., at 234–35). As to evidence preservation, "[w]here there is no formal arrest," "a person might well be ... less likely to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp*, 412 U.S., at 296.

Diaz muddled the point, confusing the *fact* of an arrest with the *grounds* for an arrest. For example, *Diaz* "assumed" that the *Chimel* interests were "present whenever an officer is justified in making an arrest." 854 F.3d, at 205. Not so: "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." *Robinson*, 414 U.S., at 234 n.5. That is why *Knowles* invalidated a search notwithstanding grounds to arrest: "Once it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative." *Macabeo*, 384 P.3d, at 1197. Put another way, "[i]t is irrelevant that, because probable cause

existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." *Reid*, 26 N.E.3d, at 239.

To be sure, *Diaz* requires a "formal arrest," which may "follow quickly on the heels of" the search. 854 F.3d, at 209. Hence *Diaz*'s second deviation from fundamental Fourth Amendment jurisprudence: the constitutionality of a search turns on whether it was justified "at its inception," *Terry*, 392 U.S., at 20, not on subsequent events. *See also, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). The rationale for that rule is self-evident. Fourth Amendment doctrine guides officers' primary conduct, *see, e.g.*, *New York v. Belton*, 453 U.S. 454, 458 (1981), but officers cannot tailor their behavior to events that they cannot foresee. Yet *Diaz* compels officers to do just that.

Take this case. At the moment when Wadolowski began to frisk Petitioner, was the search lawful? Applying *Diaz*, it is impossible to say. If Wadolowski would go on to arrest Petitioner, then it was; but if not, then not. A decisional rule unable to ascertain the legality of a search at its inception is defective for that reason alone. Worse, the lawfulness of Wadolowski's conduct would have been unknown *to the officer himself*. Recall that at the frisk's onset, Wadolowski did not intend to arrest Petitioner for littering or public drinking, but decided to arrest him only after the search revealed the gun. Pet. App. 154a. At the time of the frisk, Wadolowski did not know if an arrest would "follow quickly," on the frisk's heels, as would be necessary to validate the frisk under *Diaz*. *See also* Pet. App. 83a (Wadolowski)

("[W]hat I would have done, who knows? Only God knows."). In this very case, *Diaz* produces the bizarre result that Wadolowski could not have known whether his actions were constitutional when he acted. "Fourth Amendment rules 'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (quoting *Belton*, 453 U.S., at 458). This one is not. Nor is there any support for the premise that a search, illegal at its inception, can be retroactively transformed into a permissible search incident to arrest when an officer, motivated by the fruits of the search, decides to arrest.

Diaz erred (as have many courts) by misreading cursory dictum in *Rawlings* that "[w]here the formal arrest followed quickly on the heels of the challenged search ... , we do not believe it particularly important that the search preceded the arrest, rather than vice versa." 448 U.S., at 111; *see* 854 F.3d, at 205. That statement must be understood in light of the facts and posture of the case.

In *Rawlings*, officers entering a home to execute an arrest warrant for an absent resident on drug trafficking charges saw and smelled marijuana. Some officers left to obtain a search warrant, while others detained the occupants (including Rawlings) in the home's living room. Forty-five minutes later, the officers returned with a search warrant, read the occupants their *Miranda* rights, then ordered Rawlings's companion to empty her purse onto a coffee table. She did so, disclosing "1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methprylan, and pentobarbital" which

Rawlings "immediately claimed" were his. *Id.*, at 101. Officers then searched Rawlings, finding a knife and cash, before placing him "under formal arrest." *Ibid.*

There is no doubt that, at the time of that search, Rawlings "had plainly been subjected to a Fourth Amendment seizure amounting to an arrest, based on probable cause that existed beforehand." *Johnson*, 913 F.3d, at 806 (Watford, J., concurring). Officers executing a drug warrant, who had detained Rawlings and read him his *Miranda* rights, had just heard him admit ownership of a "sizable quantity of drugs." *Rawlings*, 448 U.S., at 111. Indeed, Rawlings's admission of ownership "clearly" supplied probable cause to arrest him. *Ibid.* For Fourth Amendment purposes, his arrest had occurred, which explains the Court's repeated use of the term "formal arrest" to describe what happened after the search. *Id.*, at 101, 111. Thus, "*Rawlings* merely establishes that when an arrest is supported by probable cause, after-acquired evidence need not be suppressed because an otherwise properly supported arrest was subsequently made more formal." *Macabeo*, 384 P.3d, at 1196. But it "does not stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows." *Id.*, at 1197.

Moreover, in this Court, Rawlings did not contend that the last search was unlawful because it preceded his "formal arrest." Rather, he argued (in Point IV of his brief, which consumed pages 82 and 83 of an 84-page filing) that "probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs." Brief for Petitioner 82–83, *Rawlings v. Kentucky*, No. 79–5146

(U.S. Feb. 6, 1980), *available at* 1980 WL 339599. This Court's statement regarding the timing of the search was unnecessary to the disposition of the case, *Lewis*, 147 A.3d, at 242, and lacks binding force, *Smith v. Robbins*, 528 U.S. 259, 273 (2000).

Knowles confirms that the Fourth Amendment forbids an incident search, notwithstanding probable cause to arrest, where but for the search there was to be no arrest. In that case, an Iowa police officer stopped Knowles for speeding and "issued a citation to Knowles, even though under Iowa law he might have arrested him." 525 U.S., at 114. The officer then searched Knowles's car and, after finding marijuana, arrested Knowles for a controlled substance offense. *Ibid.* The Iowa Supreme Court upheld the search under a "'search incident to citation'" exception to the Fourth Amendment, reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest." *Id.*, at 115–16. This Court reversed. Noting the "two historical rationales" for the search-incident-to-arrest exception—"the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial"—this Court concluded that "neither" was "sufficient to justify the search in the present case." *Id.*, at 117. As to officer safety, a lawful basis to arrest does not by itself authorize a search because "'the danger to the police officer flows from the fact of the arrest, ... and not from the grounds for the arrest.'" 525 U.S., at 117 (quoting *Robinson*, 414 U.S., at 234 n.5) As to evidence preservation, at the time of the search, "all the evidence necessary to prosecute that offense had been obtained." *Id.*, at 118. Thus, the Court declined to extend the exception because "the concern for

officer safety [was] not present to the same extent and the concern for destruction or loss of evidence [was] not present at all." *Id.*, at 119.

Diaz distinguished *Knowles* on the ground that there, the officer had issued a citation before searching Knowles's car. 854 F.3d, at 206. But that is immaterial: "[T]he critical fact in *Knowles* was not the officer's issuance of the citation, but rather than absence of an arrest" at the time of the search. *Johnson*, 913 F.3d, at 805 (Watford, J., concurring). "That absence is key because ... the exigency that justifies a warrantless arrest in this context arises from the *fact* of arrest, ... not from the existence of probable cause to arrest." *Ibid.* (citing *Robinson*, 414 U.S., at 236). Moreover, if *Diaz* were correct, *Knowles* would have come out the other way. *See Reid*, 26 N.E.3d, at 240. After all, in *Knowles*, there was probable cause to arrest before the search, and a formal arrest shortly thereafter. *See Diaz*, 854 F.3d, at 208 (stating these two requirements for a pre-arrest incident search). But this Court in *Knowles* concluded otherwise, confirming that what matters is the existence, or not, of an actual arrest at the time of an incident search.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/
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