NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

STEVEN G. KALAR
Federal Public Defender
ROBIN PACKEL
Assistant Federal Public Defender
Office of the Federal Public Defender
for the Northern District of California
Oakland Branch
1301 Clay Street, Suite 1350N
Oakland, CA 94612
(510) 637-3500

QUESTIONS PRESENTED FOR REVIEW

1. In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court upheld, under the search-incident-to-arrest exception, a warrantless search that preceded the "formal arrest." Eighteen years later, without mentioning *Rawlings*, the Court held in *Knowles v. Iowa*, 525 U.S. 113 (1998), that the exception did not authorize a warrantless search that followed the issuance of a citation, even though a custodial arrest occurred soon after. Before and since *Knowles*, federal and state courts have differed on whether and when a warrantless search that precedes an arrest may be justified under the exception. The Ninth Circuit in this case upheld the warrantless search of Mr. Johnson because the police had probable cause to arrest before the search and arrested him after the search. Judge Watford concurred based on circuit precedent but argued that it should be overruled because, under this Court's case law, "the authority to conduct [a search incident to arrest] does not arise until an arrest is actually made."

May a warrantless search be upheld under the search-incident-to-arrest exception when the search precedes the arrest?

2. Must Mr. Johnson's convictions for violating 18 U.S.C. § 922(g)(1), felon in possession of a firearm, be reversed for insufficient evidence because there was no proof that he knew at the time of the offense that he had a prior felony conviction, as required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption. However, a petition for a writ of certiorari pending before this Court presents a substantially similar issue. *See* Petition for Writ of Certiorari at i, *McIlwain v. United States*, No. 18-9393 (U.S. May 21, 2019) ("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?").

DIRECTLY RELATED LOWER-COURT PROCEEDINGS

United States v. Lamar Johnson, No. 16-cr-00251 WHA (N.D. Cal. June 6, 2017)

United States v. Lamar Johnson, No. 17-10252 (9th Cir. Jan. 9, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

State Cases

State Statute

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Lamar Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's published opinion denying Mr. Johnson's motion to suppress is reported at *United States v. Johnson*, 224 F. Supp. 3d 881 (N.D. Cal. 2016), and attached at Appendix ["App."] 25-38. The Ninth Circuit's published opinion affirming the denial of Mr. Johnson's motion to suppress and affirming his conviction is reported at *United States v. Johnson*, 913 F.3d 793 (9th Cir. 2019), and attached at App. 1-24.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit entered its judgment in favor of respondent on January 9, 2019, App. 1, and, after directing respondent to respond, denied Mr. Johnson's petition for rehearing en banc on April 16, 2019, with Judge Watford voting to grant the petition. App. 39. This petition is timely under S. Ct. R. 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment guarantees freedom from unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> The Fifth Amendment guarantees due process of law:
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

In *Rawlings*, this Court held that a warrantless search may be justified as incident to a subsequent arrest as long as the "formal arrest" is roughly contemporaneous with the search. But in *Knowles*, the Court held that the search-incident-to-arrest exception did not apply where the officer issued a citation before the warrantless search and subsequent arrest. Federal and state courts have struggled to interpret, reconcile and fill the space between *Rawlings* and *Knowles*. This case exemplifies their struggles.

A police officer searched Mr. Johnson based on the smell of marijuana and arrested him for being a felon in possession of body armor that the officer found during the search. The courts below upheld the search, concluding that because the officer had probable cause to arrest Mr. Johnson at the time of the search and subsequently arrested him, the warrantless search was constitutional under the

search-incident-to-arrest exception, even though the search preceded the arrest. This case is a good vehicle for the Court finally to resolve the federal-circuit and state-high-court splits about -- and to clarify for courts, police officers and the public -- whether or when the search-incident-to-arrest exception justifies a warrantless search that occurs before the arrest.

If the Court does not grant review based on the Fourth Amendment question, it at least must grant certiorari, vacate Mr. Johnson's § 922(g)(1) convictions and remand in light of *Rehaif* because he was convicted of being a felon in possession of firearms without proof that he knew he had the felon status that made his possession of firearms a crime.

This Court should grant the petition.

STATEMENT OF THE CASE

On August 7, 2015, East Palo Alto police sergeant Clint Simmont stopped the car Mr. Johnson was driving because he did not stop at a stop sign before turning right. App. 25, 111. While talking to Mr. Johnson, Simmont smelled burnt and fresh marijuana coming from the car. App. 5, 25, 111. Mr. Johnson gave Simmont his driver's license, which Simmont determined was suspended. App. 25-26. Mr. Johnson told Simmont that his uncle, the owner of the car from whom he had borrowed it, had removed the registration and insurance documents from the car. App. 26. When Mr. Johnson opened the glove compartment, Simmont saw pill bottles and two empty plastic bags. *Id.* Mr. Johnson "moved his hand around on

the few items" in the glove compartment and quickly closed it, which Simmont thought was "unusual." *Id.*

Simmont asked Mr. Johnson to get out of the car and "patted him down to search for evidence of the marijuana that [he] had smelled emanating from the sedan." App. 112. During the search, Simmont felt body armor on Mr. Johnson and found approximately $650 in cash. App. 26. "Sergeant Simmont detained Johnson." *Id.* After confirming that Mr. Johnson had a prior felony conviction, Simmont arrested him for illegally possessing the body armor. App. 26, 112.

Simmont testified, and the district court specifically found true, that he did not arrest Mr. Johnson for driving on a suspended license or based on the odor of marijuana. App. 26-27. Rather, Simmont arrested Mr. Johnson "[i]nitially for being a felon in possession of body armor" that Simmont had discovered during the warrantless search of Mr. Johnson. App. 27.

After he arrested Mr. Johnson, Simmont and other officers did an inventory search of Mr. Johnson's car before having it towed. *Id.* They found a gun, pills, indicia of drug distribution and concentrated cannabis. *Id.* A more thorough booking search of Mr. Johnson turned up crack, suspected heroin, marijuana and oxycodone pills. *Id.* A later, unconnected warrant search of Mr. Johnson's home turned up another gun and additional drugs. App. 6-7.

Mr. Johnson was charged in federal court with drug and gun offenses based on what police found in the warrantless searches of his person and car and the warrant search of his home. App. 7. He moved to suppress all fruits of the

warrantless and warrant searches. *Id.* After an evidentiary hearing at which Simmont testified, the district court denied the motions.[1] App. 25, 27.

Mr. Johnson waived his right to jury trial, and he and the government stipulated to facts for the bench trial. App. 42-43. For the two § 922(g)(1) offenses, they stipulated that Mr. Johnson knowingly possessed the guns, that the guns had traveled in and affected interstate commerce and that at the time Mr. Johnson possessed them, he "had been convicted of a felony, *i.e.*, a crime punishable by imprisonment for a term exceeding one year." *Id.* Consistent with Ninth Circuit law at the time, there was no allegation or proof that Mr. Johnson knew he was a felon at the time of the § 922(g)(1) offenses. On February 7, 2017, the district court found Mr. Johnson guilty of drug offenses and the two § 922(g)(1) offenses based on the stipulated facts. App. 40. Mr. Johnson did not challenge on appeal the sufficiency of the evidence supporting these convictions.

I. The district court upheld the warrantless search of Mr. Johnson based on the search-incident exception

The district court upheld Simmont's warrantless search of Mr. Johnson as a search incident to his subsequent arrest. App. 33. Simmont had probable cause to arrest Mr. Johnson for marijuana offenses and driving on a suspended license,

---

[1]The district court and the Ninth Circuit also upheld the post-arrest warrantless search of Mr. Johnson's car, App. 12-13, 37-38, which he does not challenge here. If this Court vacates the Ninth Circuit's decision upholding the challenged search of his person, the government will have to prove that the search of his car was not the fruit of that search. *See, e.g., Alderman v. United States,* 394 U.S. 165 (1969). The Ninth Circuit also addressed Mr. Johnson's challenge to the warrant search of his home. App. 6-7, 13-15. He does not here challenge this warrant search.

"[t]he search occurred quickly after that probable cause arose, and the arrest occurred immediately after the search." App. 28-33. The district court held *Knowles* inapposite because it held only that the search-incident exception did not apply after an officer had issued a citation but not, as here, where "[t]here remained the possibility that Sergeant Simmont would arrest Johnson." App. 34.

The district court regarded as immaterial Mr. Johnson's argument that neither the facts nor state law would have supported a custodial arrest for the suspended-license or marijuana offenses. App. 30-32. Even if Simmont "would not have arrested Johnson" for these offenses based on the facts he knew before the search, "[a] reasonable officer . . . could have arrested him." App. 37. "A custodial arrest did in fact occur, and Sergeant Simmont did not abandon the possibility of arresting [Johnson] on those charges . . . , so our circumstances did not run afoul of *Knowles*." *Id.* The district court also held it irrelevant that Simmont actually arrested Mr. Johnson based on evidence he discovered during the search, because an arrest is valid as long as there is probable cause to arrest for any offense, whether or not it is the same offense for which the officer actually made the arrest. App. 35-36 (citing *Devenpeck v. Alford*, 543 U.S. 146 (2004)).

II. The Ninth Circuit upheld the search of Mr. Johnson based on the search-incident exception

The Ninth Circuit upheld the warrantless search of Mr. Johnson as incident to his subsequent arrest based on similar reasoning. At the time of the search,

there was probable cause to arrest Mr. Johnson for transporting marijuana.[2] App. 12. Under *Rawlings* and *United States v. Smith*, 389 F.3d 944 (9th Cir. 2004) (per curiam), as long as there is probable cause to arrest "at the time of the search, and the arrest . . . follow[s] during a continuous sequence of events," "the fact that the arrest occurred shortly after the search does not affect the search's legality." App. 8 (internal quotation marks omitted). And "when the officer's known facts provide probable cause to arrest for an offense, the officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.'" App. 9 (quoting *Devenpeck*, 543 U.S. at 153).

The Ninth Circuit, like the district court, distinguished *Knowles* because, "[i]n that case, the issuance of the traffic citation for speeding resolved the encounter's danger," and there was no real possibility that the searching officer would discover evidence of a different offense. App. 10-11. "We therefore join our sister circuits in holding that *Knowles* does not prevent a search incident to a lawful arrest from occurring before the arrest itself, even if the crime of arrest is different from the crime for which probable cause existed." App. 11 (citing *United States v. Diaz*, 854 F.3d 197 (2d Cir. 2017); *United States v. Sanchez*, 555 F.3d 910 (10th Cir. 2009); *United States v. Coleman*, 458 F.3d 453 (6th Cir. 2006)).

---

[2] At the time of the search (August 2015), transportation of less than 28.5 grams of marijuana was a misdemeanor punishable by a fine of up to $100. Cal. Health & Safety Code § 11360(b) (2015). State law also required police to release, and not book, any person arrested for transporting less than 28.5 grams of marijuana, as long as the person provided evidence of identity and promised to appear in court. *Id.* Mr. Johnson in fact possessed less than 28.5 grams of marijuana. App. 31.

III. Judge Watford criticized the decision as conflicting with this Court's precedents

Judge Watford, concurring, believed that *Smith* compelled the panel's result but conflicts with this Court's search-incident-to-arrest precedents "and should be overruled." App. 17, 20 (discussing *Riley v. California*, 573 U.S. 373 (2014); *Knowles*; *United States v. Robinson*, 414 U.S. 218 (1973); *Cupp v. Murphy*, 412 U.S. 291 (1973); and *Chimel v. California*, 395 U.S. 752 (1969)). Under these precedents, the rationales for the exception arise from "'the fact of custodial arrest,'" and "the authority to conduct such a search does not arise until an arrest is actually made." App. 17 (quoting *Robinson*, 414 U.S. at 236). Although other circuits interpreted *Knowles* as authorizing a search "so long as the officer has not yet decided whether to arrest or cite the suspect," Judge Watford pointed out that, in light of the rationales for the search-incident exception, "the critical fact in *Knowles* was not the officer's issuance of the citation, but rather the absence of an arrest." App. 20.

Judge Watford read *Rawlings* within the limiting context of its facts, rather than as "jettison[ing] the requirement that an arrest occur before an officer may conduct a search incident to arrest." App. 21. Otherwise, it could conflict with this Court's indication in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), that the Fourth Amendment generally does not authorize police to search the driver of a car stopped for a traffic violation. *Id.* Under a broad reading of *Rawlings*, as long as the officer had not yet issued a citation, the possibility that the driver could be arrested for some traffic infraction would allow "full-blown investigatory searches of the driver's person (and in some instances of the vehicle's passenger compartment

as well) as the normal incident of any traffic stop." App. 22-23 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)).

Judge Watford also pointed out that "mak[ing] the legality of the search dependent upon events that occur after the search has taken place" would be "at odds with the background principle that the reasonableness of a search turns on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" App. 21 (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)). Moreover, "[r]equiring that a custodial arrest occur before an officer may conduct a search incident to arrest" properly places the focus, under this Court's "well-developed body of Fourth Amendment case law," "on how a reasonable person in the suspect's shoes would view the nature of the intrusion"; "the arrestee's perception that he has been placed under arrest is what triggers the need for an immediate search." App. 23. He noted, finally, that for pre-arrest searches, "[t]he government can still attempt to prove, under the inevitable discovery doctrine, that the officer would have arrested the suspect anyway, without regard to what was found as a result of the search." App. 24. This arrest-first approach would constrain officers' "unfettered discretion as to whom to target for searches," which tends disproportionately to target people of color. *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant review because this case is a good vehicle for resolving a frequently recurring and important question about the search-incident exception that has confused and split the federal circuits and state high courts.

IV. The federal circuits and state high courts have split about how to interpret, reconcile and apply *Rawlings* and *Knowles*

In all but one of its many cases addressing the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, this Court has emphasized that the exception justifies a search only after a person has been arrested. *See, e.g.*, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016) (applying exception to allow blood tests whenever suspect "is placed under arrest for drunk driving"); *Maryland v. King*, 569 U.S. 435, 449 (2013) (acknowledging, as "uncontested," "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." (internal quotation marks omitted)); *Robinson*, 414 U.S. at 224 (discussing the "well settled" exception "that a search may be made of the person of the arrestee by virtue of the lawful arrest"); *Cupp*, 412 U.S. at 295 ("The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect that arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession."). This limitation is consistent with the rationales for the exception, which arise from "interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). "[T]he two historical rationales" for the search-

incident-to-arrest exception are: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles*, 525 U.S. at 116. Also justifying the exception are "an arrestee's reduced privacy interests upon being taken into police custody." *Riley*, 573 U.S. at 391.

Despite this Court's long, consistent tradition of applying the exception only to post-arrest searches, one sentence in *Rawlings* opened the door to lower courts extending it to a wide range of *pre-arrest* searches. In that case, Rawlings had been detained for 45 minutes in the house of a person for whom the police had a warrant to arrest for drug distribution and that they had obtained a warrant to search based on the presence of marijuana. *Rawlings*, 448 U.S. at 100. After being advised of his *Miranda* rights, Rawlings had admitted ownership of a large quantity of illegal drugs the police found in his companion's purse. *Id.* at 101. The officers then searched Rawlings, discovering $4,500 and a sheathed knife, and "placed [him] under formal arrest." *Id.* He was charged with the drugs found in the purse. *Id.*

Most of the Court's opinion addressed the legality of Rawlings' detention and whether he had standing to challenge the search of the purse. *Id.* at 104-10. Only the last paragraph, adopted by five justices, addressed Rawlings' challenge to the search of his person, and it did so without mentioning the rationales for the search-incident exception. *Id.* at 111. The Court agreed with the state court below that the search could be justified "as incident to petitioner's formal arrest," which was based on his claiming the drugs that police had found in the purse. *Id.* "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." *Id.* The Court also clarified that "[t]he fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner." *Id.* at 111 n.6.

The police in *Knowles* also had probable cause to arrest Knowles (for the traffic violation for which they had stopped him) and in fact arrested him after the warrantless search of his car (based on the fruits of the search). 525 U.S. at 115-16. But the officer had issued him a traffic citation before the search. *Id.* at 114. Without mentioning *Rawlings*, the Court in *Knowles* rejected application of the search-incident exception, despite the pre-search probable cause to arrest and the post-search custodial arrest. *Id.* at 114-15. The Court held that the search was not justified by either of the rationales for the exception: "The threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest," and "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained." *Id.* at 116-18.

In both *Rawlings* and *Knowles*, then, the police had probable cause to arrest before the search and made a post-search custodial arrest. Yet this Court upheld the search in the former case as incident to the arrest but held unconstitutional the search in the latter case. Was the key difference the lengthy pre-search detention, *Miranda* advisement and gravity of the probable-cause offense in *Rawlings*? The pre-search issuance of a citation and post-search arrest based on evidence found during the search in *Knowles*? The *Rawlings* facts suggest that at the time of the

search an arrest was imminent, and the *Knowles* facts suggest the opposite. Yet many courts, including the courts below, have extended *Rawlings* to uphold searches when nothing at the time of the search suggested that an arrest would occur -- and even when the facts at the time of the search suggested there would be no arrest. This Court's failure to explain and reconcile *Rawlings* and *Knowles* has led to deep disagreement among lower courts. *See Martinez v. Carr*, 479 F.3d 1292, 1296 n.3 (10th Cir. 2007) (Gorsuch, J.) ("The specific question *Knowles* decided, whether and what authority officers should have to conduct a 'search-incident-to-traffic-citation,' remains the subject of some interest and discussion.").

Almost all the federal circuits have held, based on *Rawlings*, that as long as the police have probable cause to arrest, a search may precede the arrest that justifies it.[3] Some, like the Ninth Circuit in this case, relied on *Rawlings* and distinguished *Knowles*. *See Johnson*, 913 F.3d at 799-800; *United States v. Diaz*, 854 F.3d 197, 205-07 (2d Cir. 2017) (holding that officer with objectively reasonable probable cause to believe person has committed a crime "may lawfully search that person pursuant to the search-incident-to-arrest doctrine, provided that a formal arrest follows quickly on the heels of the frisk," whether or not officer intended to arrest or cite defendant at time of search (brackets and internal quotation marks omitted)); *United States v. Powell*, 483 F.3d 836, 839 (D.C. Cir. 2007) (en banc) (reversing panel and upholding search because police had probable cause to arrest and detained suspects for public urination before search of car and did formally

[3] The Third Circuit appears not to have addressed the issue.

arrest for that offense immediately after search). Other circuits upheld pre-arrest searches based on *Rawlings* either before *Knowles* or without addressing *Knowles*. *See, e.g., United States v. Patiutka,* 804 F.3d 684, 688 (4th Cir. 2015); *United States v. Lawlor*, 406 F.3d 37, 41 n.4 (1st Cir. 2005); *United States v. Goddard*, 312 F.3d 1360, 1364 (11th Cir. 2002); *United States v. Bizier*, 111 F.3d 214, 215-19 (1st Cir. 1997); *United States v. Miller*, 925 F.2d 695, 698 (4th Cir. 1991); *United States v. Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987).

The Sixth Circuit has applied the search-incident exception to pre-arrest searches as an alternative basis for upholding the search. *See United States v. Coleman*, 458 F.3d 453, 458-59 (6th Cir. 2006) (upholding search of car based on search-incident exception, automobile exception and consent); *United States v. Montgomery*, 377 F.3d 582, 587-88 (6th Cir. 2004) (applying exception because even if ordering defendant out of car, frisking him, putting him in police car, Mirandizing him and searching his car before challenged search of shoes was not "full custodial arrest" he was arrested immediately after). The Tenth Circuit has applied the exception when it determined that the arrest was, or may have been, "initiated" before the search. *See United States v. Sanchez*, 555 F.3d 910, 921-22 (10th Cir. 2009) (upholding search because arrest "was initiated (for purposes of the search-incident-to-arrest doctrine) when the officer apprehended him after his flight," and officer searched him "promptly after his arrest"); *United States v. Lugo*, 170 F.3d 996, 1003 (10th Cir. 1999) (upholding search even though it was "unclear from the record precisely when Mr. Lugo was formally arrested, and whether the search

began before the arrest"; he had been "told that he would be arrested if he did not produce any identification and that he was not free to go"; "at the very latest, the arrest took place shortly after the search was completed"). The Eighth Circuit has applied the exception to uphold the warrantless search of a person who was not yet formally arrested but rejected its application to the warrantless search of a car that preceded the arrest. *Compare United States v. Pratt*, 355 F.3d 1119, 1120-24, 1125 n.4 (8th Cir. 2004) ("we do not read *Knowles* as foreclosing the search-incident-to-arrest exception where the officer has not yet issued a citation and ultimately does subject the individual to a formal arrest"), *with United States v. Rowland*, 341 F.3d 774, 783 (8th Cir. 2003) ("Because Rowland was not arrested, law enforcement could not have conducted a search incident to arrest" of his car pursuant to *New York v. Belton*, 453 U.S. 454 (1981)).

By contrast, the Seventh Circuit, relying on *Knowles*, held that a warrantless car search may not be upheld under the search-incident exception "even if there is . . . probable cause to arrest the driver for the traffic violation. In order to conduct a *Belton* search, the occupant of the vehicle must actually be held under custodial arrest." *Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003). Compelling separate opinions from judges in the Ninth and D.C. circuits and the D.C. Court of Appeals add weight to the Seventh Circuit's minority view. *Johnson*, 913 F.3d at 803-07 (Watford, J., concurring); *Powell*, 483 F.3d at 842-52 (Rogers, J., dissenting); *Smith*, 389 F.3d at 953-54 (Wardlaw, J., concurring); *United States v. Lewis*, 147 A.3d 236, 251-67 (D.C. 2016) (en banc) (Beckwith, Washington and Easterly, JJ., dissenting).

State high courts that have addressed the search-incident exception under *Rawlings* and *Knowles* also are split. *See* Joshua Deahl, *Debunking Pre-Arrest Incident Searches* ["*Debunking*"], 106 Calif. L. Rev. 1061, 1087 & nn. 131, 132 (2018) (tallying 20-9 overall state-court split and citing thirteen state high courts that align with the majority of federal circuits[4] and eight state high courts that align with the federal-circuit minority).[5] Several of these state high courts applied this Court's precedents but reached conclusions opposite to those of their respective federal circuit courts, including California, New York and Virginia. *See People v. Macabeo*, 384 P.3d 1189, 1196-97 (Cal. 2016) (analyzing this Courts' search-incident cases and concluding that, even though police had probable cause to arrest defendant before challenged search of his cell phone, and did subsequently arrest him based on evidence found during the search, exception did not apply); *People v. Reid*, 26 N.E.3d 237, 239-40 (2014) (holding, based on *Knowles*, that even though police had probable cause to arrest defendant before challenged search and search

---

[4]*Adams v. State*, 815 So. 2d 578, 582 (Ala. 2001); *State v. Clark*, 764 A.2d 1251, 1268 n.41 (Conn. 2001); *Lewis*, 147 A.3d at 239–40; *Jenkins v. State*, 978 So. 2d 116, 126 (Fla. 2008); *State v. Horton*, 625 N.W.2d 362, 364 (Iowa 2001); *Williams v. Commonwealth*, 147 S.W.3d 1, 8 (Ky. 2004); *State v. Surtain*, 31 So.3d 1037, 1046 (La. 2010); *State v. O'Neal*, 921 A.2d 1079, 1087 (N.J. 2007); *State v. Bone*, 550 S.E.2d 482, 487–88 (N.C. 2001); *State v. Linghor*, 690 N.W.2d 201, 204, 208 (N.D. 2004); *State v. Freiburger*, 620 S.E.2d 737, 740–41 (S.C. 2005); *State v. Guzman*, 965 A.2d 544, 550–51 (Vt. 2008); *State v. Sykes*, 695 N.W.2d 277, 283 (Wis. 2005).

[5]*People v. Macabeo*, 384 P.3d 1189, 1196–97 (Cal. 2016); *State v. Lee*, 402 P.3d 1095, 1104–05 (Idaho 2017); *Belote v. State*, 981 A.2d 1247 (Md. 2009); *Commonwealth v. Craan*, 13 N.E.3d 569, 575 (Mass. 2014); *People v. Reid*, 26 N.E.3d 237, 239–40 (N.Y. 2014); *State v. Ingram*, 331 S.W.3d 746, 758 (Tenn. 2011); *Lovelace v. Commonwealth*, 522 S.E.2d 856, 859–60 (Va. 1999); *State v. O'Neill*, 62 P.3d 489, 501 (Wash. 2003) (en banc).

was "substantially contemporaneous" to subsequent arrest that was based on the fruit of the search, search-incident exception did not apply); *Lovelace v. Commonwealth*, 522 S.E.2d 856, 860 (Va. 1999) (on remand from this Court after *Knowles*, holding that where police had pre-search probable cause for only a misdemeanor offense for which state law generally did not provide for custodial arrest, and defendant subsequently was arrested based on evidence found during search, exception did not apply).

This state-federal split is particularly troubling in an area where this Court has recognized "law enforcement interest . . . in a bright-line rule." *Gant*, 556 U.S. at 344; *see also Birchfield*, 136 S. Ct. at 2179 (citing "our decisions holding that the legality of a search incident to arrest must be judged on the basis of categorical rules"); *id.* at 2189 (Sotomayor, concurring in part and dissenting in part) (noting that exception applies "categorically"); *id.* at 2197 (Thomas, J., concurring in judgment in part and dissenting in part) (criticizing movement away from the "categorical approach" to the exception); *Riley*, 573 U.S. at 398 (noting Court's "general preference to provide clear guidance to law enforcement through categorical rules"); *Thornton v. United States*, 541 U.S. 615, 620 (2004) (noting that *Chimel* "sought to set forth a clear rule for police officers and citizens alike").

Commentators have noted the split and the importance of the issue, discussed the tension between *Rawlings* and *Knowles* and called on this Court to address the question presented here. *Debunking*, 106 Cal. L. Rev. at 1062, 1065-66, 1069, 1080, 1126; Marissa Perry, *Search Incident to Probable Cause?: The*

Intersection of Rawlings *and* Knowles ["*Intersection*"], 115 *Mich. L. Rev.* 109, 110 (2016); Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest* ["*Exception*"], 19 Yale L. & Pol'y Rev. 381, 382-84 (2001); *see also* 3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 5.4(a) (Oct. 2018 update) (discussing questions left unclear and possible "unsettling" conclusions about application of search-incident exception from confluence of *Rawlings*, *Knowles*, *Devenpeck* and *Atwater*). This Court has granted review to resolve conflicts between a federal court of appeals and a state high court within that circuit. S. Ct. R. 10(a), (b); *see, e.g., Wos v. E.M.A.*, 568 U.S. 627, 632 (2013); *Seling v. Young*, 531 U.S. 250, 260 (2001). Although petitioners have sought certiorari on this issue a number of times,[6] this Court has not yet granted review. It should do so in this case.

---

[6]*See, e.g.*, Petition for a Writ of Certiorari at i, *Diaz v. United States*, No. 17-6606 (U.S. 2017) ("Can a police officer's warrantless search of a person be justified as incident to arrest where, at the time of the search, no arrest had been made, none was underway, and none was intended, a question that divides, among others, the Second Circuit and the New York Court of Appeals?"), *cert. denied*, 138 S. Ct. 981 (2018); Petition for a Writ of Certiorari at i, *Heaven v. Colorado*, No. 16-1225 (U.S. 2017) ("Whether a warrantless search incident to arrest may precede the arrest."); *Powell v. United States*, *cert. denied*, 552 U.S. 1043 (No. 07-5333) (2007).

This issue also is presented in at least one pending petition. Petition for a Writ of Certiorari at i, *McIlwain v. United States*, No. 18-9393 (U.S. May 21, 2019) ("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 non would have occurred but for the results of the search?").

V. This case embodies some of the questions left open by the confusing confluence of *Rawlings* and *Knowles*

Beneath the circuit and state-court splits is a deeper conflict in application, analysis and rationale. This case embodies some of the open questions.

Does the search-incident exception require some indication at the time of the search that a custodial, or "formal," arrest will occur?

The panel below, like other courts, concluded that, under *Rawlings*, the search-incident exception requires only probable cause to arrest at the time of the search and an arrest soon afterwards. *Johnson*, 913 F.3d at 799. Judge Watford, by contrast, concluded that this Court applied the exception in *Rawlings* because Rawlings had effectively been arrested, albeit not "formally," before the search. *Id.* at 806 (Watford, J., concurring); *accord Powell*, 483 F.3d at 846 (Rogers, J., dissenting) ("It was in this context -- a context without ambiguity, in which Rawlings was clearly under custodial arrest -- that the Supreme Court made its statement that it was 'not particularly important' whether Rawlings was searched before his '*formal* arrest' by the police." (emphasis added in *Powell*)).

Other courts upholding searches under the exception have relied on some indication at the time of the search that the officer had initiated, or at least intended to effect, an arrest. *See Sanchez*, 555 F.3d at 922 ("the arrest of Mr. Sanchez was initiated (for purposes of the search-incident to arrest doctrine) when the officer apprehended him after his flight"); *Powell*, 483 F.3d at 837 (citing police testimony that when they approached suspects before search, "'they were going to be placed under arrest' for urinating in public."); *Smith*, 389 F.3d at 947 (noting that district court had found that search started before arrest but was completed

afterwards); *id.* at 954 (Wardlaw, J., concurring) ("Because Officer Price would have arrested Smith absent the fruits of any search (in fact, he did), any subsequent search of the vehicle would qualify as a lawful search incident to arrest under *Belton*."); *see also Debunking*, 106 Cal. L. Rev. at 1065 ("argu[ing] that a custodial arrest must be under way at the time of an incident search"). The government itself has taken the position that a car search is "substantially contemporaneous" with an arrest if it occurs "'during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed.'" *Gant*, 556 U.S. at 340 (quoting government's amicus brief in *Belton*).

The government and all the judges below agreed that the search-incident exception requires a custodial arrest. *Johnson*, 913 at 801 (citing "an actual custodial arrest" as a "safeguard[]" to "protect individuals' Fourth Amendment rights"); *id.* at 804 (Watford, J., concurring) ("the authority to conduct a search does not arise until an arrest is actually made"); App. 34, 36, 37 (noting that Simmont "*did* arrest Johnson" (emphasis in original)); C.A. E.R. 24 (government acknowledging, "[y]ou must have a custodial arrest if you are going to have a search."). But here, as in some of the other cases in which pre-arrest searches were upheld under the exception, there was nothing to indicate, at the time of the search, that an arrest was occurring, was about to occur or would have occurred absent the search. *See, e.g.*, App. 34-35, 37 (upholding search based on the subjective or objective "possibility" of a post-search arrest); *Diaz*, 854 F.3d at 209 (upholding search "despite the fact that [officer] did not intend to arrest him when she began

the search"). The Court should clarify whether the search-incident exception justifies a warrantless search when, as here, there was no pre-search indication that the custodial arrest necessary for the exception would occur.[7]

Does it matter, for purposes of the search-incident exception, that the pre-search probable cause to arrest was for a different offense than the one for which the defendant ultimately was arrested?

In *Rawlings* and some of the other cases upholding searches incident to subsequent arrests, the police had probable cause to arrest the defendant before the search for the same offense for which they ultimately made the arrest. 448 U.S. at 111; *see Powell*, 483 F.3d at 839 (defendant was formally arrested for both pre-search offense of public urination and post-search gun offense); *Smith*, 389 F.3d at 947 (defendant arrested for false impersonation based at least in part on pre-search evidence). In *Knowles*, this case and others, by contrast, the pre-search probable cause was for a different offense, and the defendant was arrested after the search based on the fruits of the search. 525 U.S. at 114; *Johnson*, 913 F.3d at 798; *Sanchez*, 555 F.3d at 922; *Coleman*, 458 F.3d at 458; *Reid*, 26 N.E. 3d at 239; *see Debunking*, 106 Cal. L. Rev. at 1100 (discussing reconciling majority approach with

---

[7]If the Court holds that the exception authorizes searches before a formal arrest but requires some indication that a custodial arrest will follow, there is the subsidiary question, raised in this case and by commentators, whether courts may consider subjective evidence (officers' testimony about their intentions) or only objective evidence (*e.g.*, officers' actions, state laws and police department policies). *Johnson*, 913 F.3d at 800; *id.* at 807 (Watford, J., concurring); *see Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Debunking*, 106 Cal. L. Rev. at 1093-99 (arguing that *Whren* allows courts to consider officers' intentions in this context); *Intersection*, 115 Mich. L. Rev. at 130-33 (same).

Knowles based on whether or not "the post-search arrest [was] *for* the conduct that gave rise to pre-search probable cause" (brackets added; emphasis in original)).

Applying the search-incident exception to uphold the pre-arrest search in this case, the courts below abandoned the principle that the constitutionality of searches must be judged at their inception. They considered merely, post facto, whether there had been a custodial arrest for some offense after the search. If the Court endorses the exception for pre-arrest searches, it should consider whether to limit the exception to cases where the custodial arrest was based on probable cause that existed before the search (as in *Rawlings* but in contrast to *Knowles*) to constrain police discretion to conduct warrantless searches to situations where the pre-search probable cause was weighty enough for an actual custodial arrest. *See, e.g.*, *People v. Reid*, 26 N.E. 3d 237, 239-40 (N.Y. 2014) (rejecting application of search-incident exception, based on *Knowles*, although there was pre-search probable cause to arrest for driving under the influence and post-search arrest for gun found during search: "The problem is that, as [the officer testified], but for the search there would have been no arrest at all.").

Does a custodial arrest end or trigger the rationales underlying the search-incident exception?

The majority view is that the officer-safety and evidence-preservation rationales supporting the search-incident exception persist *until* the police issue a citation or make a custodial arrest. *See, e.g.*, *Johnson*, 913 F.3d at 800 ("the danger attendant to the custodial arrest remains until the officer decides to arrest, cite, or warn"); *Diaz*, 854 F.3d at 206 (absent a citation, "the dangers to the officer that

accompany the prospect of arrest therefore remained present"); *Powell*, 483 F.3d at 841 (noting that safety and evidentiary concerns "are greater before the police have taken a suspect into custody than they are thereafter"). Under this view, the issuance of the citation in *Knowles* was significant because it "resolved the encounter's danger." *Johnson*, 913 F.3d at 800; *accord Diaz*, 854 F.3d at 206 (distinguishing *Knowles* because, absent a citation, it "remained uncertain . . . whether the encounter would lead to an arrest," and "the dangers to the officer that accompany the prospect of arrest therefore remained present.").

As Judge Watford pointed out, however, this Court's precedents make it clear that it is the arrest that "triggers" these rationales and reduces defendants' Fourth Amendment privacy interests: "As 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." *Johnson*, 913 F.3d at 804 (Watford, J., concurring); *id.* at 807 ("the arrestee's perception that he has been placed under arrest is what triggers the need for an immediate search"). Thus, "the critical fact in *Knowles* was not the officer's issuance of the citation, but rather the absence of an arrest," which is what gives rise to "the exigency that justifies a warrantless search in this context." *Id.* at 805 (Watford, J., concurring); *see also Debunking*, 106 Calif. L. Rev. at 1073-74 (distinguishing legal justifications for pre-and post-arrest warrantless searches and explaining "the vastly different treatment of arrestees and suspects, despite the presence of officer safety and evidence preservation concerns in both types of encounters").

In this case, there was no citation before the search and ultimate arrest. Under the majority view, the danger and evidence-preservation concerns that arose from the detention and had not yet been put to rest by an arrest justified the pre-arrest search. Under the minority view, however, these concerns, as well as Mr. Johnson's arrest-diminished privacy rights, could not have justified the search because they had not yet arisen. The Court should explain when, during police-citizen encounters, a search incident to arrest is authorized.

Should the search-incident exception err on the side of encouraging searches (by allowing them before a custodial arrest and without any indication that an arrest will occur) or arrests (by requiring them before officers may search incident to them)?

Courts and commentators have disagreed about whether the majority or minority approach better serves the privacy and personal-integrity interests protected by the Fourth Amendment. Should police be encouraged to search before making an arrest, and thus possibly quickly and with minimal intrusion dissipate the pre-search probable cause? Or should they be required to make an arrest before searching, because the administrative burdens that accompany custodial arrests help ensure that they will search only with solid probable cause for sufficiently weighty offenses? *Compare, e.g.*, *Powell*, 483 F.3d at 845 (Rogers, J., dissenting) (noting that the majority's "approach encourages law enforcement officers to use minor pretextual arrestable offenses -- one for which, in practice, an offender would rarely be arrested, to justify fishing expeditions for evidence unrelated to the offense for which the officer originally had probable cause to arrest. If the officer happens to find evidence of a serious law violation, the officer can make the arrest

and everything will have been proper; if the officer finds nothing and lets the offender off, courts of law are unlikely to have the opportunity to ensure that police conduct is consonant with the Fourth Amendment."); *Debunking*, 106 Cal. L. Rev. at 1121 ("The majority rule thus invites investigatory searches upon a bare suspicion that they might turn up something -- anything -- provided there is pre-search probable cause for any offense."); *with, e.g,*, *Debunking*, 106 Cal. L. Rev. at 1122-23 (noting arguments "that the minority rule, by insisting upon an arrest as a prerequisite to search, creates a perverse incentive for officers to simply make more arrests in order to justify their searches.").

The panel below concluded that the undisputed requirements for the exception to apply of "probable cause and an actual custodial arrest" were sufficient to protect against "pretextual and discriminatory searches." *Johnson*, 913 F.3d at 801. Judge Watford, by contrast, opined that excluding from the exception those searches where, "but for the search there would have been no arrest at all," is a necessary check on "the serious potential for abuse that otherwise exists when officers possess unfettered discretion as to whom to target for searches." *Id.* at 807 (Watford, J., concurring). This Court should decide whether the "balancing of interests," *Riley*, 573 U.S. at 386, supports allowing police to search whenever they have probable cause to arrest for some offense or limiting their ability to conduct warrantless searches to those that occur after a custodial arrest.

This Court should grant review to reconcile these conflicting views of *Rawlings*, *Knowles* and the search-incident exception and to give clear guidance to the lower courts, the police and the public.

VI. The issue is important

This Court has decided several cases since *Knowles* about when and how police can search without a warrant under the search-incident exception. *See Riley*, 573 U.S. at 386 (holding the police cannot search cell phones incident to arrest); *Gant*, 556 U.S. at 335 (clarifying when police can search cars incident to arrest); *Virginia v. Moore*, 553 U.S. 164 (2008) (applying exception to search incident to arrest for misdemeanor traffic offense that was supported by probable cause but in violation of state law); *Thornton*, 541 U.S. at 617 (clarifying that exception authorizes search of car even when police first contact arrestee outside car). It has not, however, decided the more fundamental, recurring and disputed question left open by *Rawlings* and *Knowles* that is squarely presented by this case: With probable cause to arrest but before an arrest, may police search incident to arrest?

The number of state and federal courts that have grappled with this issue attests to the frequency with which it arises. Warrantless searches incident to arrest have long been "by far the commonest method of searching." *Exception*, 19 Yale L. & Pol'y Rev. at 382 (internal quotation marks omitted); *accord Riley*, 573 U.S. at 382 ("warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant."). Every year, millions of people encounter the police in situations that could lead to warrantless searches

of their persons, cars or possessions. More than 27 million people experienced police-initiated contact in 2015, and nearly 20 million people were stopped by police while driving a vehicle. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2015*, at 2, 12 https://www.bjs.gov/content/pub/pdf/cpp15.pdf. During non-traffic street stops, police searched more than twice as many people as they arrested (9% versus 4%). *Id.* at 15. According to police-department statistics from Oakland, California, with a population of approximately 400,000, police made more than 30,000 "discretionary" stops per year in 2016 and 2017. Oakland Police Department, 2016-2017 Stop Data Report, https://s3-us-west-1.amazonaws.com/beta.oaklandca.gov/2016-2017-SD-Report-Final.pdf. pp. 2, 7. Oakland police searched people they stopped 36% of the time, and approximately 24% of those searches were incident to an arrest, with significant disparities by the race of the person stopped and searched. *Id.* at 3-4, 8-10.

This Court's post-*Knowles* decisions upholding warrantless arrests for "minor criminal offense[s], such as a misdemeanor seatbelt violation punishable only by a fine," *Atwater*, 532 U.S. at 323, and "based on probable cause but prohibited by state law," *Moore*, 553 U.S. at 166, vastly expanded the number of people who may be subject to warrantless pre-arrest searches. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (noting expansion of "warrantless arrests for misdemeanors . . . often whenever officers have probable cause for even a very minor criminal offense," citing, as example, jaywalking that "is endemic but rarely results in arrest" (internal quotation marks omitted)); *id.* at 1730 (Gorsuch, J., concurring in part and

dissenting in part) ("criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."). Pre-arrest searches based on probable cause for the most minor offenses are not merely hypothetical. *See, e.g., United States v. Orozco-Castillo,* 404 F.3d 1101, 1102-03 (8th Cir. 2005) (applying *Atwater* and *Knowles* to uphold search of car after driver was arrested for "careless driving" and failing to stop at two stop signs); *United States v. Davis*, 111 F. Supp. 3d 323, 333-34 (E.D. N.Y. 2015) (applying *Rawlings* to uphold warrantless search of defendant as incident to his subsequent arrest based on pre-search probable cause to arrest for littering); *Lewis*, 147 A.3d at 240-51 (applying *Rawlings* to uphold warrantless search of car as incident to passenger's subsequent arrest based in part on pre-search probable cause to arrest for possession of open container of alcohol); *Macabeo*, 384 P.3d at 1216-19 (discussing *Rawlings* but relying on *Chimel*, *Chadwick* and *Knowles* to hold that search-incident exception did not justify pre-arrest search of cell phone despite probable cause to arrest for infraction of failing to stop bicycle at stop sign).

As noted, this Court has called for clarity and bright-line rules in this area of frequent police-citizen contact. *Birchfield*, 136 S. Ct. at 2179; *Riley*, 573 U.S. at 398; *Gant*, 556 U.S. at 344; *Thornton*, 541 U.S. at 620. Although this Court has not applied *Rawlings* to expand the exception to searches that precede an arrest, many other courts have, with conflicting and confusing results.[8] *See Exception*, 19 Yale L.

---

[8]A Westlaw search indicates that this Court has cited *Rawlings* only once in connection with the search-incident exception in the nearly forty years since it was decided. *See Smith v. Ohio*, 494 U.S. 541, 543 (1990) (per curiam) (citing *Rawlings* to support proposition, "an incident search may not precede an arrest and serve as

& Pol'y Rev at 411-12 (noting "major practical concerns, deriving from the colossal indeterminacy" of extending exception to pre-arrest searches).

As Judge Watford and commentators have noted, allowing police to search whenever they have probable cause to arrest for some offense but have not yet made an arrest gives police "unfettered discretion as to whom to target for searches." *Johnson*, 913 F.3d at 807 (Watford, J., concurring); *see also Debunking*, 106 Cal. L. Rev.at 1121-22 (allowing searches based solely on pre-arrest probable cause invites fishing expeditions and profiling); *Exception*, 19 Yale L. & Pol'y Rev at 414 ("a massive grant of unfettered discretionary authority anathema to the Framers, and certainly in radical excess of the narrow historic confines of search incident authority."); *Intersection*, 115 Mich. L. Rev. at 112 (allowing search before officer determines that he's going to arrest "creates a substantial risk for pretextual searches."). Police frequently have probable cause to arrest but "exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727; *see also id.* at 1732 (Gorsuch, J., concurring in part and dissenting in part) ("No one doubts that officers regularly choose against making arrests, especially for minor crimes, even when they possess probable cause."). Giving the police blanket authority to conduct intrusive warrantless searches of people, cars and possessions whenever they have probable cause to arrest for some offense, however minor, without the limiting requirement

---

part of its justification." (quotation marks omitted)). By contrast, Westlaw indicates that the search-incident paragraph of *Rawlings* has been cited by 252 federal district and circuit courts and 450 state courts.

of a pre-search arrest invites unscrutinizable police overreaching, contrary to the protections established by the Fourth Amendment.

When lower courts interpreted *Belton* to authorize vehicle searches incident to arrest in overbroad and conflicting ways, this Court granted review. *Gant*, 556 U.S. at 342-43, 350-51. Federal and state courts have similarly misconstrued *Rawlings* to apply the search-incident-to-arrest exception to myriad warrantless searches of persons, vehicles and effects when, at the time of the search, no arrest had been made or even anticipated. This Court should grant review to consider the lower courts' vast expansion of police authority to conduct warrantless searches incident to not-yet-existent arrests and to retether the search-incident exception to its underlying justifications, which require a prior lawful, custodial arrest.

VII. This case presents a good vehicle for resolving the conflict about whether or when the search-incident exception authorizes a warrantless search that precedes an arrest

State and federal courts have grappled with whether and how to apply the search-incident exception to pre-arrest searches since *Rawlings* was decided nearly forty years ago. Although numerous petitioners, judges and commentators have urged this Court to address the issue, the Court has so far declined, resulting in splits among federal appeals courts and between these courts and the high courts of states within their circuits. This case offers a good basis for the Court to resolve these disputed issues.

Both courts below upheld the challenged search of Mr. Johnson based solely on the search-incident-to-arrest exception, which was the only justification the

government offered. The factual record is well-developed and clearly frames the issue: Simmont had probable cause to arrest Mr. Johnson for a marijuana offense before the search; he did not intend or take any steps to initiate an arrest before the search; and after the search, and based on its fruits, he made a custodial arrest. Both the district court and the Ninth Circuit issued reasoned, published decisions upholding the search under the search-incident exception. And as discussed above, the conflicting reasoning of the Ninth Circuit's majority and concurring opinions highlights the questions this Court's decisions have left open.

In the forty years since *Rawlings*, this Court has insisted that the search-incident exception remain tethered to its custodial-arrest-generated rationales. *See, e.g.*, *Riley*, 573 U.S. at 376; *Gant*, 556 U.S. at 343; *Knowles*, 525 U.S. at 119. Lower federal and states courts, however, have moved expansively in the opposite direction. With this case, the Court can resolve "one of the most important live issues in Fourth Amendment jurisprudence," *Debunking*, 106 Cal. L. Rev. at 1126, and correct their course. The Court should grant Mr. Johnson's petition.

VIII. If the Court does not grant the writ based on the Fourth Amendment issue, it should grant, vacate and remand because the evidence was not sufficient to support Mr. Johnson's § 922(g)(1) convictions under *Rehaif*

On June 21, 2019, this Court held in *Rehaif* that the word "knowingly" in the federal gun statutes "applies both to the defendant's conduct and to the defendant's status." 139 S. Ct. at 2194. Thus, for a conviction under § 922(g), the government must prove "that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* Mr. Johnson was convicted at

a stipulated-facts bench trial of two § 922(g)(1) violations without the proof, required by *Rehaif*, that he knew at the relevant time that he was a felon. His § 922(g)(1) convictions thus were not supported by sufficient evidence and violated his constitutional right to due process. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). If the Court does not grant Mr. Johnson's petition on the first issue presented, it must grant, vacate and remand based on *Rehaif*.

CONCLUSION

For the reasons stated above, Mr. Johnson respectfully asks this Court to issue a writ of certiorari.

Dated: July 12, 2019

STEVEN G. KALAR
Federal Public Defender
ROBIN PACKEL
Assistant Federal Public Defender

Counsel of Record
Office of the Federal Public Defender
for the Northern District of California
Oakland Branch
1301 Clay Street, Suite 1350N
Oakland, CA 94612
(510) 637-3500