No. 18–9393

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

REPLY BRIEF OF PETITIONER

Daniel Habib
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
daniel_habib@fd.org
(212) 417–8742

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Respondent concedes that *United States v. Diaz*, 854 F.3d 197 (CA2 2017), "squarely rejected" *People v. Reid*, 24 N.Y.3d 615 (2014), and created a "conflict" between the Second Circuit and the New York Court of Appeals. BIO 18. Respondent agrees that resolution of the *Diaz*/*Reid* conflict is outcome-determinative here, having acknowledged below that if *Reid* controls, the search of Petitioner's person violated the Fourth Amendment. Pet. App. 154a. And Respondent does not dispute that this petition offers an ideal vehicle, or that the question presented is important and recurrent. *See* Pet. 22–25. The correct disposition of this petition is thus straightforward: Certiorari should be granted.

I. Respondent Concedes That *Diaz* Conflicts With *Reid*.

Respondent concedes the *Diaz*/*Reid* split. In an effort to avoid review, Respondent minimizes the split as "shallow" and speculates that the New York Court of Appeals "may well reconsider" *Reid* in a future case. BIO 18.

A split that affects each of the 19.5 million residents of New York State is not shallow. This Court regularly grants review of conflicts between state supreme courts and their regional federal circuits. Pet. 12 (collecting cases).

The New York Court of Appeals has already answered Respondent's conjecture: "[W]e do not abandon our jurisprudence in response to every new lower federal court decision." *People v. Garvin*, 30 N.Y.3d 174, 182, n. 6 (2017). Indeed, *Garvin* rejected the very suggestion Respondent makes here, declining to revisit Fourth Amendment precedent (on the reasonableness of a warrantless arrest in the

threshold of a home) in light of an intervening Second Circuit decision (*United States v. Allen*, 813 F.3d 76 (CA2 2016)). *See also e.g.*, *People v. Pignataro*, 22 N.Y.3d 381, 386, n. 3 (2013) (declining to overrule precedent based on intervening Second Circuit decision because "the Second Circuit's interpretation of the Federal Constitution does not bind us"). In any case, New York State prosecutors will never give the Court of Appeals the chance to reverse itself because they have a far easier option: as here, referring cases that arise from *Reid*-barred searches for federal prosecution. *E.g.*, *United States v. Dupree*, 767 F. App'x 181, 183 (CA2 2019).[1]

II. The Question Presented Implicates A Nationwide Split.

Petitioner has demonstrated a nationwide split on the question presented. Pet. 14–22. Respondent's attempt to show otherwise fails.

A. Start with Respondent's treatment of the decisions of the highest state courts of California, Virginia, and Idaho. BIO 15–16. Respondent admits that "aspects of the reasoning of those decisions is inconsistent with" *Diaz*, but argues that each is factually distinguishable. BIO 15. For example, Respondent says, in both *People v. Macabeo*, 384 P.3d 1189 (Cal. 2016), and *Lovelace v. Commonwealth*, 522 S.E.3d 856 (Va. 1999), state law precluded arrest for the relevant offenses. BIO 15. But the Fourth Amendment allows an arrest based on probable cause to believe a person has committed any crime, whether state law does or not. *Virginia v. Moore*, 553 U.S. 164, 171 (2008). So the only relevance of the state-law bars in *Macabeo* and

[1] The pending petition in *Dupree v. United States*, No. 19–5343, also presents the *Diaz*/*Reid* split, but, as explained there, in an inferior vehicle.

Lovelace was that they confirmed that no arrests were going to occur at the time of the challenged searches, triggering the rule of *Knowles v. Iowa*, 525 U.S. 113 (1998). *See Macabeo*, 384 P.3d, at 1197 (reading *Knowles* to stand for the proposition that "[o]nce it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative," and concluding that "[t]his case is analogous to *Knowles*"); *Lovelace*, 522 S.E.2d, at 860 ("The fact that the officers could have issued only a summons ... negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [the officer] to search him. After *Knowles,* 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."). On Respondent's view of the search-incident-to-arrest exception, however, it is immaterial whether an arrest is going to occur at the time of a search, as long as an arrest in fact follows (as happened in *Macabeo* and *Lovelace*, and as is authorized by *Moore*). Respondent's distinction of these cases therefore has constitutional significance only if Petitioner's understanding of the exception is correct.

Likewise, Respondent notes that in *State v. Lee*, 402 P.3d 1095 (Idaho 2017), the police officer "'told [the driver] that he would issue him a citation' instead of making an arrest." BIO 16 (quoting *Lee*, 402 P.3d, at 1104). But the officer had not in fact issued a citation—according to Respondent, the critical difference between this case and *Knowles*, BIO 14—and retained the authority to arrest for the traffic offense. The relevance of the officer's statement was that it enabled the Idaho

Supreme Court to conclude that "it was clear than an arrest was not going to take place," so that "the historical rationales justifying the search were no longer present." 402 P.3d, at 1104. Indeed, in alignment with *Reid*, *Lee* considered the officer's statement as evidence of his intention not to arrest: "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 the circumstances as to whether an arrest is to occur." 402 P.3d, at 1105. Again, under Respondent's interpretation of the search-incident exception, an officer's intention to cite rather than arrest does not impact the constitutional analysis. The officer's statement in *Lee* matters only if *Reid* is right about the kind of inquiry that the exception demands.

The split between *Diaz*, on the one hand, and *Macabeo*, *Lovelace*, and *Lee*, on the other, is readily grasped. *Diaz* holds that a permissible pre-arrest incident search has two prerequisites: probable cause to arrest before the search, and a formal arrest shortly thereafter. 854 F.3d, at 209. In *Macabeo*, *Lovelace*, and *Lee*, both prerequisites were met, but all three state supreme courts held the searches invalid because some evidence—state law in *Macabeo* and *Lovelace*; the officer's expressed intention in *Lee*—established that no arrest was going to occur at the time of the search. *Macabeo*, 384 P.3d, at 1197; *Lovelace*, 522 S.E.2d, at 860; *Lee*, 402 P.3d, at 1105–06. These searches would have passed muster under *Diaz*, but were held invalid because the state courts answered the question that the Second

Circuit refused to ask: "whether or not an arrest was impending at the time of the search." 854 F.3d, at 208.

B. Turning to the federal courts, Respondent discounts the Seventh Circuit's statement in *Ochana v. Flores*, 347 F.3d 266, 270 (2003)—an incident search requires that the suspect "must actually be held under custodial arrest"—as "erroneous ... *dicta*" that "is not the law in the Seventh Circuit." BIO 15. Respondent is incorrect. Although *Ochana* upheld the vehicle search in that case on other grounds, the Seventh Circuit expressly disagreed with the District Court's ruling that the search could be justified as incident to arrest. 347 F.3d, at 270 (explaining that "we depart from the district court's analysis" and "find insufficient evidence in the summary judgment record to support a conclusion as a matter of law that this search was incident to a custodial arrest"). Subsequent cases confirm that *Ochana* states Seventh Circuit law. *See United States v. Jackson*, 377 F.3d 715, 717 (CA7 2004) ("[A]s *Knowles* explained, it is *custody* ... that makes a full search reasonable."); *see also ibid.* (*Knowles* "instantiates the principle that the reasonableness of a search depends on what the officers actually do, not what they might have done"); *United States v. Cochran*, 309 F. App'x 2, 6 (CA7 2009) ("[B]ecause Cochran was lawfully under arrest, the officers could search him and the passenger section of his vehicle as a search incident to the lawful arrest.") (citing *Ochana*). The mention of the search-incident exception in *United States v. Leo*, 792 F.3d 742 (CA7 2015) (cited at BIO 15) was true dictum because the

government there "never suggested ... that the police officers searched Leo's backpack incident to arrest," *id.*, at 748.[2]

C. This Court's prior denials of certiorari (BIO 5) do not counsel the same course here. *Diaz v. United States*, No. 17–6606, and *Heaven v. Colorado*, No. 16–1225, had significant vehicle problems. In *Diaz*, the petitioner had not preserved the argument "that 'an incident search requires an existent arrest at the time of search,'" and had instead conceded in the District Court that "'it doesn't matter if the search precedes or follows the arrest.'" *Diaz* BIO 23. Moreover, reasonable suspicion supported the challenged search and furnished an alternate ground for affirmance. *Id.*, at 24–28. In *Heaven*, the state courts had concluded that the petitioner "was under arrest" at the time of the challenged search. *Heaven* Pet. App. 5a ¶ 12; *see Heaven* BIO 6 ("The problem for Petitioner is that, according to the two courts below, at the time of the search Petitioner was *under arrest*."). When this Court denied certiorari more than a decade ago in *Powell v. United States*, No. 07–

[2] Respondent identifies factual distinctions with the Massachusetts, Maryland, and Tennessee cases, BIO 16–17, but neglects that the reasoning of these cases embraces Petitioner's side of the split. *See 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."); *Belote v. State*, 981 A.2d 1247, 1252 (Md. 2009) ("Where there is no custodial arrest, however, these underlying rationales for a search incident to an arrest do not exist."); *State v. Crutcher*, 989 S.W.2d 295, 302 (Tenn. 1999) ("[W]e are not prepared to hold that the police may conduct a warrantless search merely because they have probable cause to arrest the suspect. Having determined that [the defendant] was not under arrest at the time of the search, we conclude that the search was not incident to a lawful arrest.").

5333, the *Diaz*/*Reid* split did not exist, and most of the cases on Petitioner's side of the broader split (*Lee*, *Macabeo*, *Craan*, and *Belote*) had not been decided.[3]

III. *Diaz* Is Wrong.

A. On the merits, the BIO, like *Diaz*, is wrong, for two principal reasons. First, "it is the fact of lawful custodial arrest which gives rise to the authority to search." *United States v. Robinson*, 414 U.S. 218, 236 (1973). *See* Pet. 25–27. That principle reflects the settled historical rule, many times explicated by this Court. *E.g.*, *Weeks v. United States*, 232 U.S. 383, 392 (1914) (referring to "the right on the part of the Government, always recognized under English and American law, to search the person of the accused *when legally arrested* to discover and seize the fruits or evidences of crime"); *Carroll v. United States*, 267 U.S. 132, 158 (1925) ("*When a man is legally arrested* for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (referring to "[t]he right without a search warrant contemporaneously to search *persons lawfully arrested*"); *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950) ("The right to search the person incident to arrest always has been recognized in this country and in England. *Where one had been placed in the custody of the law* by valid action of officers, it was not unreasonable to search him.") (all emphases added).

---

[3] In addition to *Dupree*, *ante*, n. 1, at least two other pending petitions present this question. *Johnson v. United States*, No. 19–5181; *Lam v. United States*, No. 19–____ (petition filed Aug. 2, 2019). The question is not going away.

Respondent does not dispute that at the time of the search, Officer Wadolowski had not arrested Petitioner and intended only to issue him a citation for littering. *See* Pet. App. 7a, 154a. On these facts, the search implicates neither of the interests served by the search-incident exception—officer safety or evidence preservation. As to officer safety, this Court has clarified that the relevant "danger" is that associated with "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." *Robinson*, 414 U.S. at 234–35. When no arrest is to occur, this danger is not present. As to evidence preservation, "[w]here there is no formal arrest, ... a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person." *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). If the suspect is to be cited and released, the concern for destruction of evidence is absent. Thus, "[a]s the doctrinal underpinnings of the search-incident-to-arrest exception suggest, the authority to conduct such a search does not arise until an arrest is actually made." *United States v. Johnson*, 913 F.3d 793, 804 (CA9 2019) (Watford, J., concurring).

Respondent's contrary position (BIO 6–10) depends entirely on a single sentence from *Rawlings v. Kentucky*, 448 U.S. 98 (1980). As Petitioner has explained, that sentence "cannot fairly be read as having jettisoned the requirement that an arrest occur before an officer may conduct a search incident to arrest." *Johnson*, 913 F.3d, at 806 (Watford, J., concurring). *See also Macabeo*, 384

P.3d, at 1197 (*Rawlings* "does not stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows").

Recall that the petitioner in *Rawlings* had been subjected to a lengthy detention based on probable cause, and Mirandized, before the challenged search. Thus, this Court's "repeated use of the qualifying word 'formal' when describing the arrest denotes its recognition that an arrest was well under way prior to the search, and it was only the more overt formalities of a custodial arrest that followed the search." J. Deahl, *Debunking Pre-Arrest Incident Searches*, 106 Cal. L. Rev. 1061, 1079 (2018). *See Johnson*, 913 F.3d, at 806 (Watford, J., concurring) ("At the time he was searched, the defendant in *Rawlings* had plainly been subjected to a Fourth Amendment seizure amounting to an arrest, based on probable cause that existed beforehand. As I read *Rawlings*, the Court merely held that the search was not invalidated by the fact that the 'formal arrest' (handcuffing, etc.) occurred shortly after the search took place, rather than before."); *United States v. Powell*, 483 F.3d 836, 846 (CADC 2007) (Rogers, J., dissenting) ("The Court's reference to 'formal arrest' signals that it recognized that Rawlings was in custody prior to the search."). Even decisions on Respondent's side of the split concede that the timing discussion in *Rawlings* did not pertain to any argument raised in that case. *United States v. Lewis*, 147 A.3d 236, 242 (D.C. 2016) ("[T]he defendant in *Rawlings* did not argue in the Supreme Court that a lawful search incident to arrest must follow arrest.").

Respondent defends its reading of *Rawlings* on the ground that courts should not "'micromanage'" the order of searches and arrests because the concerns for

officer safety and evidence preservation "may be even 'greater before the police have taken a suspect into custody than they are after.'" BIO 7 (quoting *Lewis*, 147 A.3d, at 240, then *Powell*, 483 F.3d, at 841). The way to accommodate these interests during police-citizen encounters that have not ripened into arrests is not an ahistorical expansion of the search-incident exception, but other, more fitting doctrines. *See Terry v. Ohio*, 392 U.S. 1 (1968) (permitting frisk of person based on reasonable suspicion that person is armed and dangerous); *Mitchell v. Wisconsin*, ___ U.S. ___ (2019) (permitting blood test of person based on exigent circumstances, namely, imminent destruction of evidence).

B. Respondent has no answer for Petitioner's second merits point: under *Diaz*, the lawfulness of a pre-arrest search turns on the officer's subsequent decision whether to arrest, in contravention of the basic rule that the constitutionality of a search must be judged at its inception. *See* Pet. 27–28 (citing *Terry*, 392 U.S., at 20). Indeed, Respondent identifies no other situation where the Fourth Amendment reasonableness of a search is unknowable until after the search has occurred. Respondent nonetheless contends that *Diaz* supplies officers with a "'readily applicable'" rule, explaining that "a police officer in Officer Wadolowski's situation knows that a search of a suspect will be a valid search incident to arrest if (i) the officer has probable cause to arrest before the search, and (ii) an arrest follows quickly after the search." BIO 10 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)). But as this case proves, *see* Pet. App. 83a, officers cannot always foresee whether an arrest will "follow[] quickly" after a search. Probable cause may

dissipate during a pre-arrest search—for example, because what appeared to be cocaine turns out to be creatine, *Ochana*, 347 F.3d, at 269–70.

Moreover, Respondent's position gets things backwards. All agree that, at the precise moment when Officer Wadolowski searched Petitioner, the search was unconstitutional because no arrest had occurred. On Respondent's view, the search became constitutional when Officer Wadolowski decided to arrest Petitioner after finding a gun in the latter's waistband. Petitioner's arrest, prompted by the fruits of that unlawful search, did not cure the initial illegality, but made it worse.

This is the real mischief of *Diaz*. Its post-hoc mechanism for validating warrantless searches invites "general, exploratory rummaging," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). An officer with probable cause to believe a person has committed any crime—no matter how insignificant, or how infrequently sanctioned with arrest—can search that person, and if the search yields evidence of a more serious crime, make an arrest and retroactively ratify the search. "Criminal codes abound with offenses so minor that, with minimal patience, officers should be able to articulate probable cause for some offense whenever the urge to search arises." *Deahl*, *supra*, at 1120. *Diaz* itself involved public drinking, and cases applying *Diaz* have involved even lesser infractions: littering (this case), jaywalking (*Dupree*), and being in a park after dark (*United States v. Witty*, 2017 WL 3208528 (EDNY July 26, 2017)). Such offenses rarely result in arrests because police resources are too limited. But *Diaz* permits officers to search anyone suspected of committing such petty crimes for any reason. Unfettered discretion to search

anyone who has committed even the most minor offense all but ensures discriminatory policing. *See Johnson*, 913 F.3d, at 807 (Watford, J., concurring).

C. Contrary to Respondent's argument (BIO 11–13), there is nothing anomalous about considering an officer's subjective intentions (as *Reid* and *Lee* do) in certain Fourth Amendment contexts. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 10 (2013) (reasonableness of dog sniff at home's front door "depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered"). Likewise, in applying the independent source doctrine, this Court has said that the pertinent question is whether the police's "decision to seek the warrant" authorizing a subsequent search is "*prompted* by what they had seen" during an initial illegal search. *Murray v. United States*, 487 U.S. 533, 542 (1988) (emphasis added). Lower courts applying *Murray* have correctly understood this rule not only to permit, but to compel, consideration of an officer's "subjective intent." *E.g.*, *United States v. Jadlowe*, 628 F.3d 1, 10–12 (CA1 2010); *United States v. Restrepo*, 966 F.2d 964, 971–72 (CA5 1992). *See also, e.g.*, *United States v. Rodriguez*, 834 F.3d 937, 942 (CA8 2016) (noting government's argument that independent source doctrine applied because officer "had already announced his intent to apply for a search warrant"). When ascertaining the existence of probable cause, an objective approach makes sense. But when asking a forward-looking question—would an arrest have occurred but for the search?—an officer's intentions could, consistent with existing doctrine, factor into the analysis.

D. Respondent distinguishes *Knowles* on the ground that "at the time of the search, the officer had already completed the encounter by issuing a citation." BIO 14. If *Knowles* is limited in this manner, it is a dead letter because the workaround is obvious: "Why not just search first? If nothing incriminating is found, then a citation could be issued; if something incriminating is found, the officer then could declare the violator under arrest .... [T]he search could then be upheld on the authority of *Rawlings*." 3 W. LaFave, *Search & Seizure* § 5.2(h), at 177–78 (5th ed. 2012). Moreover, the officer in *Knowles* retained authority to arrest even after issuing the citation, and did in fact arrest shortly thereafter. Thus, if *Diaz* is correct, *Knowles* should have come out the other way. *See* Pet. 31.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Daniel Habib
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417–8742
daniel_habib@fd.org

August 7, 2019