No. 19 - ____

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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TUAN DUC LAM,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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## PETITION FOR WRIT OF CERTIORARI


STEVEN G. KALAR
Federal Public Defender
JODI LINKER*
JULIANA DEVRIES
Assistant Federal Public Defenders
450 Golden Gate Avenue, 19th Floor
San Francisco, California 94102
(415) 436-7700

** Counsel of Record for Petitioner*

## QUESTION PRESENTED

Once a police officer makes a formal custodial arrest, the Fourth Amendment permits a warrantless search incident to that arrest. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 384 (2014). But where an officer merely conducts an investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 26 (1968), a full search is not permitted. Here, a California police officer told Petitioner he was "detaining"—not arresting—him. C.A. E.R. 150. The officer then conducted a full search of Petitioner's person and wallet and found contraband. Only then did the officer put Petitioner "under arrest." C.A. E.R. 151.

The Ninth Circuit upheld this pre-arrest search under *United States v. Johnson*, 913 F.3d 793, 800 (9th Cir. 2019), which deems a search "incident to arrest" so long as "probable cause to arrest existed and the search and arrest are roughly contemporaneous." That case directly conflicts with the California Supreme Court's decision in *People v. Macabeo*, 384 P.3d 1189, 1197 (Cal. 2016), which struck down a pre-arrest search as invalid under *Knowles v. Iowa*, 525 U.S. 113 (1998).

The question presented, which divides the Ninth Circuit and the California Supreme Court, among other state and federal courts, is: Can a warrantless search of a person be "incident to arrest" where, at the time of the search, no arrest has occurred, and the objective evidence fails to show that an arrest would have occurred without the information discovered during the search?

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The Ninth Circuit's decision below (*United States v. Lam*, No. 18-10221, 2019 WL 2207660 (9th Cir. 2019) (mem.)) was not published.

## JURISDICTION

The Ninth Circuit issued its decision on May 22, 2019. App. 001a. Petitioner did not file a petition for rehearing or rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISION

U.S. Const. Amend. IV reads:

> 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.

## PENDING PETITIONS RAISING THE SAME QUESTION

Undersigned counsel is aware of the following petitions for writs of certiorari raising the same question presented here:

> Petition for a Writ of Certiorari, *McIlwain v. United States*, No. 18-9393 (May 21, 2019)
>
> Petition for a Writ of Certiorari, *Johnson v. United States*, No. 19-5181 (July 12, 2019)

## STATEMENT OF THE CASE

The "willingness to search first and later seek justification has properly been characterized as 'a decision roughly comparable in prudence to determining whether an electrical wire is charged by grasping it.'" *California v. Carney*, 471 U.S. 386, 404 n.17 (1985) (Stevens, J., dissenting) (quoting *United States v. Mitchell*, 538 F.2d 1230, 1233 (5th Cir. 1976)). This case illustrates the consequences of such an approach. California state officer Kevin McGoon "detain[e]d" Petitioner to "figure out what's going on." C.A. Ex. C 00:40. McGoon then searched Petitioner's person and wallet, looking for contraband. He found a falsified ID card and then arrested Petitioner. McGoon appears to have thought he could do this search as part of a *Terry* investigatory detention. He could not. It was not until this case was litigated in federal court that prosecutors claimed this was a pre-arrest search incident to arrest. The Ninth Circuit agreed.

This Court has carefully drawn a line between *Terry* searches and searches incident to arrest. Under *Terry* and its progeny, an officer may conduct a brief investigatory detention based on reasonable suspicion. *Arizona v. Johnson*, 555 U.S. 323, 330 (2009). Then, if the officer reasonably concludes that the person may be armed and presently dangerous, a limited pat-down search for weapons is proper. *Id.* at 331. But now courts, including the Ninth Circuit here, are sanctioning extensive, pre-arrest searches for evidence pursuant to investigatory detentions. *See, e.g.*, App. 002-04a. This threatens to undo this Court's careful attempts to constrict *Terry* searches. It also encourages discriminatory policing because, when

officers have this essentially unrestricted ability to search whomever they want, people of color are disproportionately targeted.

The Ninth Circuit's rule, shared by the majority of circuit courts, is that a warrantless search is incident to a subsequent arrest, so long as the officer had probable cause to arrest at the time of the search and a custodial arrest followed in a continuous series of events. *Johnson*, 913 F.3d at 800. The California Supreme Court has adopted the opposite rule, *see Macabeo*, 384 P.3d at 1197, as have the Seventh Circuit and eight state high courts, *see Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003); Joshua Deahl, *Debunking Pre-Arrest Incident Searches*, 106 Calif. L. Rev. 1061, 1087 n.131 (2018).

This Court should grant review to resolve this deep and entrenched split. This case is an ideal vehicle because the question presented was raised at every stage and because the relevant facts are undisputed. This case also offers the Court the unusual chance to give needed guidance on the distinction between *Terry* stop and frisks on the one hand and searches incident to arrest on the other.

1. In the middle of the afternoon on September 7, 2016, Central Marin Police Officer Kevin McGoon responded to a call from Julianna's Jewelry in Corte Madera, California. C.A. E.R. 150. Upon McGoon's arrival at Julianna's, the manager told McGoon that Petitioner, who had purchased a Rolex there the previous day, had today returned to purchase another. *Id.* The manager found this suspicious and had told Petitioner to leave and come back later because her credit card machine was broken (a lie). *Id.*

The manager showed McGoon a photocopy of the ID card and credit card Petitioner had used to purchase the Rolex the previous day. *Id.* McGoon learned from dispatch that, according to the California DMV, the birth year on the ID card was off by forty years. He "explained to [the manager] that the ID card was most likely fraudulent, but without the actual card, [he] could not verify its validity." *Id.* The manager asked McGoon to verify that the purchase was legitimate by waiting there until Petitioner returned. *See id.*

When Petitioner returned to Julianna's, McGoon immediately seized and handcuffed him. McGoon told Petitioner, "Until we can figure out what's going on I'm detaining you." *Id.*; C.A. Ex. C 00:40. Then he searched Petitioner's pockets, removed his wallet, and searched the wallet. C.A. Ex. C 00:00–1:05. Inside the wallet was a discernibly falsified ID card in the name Henry Lee. *Id.* at 01:00; 9:25; C.A. E.R. 150.

McGoon started interrogating Petitioner in the customer area of the store. *See* C.A. Ex. C 01:07–09:14. After a few minutes, McGoon read Petitioner his Miranda warnings. *Id.* at 2:25. About six minutes later, McGoon received a follow-up call from dispatch, informing him that Henry Lee reportedly had not authorized the purchase. C.A. Ex. D 9:04-9:18. McGoon then told Petitioner he was "under arrest" and brought him to the police car. C.A. Ex. D 9:39; C.A. E.R. 151.

Petitioner was not under arrest when McGoon searched his person and wallet. *See* C.A. E.R. 2; App. 003-04a. As McGoon told Petitioner, McGoon was merely "detaining" Petitioner to "figure out what's going on." C.A. E.R. 150; C.A. Ex. C at 00:40. McGoon apparently wanted to see the ID card itself before deciding whether

to arrest since, "without the actual card," he "could not verify its validity." C.A. E.R. 150. Once he found the "actual card" and saw that it looked invalid, he arrested Petitioner. *Id.*

2. A grand jury in the United States District Court for the Northern District of California returned a two-count indictment charging Petitioner with fraudulent use of an unauthorized access device in violation of 18 U.S.C. § 1029(a)(2) and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). C.A. E.R. 165–67.

Petitioner brought a motion to suppress the evidence found during the warrantless search of his person and wallet at Julianna's. He argued this was not a valid search incident to arrest. The district court, in an oral ruling, agreed but nonetheless held for the government under the inevitable discovery exception to the exclusionary rule. C.A. E.R. 32–34.

Following a stipulated testimony bench trial, the district court found Petitioner guilty on both counts. C.A. E.R. 86–87. It sentenced him to twenty-four months in custody (the mandatory minimum under § 1028A) and three years of supervised release. C.A. E.R. 175–76. But it granted bail pending appeal. C.A. E.R. 80–81.

3. While Petitioner's appeal was pending, the Ninth Circuit decided *Johnson*. Relying on *Johnson*, the Court of Appeals here held that McGoon had probable cause to arrest at the time of the search based on the information from the DMV, and that the arrest followed in a continuous sequence of events, so the search was incident to arrest. App. 003-04a.

One of Petitioner's arguments on appeal was that the government needed to prove that an arrest was going to occur before the search began. C.A. Br. at 25. Here

it appeared an arrest was not going to occur until McGoon found the ID card during the search. *See* C.A. E.R. 150. McGoon seems to have wrongly thought he could do a full search of Petitioner as part of a *Terry* investigatory detention. *See* C.A. E.R. 9, 80, 150. The memorandum disposition did not address this specific argument but rejected it implicitly by summarily affirming under *Johnson*. App. 002-04a.

The Ninth Circuit stayed the mandate pending the resolution of this petition. C.A. Dkt. 30. Petitioner, therefore, remains out on bail.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit and the California Supreme Court are in direct conflict on the question presented. Many other state and federal courts are also split. This creates confusion and encourages forum-shopping. The majority rule, to which the Ninth Circuit subscribes, is wrong and blurs the line between *Terry* stop-and-frisks and searches incident to arrest. This case is an ideal vehicle for this Court to grant review and clarify its case law for law enforcement and the lower courts.

### I. The Ninth Circuit (*Johnson*) and the California Supreme Court (*Macabeo*) are in direct conflict.

The Ninth Circuit and the California Supreme Court take conflicting approaches to pre-arrest searches purportedly incident to arrest. In *Johnson*, the Ninth Circuit held that a search incident to arrest may precede the arrest so long as "probable cause to arrest existed and the search and arrest are roughly contemporaneous." 913 F.3d at 800. The California Supreme Court in *Macabeo*, on

the other hand, struck down a warrantless pre-arrest search, where the officer had no apparent intention to arrest at the time of the search. 384 P.3d at 1197.

The split between the Ninth Circuit and the California Supreme Court is well-documented. *See, e.g.*, Deahl, *Debunking*, 106 Cal. L. Rev. at 1086 n.128, n.131. And it has an enormous impact. Because of the split, Fourth Amendment rights in California—the most populous state in the country—turn on whether a case is brought at the state or federal level. *California's Population*, Public Policy Institute of California, https://www.ppic.org/publication/californias-population/ (last visited July 5, 2019) (one in every eight United States residents lives in California). Searches incident to arrest also far outnumber searches by warrant, so the question presented arises frequently. *Riley*, 573 U.S. at 382; Wayne R. LaFave, 3 Search & Seizure § 5.2(b), at 132 (5th ed. 2018).

*Johnson* involved a warrantless pre-arrest search during a vehicle stop. The officer smelled marijuana when he first spoke to Johnson through the open car window. 913 F.3d at 797. But the officer chose not to arrest until *after* conducting a warrantless search of Johnson's person, which revealed a bullet-proof vest. *Id.* at 798. The officer arrested specifically because of the bulletproof vest found during the warrantless, pre-arrest search. *Id.* The Ninth Circuit nonetheless upheld the search as incident to arrest. *Id.* at 802.

The *Johnson* court viewed itself as bound by *United States v. Smith*, 389 F.3d 944, 950–51 (9th Cir. 2004) (per curiam), which had upheld a warrantless search that began before the formal arrest. Johnson had attempted to distinguish *Smith* in that, there, the fruit of the search did not cause the arrest, whereas the officer

arrested Johnson because of the bulletproof vest he found during his warrantless search. Brief for Appellant at 22, *Johnson*, 913 F.3d 793 (No. 17-10252), 2017 WL 5202375. But the Ninth Circuit interpreted *Smith* to mean that a search may precede an arrest and be incident to it whenever "probable cause to arrest existed and the search and arrest are roughly contemporaneous." *Johnson*, 913 F.3d at 800.

The California Supreme Court took a starkly different approach in *Macabeo*. In that case, officers stopped Macabeo, who was on a bicycle, for riding through a stop sign. 384 P.3d at 1191. As in *Johnson*, the officers had probable cause to arrest but did not do so until after a warrantless search revealed contraband. *Id.* at 1191–92. They searched Macabeo's cellphone,[1] found images of underage girls, and then arrested him. *Id.*

The California Supreme Court found that the warrantless pre-arrest search of Macabeo was not incident to his subsequent arrest. It refused to view this Court's precedent as allowing "for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows." *Id.* at 1218–19. There was no "objective indicia to suggest . . . that the officers would have arrested" Macabeo without the photos found during the search. *Id.* at 1219. The search, therefore, "did not qualify as incident to arrest under the Fourth Amendment." *Id.*

The conflicting outcomes in *Johnson* and *Macabeo* are rooted in the courts' divergent readings of this Court's opinions in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), and *Knowles*, 525 U.S. 113. In *Rawlings*, this Court wrote, in apparent dicta,

[1] The controlling law at the time allowed an officer to search a cell phone incident to arrest—*Riley* later changed this. 573 U.S. at 401.

that "[w]here the formal arrest follow[s] 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. at 111. There "[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 search incident to arrest part of the opinion was just four sentences long; most of the opinion addressed the legality of Rawlings' detention and whether he had standing to challenge a search of his companion's 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 to arrest exception. *Id.* at 111.

The Ninth Circuit has interpreted *Rawlings* to mean that pre-arrest probable cause and a later arrest are enough to safeguard the Fourth Amendment. *Johnson*, 913 F.3d at 801. "To the extent Johnson argues that those safeguards are insufficient, his argument is properly directed at the search-preceding-arrest doctrine more generally, and this panel has no power to overrule circuit precedent, let alone that of the Supreme Court." *Id.* (citing *Rawlings*, 448 U.S. at 111).

The California Supreme Court, on the other hand, says the Ninth Circuit's interpretation "read[s] far too much into the *Rawlings* comment" on pre-arrest searches incident to arrest. *Macabeo*, 384 P.3d at 1195. "*Rawlings* merely established 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 formal." *Id.* Probable cause alone does not justify a pre-

arrest search in the California state courts—the arrest must also be underway, if not fully formalized. *See id.*

The California Supreme Court also reads *Knowles* as limiting *Rawlings*. *Macabeo*, 384 P.3d at 1195. In *Knowles*, this Court held that the search incident to arrest exception did not apply where the officer issued a citation, then searched, and then arrested. 525 U.S. at 114–16. Without mentioning *Rawlings*, this Court in *Knowles* rejected the search incident to arrest exception under those circumstances, despite the pre-search probable cause to arrest and the post-search custodial arrest. *Id.* at 114–15.

The Ninth Circuit reads *Knowles* narrowly. "In that case, the issuance of the traffic citation for speeding resolved the encounter's danger," whereas in cases like *Johnson*, where there is no citation, "the danger attendant to the custodial arrest remains until the officer decided to arrest, cite, or warn, and probable cause provides a basis for the officer to search for evidence of that crime." 913 F.3d at 800. In other words, the Ninth Circuit reads *Knowles* as an exceptional, search-incident-to-*citation* case. *See id.*

The Honorable Paul J. Watford, in his concurrence in *Johnson*, argued the Ninth Circuit's rule is inconsistent with *Knowles*. "[T]he critical fact in *Knowles* was not the officer's issuance of the citation, but rather the absence of an arrest" before the search began. *Johnson*, 913 F.3d at 805 (Watford, J., concurring). "That absence is key because . . . the exigency that justifies a warrantless search in this context arises from the *fact* of arrest . . . not from the existence of probable cause to arrest." *Id.*

The California Supreme Court agrees with Judge Watford. It interprets *Knowles* as holding that probable cause to arrest does not always justify an incident search as long as an arrest follows. *Macabeo*, 384 P.3d at 1218. "Otherwise, *Knowles* would have been decided differently." *Id.*

This Court's decisions in *Knowles* and *Rawlings* have created much confusion. California state courts must follow the California Supreme Court—rather than the Ninth Circuit. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara City*, 369 P.2d 937, 939–40 (Cal. 1962). But the Ninth Circuit must, of course, follow itself. *See Johnson*, 913 F.3d at 801. California police officers are caught in the middle, with understandable confusion about when they can lawfully search. *See Smith*, 389 F.3d at 953 (Wardlaw, J., concurring) ("We cannot expect police officers to abide by ambiguous rules."); *Riley*, 573 U.S. at 398 (noting this Court's "general preference to provide clear guidance to law enforcement through categorical rules").

The state/federal split in California also encourages forum-shopping. Because the Ninth Circuit allows searches that California courts would reject, a federal prosecutor can obtain a conviction based on evidence in federal court that would be inadmissible at the state level. This provides powerful incentives for prosecutors to bring cases with warrantless searches at the federal level instead of in state court.

There are, therefore, sound reasons why this Court regularly grants review to resolve splits between a circuit court and a highest state court within that circuit. *See, e.g.*, *Wos v. E.M.A.*, 568 U.S. 627, 632 (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). This Court should similarly grant review in this case to resolve the split between the Ninth Circuit and the California Supreme Court, which impacts the constitutional rights of the nearly 40 million individuals living in California (and the millions of others who visit).

## II. *Johnson* deepens an entrenched split on the question whether a search can be "incident to arrest" where the search precedes the arrest and the objective evidence fails to show the officer would have arrested without the information discovered during the search.

The Ninth Circuit and the California Supreme Court are not the only courts split on the question presented. There is deep disagreement among federal appellate and state high courts on whether a search can be incident to arrest if the search precedes the arrest and the objective evidence fails to show that the officer would have arrested without the information discovered during the search.

The majority of United States courts of appeals that have addressed the question have held, like the Ninth Circuit, that as long as the police have probable cause to arrest, a search may precede the arrest that justifies it. *United States v. Bizier*, 111 F.3d 214, 217 (1st Cir. 1997) ("[W]hether a formal arrest occurred prior to or followed 'quickly on the heels' of the challenged search does not affect the validity of the search so long as the probable cause existed prior to the search."); *United States v. Diaz*, 854 F.3d 197, 205–07 (2d Cir. 2017) (An officer with probable cause to arrest "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") (quoting *Rawlings*, 448 U.S. at 111)); *United States v. Patiutka*, 804 F.3d 684, 688 (4th Cir. 2015) ("A search may begin prior to an arrest, and still be incident to that arrest," but "police must have probable cause to arrest prior to beginning the search" to "ensure[] that the fruits of a warrantless search will not serve as justification for the arrest."); *United States v. Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987) ("A custodial arrest based on probable cause is a reasonable intrusion under the Fourth Amendment . . . [t]hat intrusion being lawful, an incidental search requires no additional justification, even though the justifying arrest, whether de facto or formal, immediately follows the search."); *United States v. Coleman*, 458 F.3d 453, 458 (6th Cir. 2006) (the search incident to arrest doctrine "applies once the police are in possession of probable cause to make a lawful arrest"); *United States v. Sanchez*, 555 F.3d 910, 920 (10th Cir. 2009) ("[A] search incident to arrest can also precede the arrest if probable cause for the arrest preceded the search (rather than being justified by the fruits of the search)."); *United States v. Banshee*, 91 F.3d 99, 102 (11th Cir. 1996) ("Moreover, because there was probable cause for the arrest before the search and the arrest immediately followed the challenged search, the fact that Banshee was not under arrest at the time of the search does not render the search incident to arrest doctrine inapplicable."); *United States v. Powell*, 483 F.3d 836, 839 (D.C. Cir. 2007) (en banc) (upholding search because police had pre-search probable cause to arrest and arrested immediately after the search).

The Eighth Circuit has gone both ways, applying the exception to uphold the warrantless search of a person who was not yet formally arrested but rejecting application of the exception 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) ("[W]e 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).).

But the Seventh Circuit, relying on *Knowles*, has held that a warrantless search may not be upheld under the search incident to arrest exception "even if there is . . . probable cause to arrest the driver for the traffic violation." *Ochana*, 347 F.3d at 270. The "occupant of the vehicle must actually be held under custodial arrest" prior to the search. *Id.* Reasoned, compelling separate opinions from circuit judges in the Ninth and D.C. Circuits 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). The Third Circuit is the only circuit that does not appear to have addressed the issue.

The state high courts that have addressed the search incident to arrest exception under *Rawlings* and *Knowles* are also split. *See* Deahl, *Debunking*, 106 Calif. L. Rev. at 1087 nn. 131, 132 (tallying 20-9 overall state-court split aligning

with United States courts of appeals majority and citing thirteen state high courts in the majority[2] and eight state high courts in the minority[3]).

Several of the state high courts, in addition to the California Supreme Court, have reached the opposite conclusions from their circuit courts, including those in New York and Virginia. *People v. Reid*, 26 N.E.3d 237, 239–40 (N.Y. 2014) (holding, based on *Knowles*, that even though police had probable cause to arrest defendant before challenged search and search was "substantially contemporaneous" with subsequent arrest, search incident to arrest exception did not apply); *Lovelace v. Commonwealth*, 522 S.E.2d 856, 860 (Va. 1999) (holding that where police had pre-search probable cause but subsequently arrested based on evidence found during search, search could not be justified under search incident to arrest exception).

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. *Debunking*, 106 Cal. L. Rev. at 1062, 1065–66, 1069, 1080, 1126; Marissa Perry, *Search Incident to Probable Cause?: The Intersection of*

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[2] *Adams v. State*, 815 So. 2d 578, 582 (Ala. 2001); *State v. Clark*, 764 A.2d 1251, 1268 n.41 (Conn. 2001); *United States v. Lewis*, 147 A.3d 236, 239–40 (D.C. 2016) (en banc); *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).

[3] *Macabeo*, 384 P.3d at 1196–97; *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).

Rawlings *and* Knowles, 115 Mich. L. Rev. 109, 110 (2016); Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 Yale L. & Pol'y Rev. 381, 382–84 (2001); *see also* Wayne R. LaFave, 3 Search & Seizure § 5.2(b), at 132 (5th ed. 2018) (discussing questions left open and possible "unsettling" conclusions about application of the search incident to arrest exception following *Rawlings*, *Knowles*, *Devenpeck*, and *Atwater*). Although petitioners have sought review on the question presented in numerous cases,[4] this Court has not yet granted review. It should do so here.

**III. The question presented is important and this case is a good vehicle.**

This case is an ideal vehicle for resolving the split among the lower courts. Petitioner raised the question presented at every stage of litigation. C.A. E.R. 97–102; C.A. Br. 25–29. And this case tees up that question with remarkable clarity. The relevant facts are undisputed because the seizure and searches were recorded on two officers' body cameras. So this Court need not rely on any admissions by the government as to how events unfolded or as to the officers' intent.

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[4] *See, e.g.*, Petition for a Writ of Certiorari at i, *Diaz v. United States*, No. 17-6606 (Nov. 1, 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 (April 7, 2017) ("Whether a warrantless search incident to arrest may precede the arrest."), *cert denied*, 137 S.Ct. 2297 (2017).

As noted above, there are also at least two pending petitions that raise this issue. *McIlwain*, No. 18-9393 at i ("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?"); *Johnson*, No. 19-5181 at i ("May a warrantless search be upheld under the search-incident-to-arrest exception when the search precedes the arrest?").

This petition also offers the Court an unusual chance to give needed guidance on the distinction between *Terry* stop-and-frisks on the one hand and searches incident to arrest on the other. McGoon appears to have mistakenly thought he could do a full search of Petitioner's person and wallet as part of a *Terry* investigatory detention. *See* C.A. E.R. 150-51. He could not. But the Ninth Circuit affirmed anyway under a pre-arrest search incident to arrest theory.

Here McGoon told Petitioner he was being detained, not arrested. McGoon then searched him, found the evidence for which he was searching, and arrested based on that evidence. McGoon never claimed he was searching incident to arrest. C.A. E.R. 150-51. It was not until Petitioner's case was litigated in the District Court that the government argued the search incident to arrest exception applied.

If it is constitutional for an officer to do a full search incident to a temporary detention as long as an arrest follows, this Court's careful attempts to constrict *Terry* searches lose their meaning. Under *Terry*, an officer can conduct a brief investigatory detention based on reasonable suspicion of criminal activity. *Arizona v. Johnson*, 555 U.S. at 330. In deciding whether a Fourth Amendment seizure has occurred, courts consider whether a "reasonable person" in the suspect's shoes would have "felt free to leave." *Florida v. Bostick*, 501 U.S. 429, 433 (1991). After reasonably concluding that the detained person may be armed and presently dangerous, the officer may do a limited pat-down search for weapons. *Arizona v. Johnson*, 555 U.S. at 331.

A search incident to arrest, in contrast to a *Terry* stop-and-frisk, may "involve a relatively extensive exploration of the person." *Terry*, 392 U.S. at 26. This is

because an arrest "is a wholly different kind of intrusion upon individual freedom from a limited search for weapons" during an investigatory detention. *Id.*

Historically, an officer could only perform this more extensive search of a person after the actual arrest had occurred. *See United States v. Robinson*, 414 U.S. 218, 235 (1973). But this Court has since indicated that a search incident to arrest may precede the "formal" arrest. *Rawlings*, 448 U.S. at 111. It is nonetheless "axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Smith v. Ohio*, 494 U.S. 541, 543 (1990).

The lower courts have struggled to reconcile these various precedents. *See* Parts I–II. Some have allowed searches incident to arrest before the actual arrest but require that the arrest be "about to occur" and that the officer "intended to make" an arrest before the search. *See, e.g.*, *Reid*, 24 N.Y.3d at 620. Some seem to require that the arrest begin pre-search, with only "the formalities of the arrest follow[ing] the search." *See, e.g.*, *Macabeo*, 384 P.3d at 1196. Others have interpreted *Rawlings* as approving of extensive, warrantless pre-arrest searches while the person is merely detained—so long as the officer has probable cause and an arrest follows in a continuous sequence of events. *See, e.g.*, *Johnson*, 913 F.3d at 800; App. 002-04a.

If an officer may perform a full search pre-arrest, the limitations of *Terry* and its progeny appear to no longer apply. Here a reasonable person in Petitioner's shoes would have believed he was being detained at the time of the search. McGoon unambiguously told Petitioner, on camera, that he was just "detaining" him to "figure out what's going on." *See Bostick*, 501 U.S. at 433; C.A. E.R. 150; C.A. Ex. C

at 00:40. In other words, Petitioner reasonably believed this was a *Terry* investigatory detention.

Yet McGoon did an extensive search of Petitioner's person and wallet—the kind of search expressly prohibited under *Terry*, 392 U.S. at 25–26. The evidence found during this search also "serve[d] as part of [the] justification" for Petitioner's later arrest. *See Smith*, 494 U.S. at 543; C.A. E.R. 151. These uncontroverted facts make this case an ideal vehicle for resolving the entrenched split among the lower courts and clarifying the boundary between *Terry* investigatory detentions and searches incident to arrest.

This is an important issue. *Terry* stops are a regular part of policing and searches incident to arrest "occur with far greater frequency than searches conducted pursuant to a warrant." *Riley*, 573 U.S. at 382. The lower courts and law enforcement need clarity on if and when the Constitution permits extensive, warrantless searches of detained persons.

This issue is also recurring. The question presented has been raised in two other petitions known to undersigned counsel currently pending before this Court. *See McIlwain*, No. 18-9393; *Johnson*, No. 19-5181.

It is also common for cases to begin—as did Petitioner's case—with a state police investigation and a state prosecution, before being moved to federal court. The split between state and federal courts on the question presented, therefore, encourages forum-shopping, confuses officers and courts, and leads to unjust results. Here, for example, Petitioner faced a mandatory two-year minimum

sentence in federal court that would not have applied at the state level. The question presented is important and should be resolved with this case.

## IV. *Johnson* and this case were wrongly decided.

This case was wrongly decided. A search must be valid "at its inception." *Terry*, 392 U.S. at 20. The Ninth Circuit's rule, therefore, "is doctrinally unsound" in that it "makes the legality of the search dependent upon events that occur after the search has taken place." *Johnson*, 913 F.3d at 805 (Watford, J., concurring). To prevent this problem, the search incident to arrest exception should not apply unless the arrest was already going to occur pre-search.

Imagining a lawsuit under 42 U.S.C. § 1983 is instructive. If McGoon's search of Petitioner had revealed exculpatory—rather than inculpatory—evidence, he would not have arrested Petitioner. In that scenario, Petitioner would have had a strong civil rights lawsuit under § 1983 because McGoon would have searched him without a warrant or any recognized exception to the warrant requirement. But because McGoon did find inculpatory evidence, and so did arrest Petitioner after the search, the Ninth Circuit found no violation of the Fourth Amendment. Allowing a subsequent arrest to clean up an otherwise unconstitutional search assumes that every search reveals contraband, which is, of course, untrue. *See, e.g.*, Elizabeth David, et al., *Contacts Between Police and the Public, 2015*, U.S. Department of Justice Special Report (Oct. 2018) ("Forty-six percent of residents who experienced a street stop had no resulting enforcement action.").

Moreover, it "is the fact of the lawful arrest which establishes the authority to search." *Robinson*, 414 U.S. at 235. An arrest is a "wholly different kind of intrusion." *Terry*, 392 U.S. at 26. The arrest "is the initial stage of a criminal prosecution," and it "is inevitably accompanied by future interference with the individual's freedom of movement." *Id.* In short, the arrest is the triggering Fourth Amendment event.

The arrest creates the justifications for the search incident to arrest exception. Incident searches are "justified in part by 'reduced expectations of privacy caused by the arrest.'" *Riley*, 573 U.S. at 392 (quoting *United States v. Chadwick*, 433 U.S. 1, 16 n.10 (1977)). They are also justified by a perceived need to prevent destruction of evidence and danger to the arresting officer during the arrest. *Robinson*, 414 U.S. at 229–30. In contrast, where 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).

In a case like Petitioner's, where he was told he was being "detained" and not arrested, the justifications for the search incident to arrest doctrine do not exist. From Petitioner's point of view, he was not arrested at the time he was searched. So he was no more likely to destroy evidence or harm the police than any other temporarily detained person. The justifications underlying the search incident to arrest exception, therefore, did not exist here, so that exception should not apply.

The search incident to arrest exception should only apply to pre-arrest searches when the government proves the arrest was already going to occur before the

search. The Ninth Circuit's contrary rule—applied in Petitioner's case—does not conform to this Court's jurisprudence.

The Ninth Circuit's rule also propagates injustice. As Judge Watford wrote, allowing extensive, pre-arrest searches exacerbates "the serious potential for abuse that otherwise exists when officers possess unfettered discretion as to whom to target for searches." *Johnson*, 913 F.3d at 807 (Watford, J., concurring). When officers can search first and justify later, they can essentially search whomever they want. And "it is no secret that people of color are disproportionate victims of this type of scrutiny." *Id.* (quoting *Utah v. Strieff*, 136 S.Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting)). It is time for this Court to step in to thwart discriminatory policing by clarifying the boundaries of the search incident to arrest exception to the warrant requirement.

## CONCLUSION

For the aforementioned reasons, the Court should grant this petition for a writ of certiorari and reverse the Ninth Circuit.

Respectfully submitted,

STEVEN G. KALAR
Federal Public Defender

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s/Jodi Linker

JODI LINKER
JULIANA DEVRIES
Assistant Federal Public Defenders