NO. 19-5582

IN THE SUPREME COURT OF THE UNITED STATES

TUAN DUC LAM,

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

REPLY TO PETITION FOR A WRIT OF CERTIORARI

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

* *Counsel of Record for Petitioner*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

INTRODUCTION

This Court's precedents do not authorize the search incident to an investigatory detention by the California police officer in this case. The Ninth Circuit, like some other courts, overextended, misread and misapplied this Court's precedents by extending the search-incident-to-arrest exception to the pre-arrest search, even when the objective evidence failed to show that an arrest would have occurred without the information discovered during the search. The California Supreme Court and other state and federal courts, by contrast, correctly interpreted this Court's precedents to limit the search-incident exception to situations that serve its rationales. The Court should grant the petition to resolve the established and ongoing split about whether the exception applies when there was no arrest at the time of the search and the government cannot prove that the arrest was already going to occur before the search.

I. There is no dispute that this is an important and frequently recurring issue that has divided state and federal courts

The government does not dispute that the search-incident issue is ripe for this Court's attention, that it is important or that it arises frequently. Both parties cite numerous state and federal cases that raise the issue. Pet. 17-20 & n.2; Opp. 5-6, 11, 15-20 & nn.2, 3. The government acknowledges that at least one state high-court case conflicts with the majority approach, *People v. Reid*, 26 N.E.3d 237

(2014), but hypothesizes that the New York court might reconsider *Reid* based on the Second Circuit's decision to the contrary. Opp. 19-20 (citing *United States v. Diaz*, 854 F.3d 197 (2d Cir. 2017)). Despite post-*Diaz* opportunities to address the issue, however, the New York Court of Appeals has declined to do so, and *Reid* is well-entrenched in New York law. *See, e.g.*, *People v. Darby*, 81 N.Y.S. 3d 870, 876-78 (2018); *People v. Simmons*, 58 N.Y.S. 3d 329, 330 (2017); *People v. Mangum*, 3 N.Y.S. 3d 332, 335 (2015).

The government's attempts to explain away the genuine splits in outcome -- and in reasoning -- discussed in the Petition, 14-20 & n.2, are equally unavailing. It acknowledges that "aspects of the reasoning" in the California Supreme Court's decision in *People v. Macabeo*, 384 P.3d 1189 (2016), "are inconsistent with the Ninth Circuit's approach, Opp. 16, but claims that *Macabeo* is distinguishable because state law did not authorize an arrest for the offenses for which the police had probable cause. Opp. 16-17. Although that is true, it was not the basis for the California Supreme Court's rejection of pre-arrest searches, which was based instead on its lengthy and thoughtful analysis of *Rawlings v. Kentucky*, 448 U.S. 98 (1980), and its place in this Court's search-incident jurisprudence. *Macabeo*, 384 P.3d at 1216-19, 1223. Notably, the California Supreme Court explicitly rejected the rule the government here advocates, Opp. 7-8: "These authorities make clear that *Rawlings* does *not* stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows. Otherwise, *Knowles v. Iowa*, 525 U.S. 113 (1998)] would have been decided differently." *Macabeo*, 384 P.3d at 1197 (emphasis in original).

The government also is wrong in claiming that the Seventh Circuit's decision in *Ochana v. Flores*, 347 F.3d 266 (7th Cir. 2003), does not create a federal circuit split because its search-incident ruling was dicta, given that the search was upheld, and because it did not address *Rawlings*. Opp. 15. The later Seventh Circuit cases that the government cites, Opp. 16, do not undermine *Ochana* or the circuit split it created. *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015), not only held that the warrantless search was unlawful, making any statement about the search-incident exception dicta by the government's own standard, it also was decided based on the *Terry* pat-search exception, the only justification the government offered, not the search-incident exception. *United States v. Coleman*, 676 Fed. Appx. 590, 592 (7th Cir. 2017), and *United States v. Ochoa*, 301 Fed. Appx. 532, 535 (7th Cir. 2007), are both unpublished case submitted on *Anders* briefs that define *Rawlings* more narrowly than the government does here. *Duncan v. Fapso*, 216 Fed. Appx. 588 (7th Cir. 2007), is an unpublished decision granting summary judgment in a *pro se* case. The closest the government comes is with *United States v. Paige*, 870 F.3d 693, 697 (7th Cir. 2017); although the Seventh Circuit in that case upheld the search as incident to the subsequent formal arrest under *Rawlings*, the search was merely a pat-search "to ensure he 'did not have any illegal contraband or weapons on him.'" Moreover, *Paige*, like the other Seventh Circuit cases the government cites, did not address either *Ochoa* or *Knowles.* At best, the Seventh Circuit is in conflict with itself. The government's largely boilerplate

opposition[1] also fails to acknowledge Petitioner's discussion of the similar split within the Eighth Circuit. Pet. 19 (comparing *United States v. Pratt*, 355 F.3d 1119 (8th Cir. 2004), with *United States v. Rowland*, 341 F.3d 774 (8th Cir. 2003)).

The cases the government cites in support of its claim that other circuits all have upheld pre-arrest searches under *Rawlings*, Opp. 10 n.2, offer similarly weak support alleged circuit unanimity. None of these cases cited *Knowles*, even those that were decided after it. *See United States v. Patiuitka*, 804 F.3d 684 (4th Cir. 2015); *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015); *United States v. Chartier*, 772 F.3d 539 (8th Cir. 2014); *United States v. McCraney*, 674 F.3d 614 (6th Cir. 2012); *United States v. Torres-Castro*, 470 F.3d 992 (10th Cir. 2006); *United States v. Smith*, 389 F.3d 944, 951-52 (9th Cir. 2004); *United States v. Bizier*, 111 F.3d 214 (1st Cir. 1997); *United States v. Banshee*, 91 F.3d 99 (11th Cir. 1996); *United States v. Hernandez*, 825 F.2d 846 (5th Cir. 1987). Some addressed different Fourth Amendment exceptions. *Leo*, 792 F.3d at 748; *Torres-Castro*, 470 F.3d at 996-99. Some affirmed the district court's suppression order, making any statements about the search-incident exception dicta, by the government's standard. *Patiuitka*, 804 F.3d at 686, 688-89 & n.1; *McCraney*, 674 F.3d at 616-20.

---

[1] The government filed a substantively identical opposition in at least four other recent cases: *Johnson v. United States*, No. 19-5191, *granted, vacated and remanded in light of* Rehaif v. United States; *Dupree v. United States*, No. 19-5343, *cert. denied* Nov. 4, 2019; *McIlwain v. United States*, No. 18-9393, *cert. denied* Oct. 7, 2019; *Diaz v. United States*, No. 17-6606, *cert. denied* Feb. 20, 2018. It thus devoted several pages to arguing against consideration of subjective intent, Opp. 11-14, when Petitioner did not argue that subjective intent should be considered. *Cf.* Pet. 2 (question presented refers to "objective evidence").

Finally, the few circuit cases that have considered both *Rawlings* and *Knowles* have relied significantly on their own pre-*Knowles* precedent. *United States v. Johnson*, 913 F.3d 793, 799 (9th Cir. 2019), *vacated on other grounds*, No. 19-5181 (Oct. 21, 2019); *Diaz*, 854 F.3d at 205-09; *accord United States v. Lewis*, 147 A.3d 236, 240-42 (D.C. 2016) (en banc).

II. There is genuine confusion and disagreement among courts about the meaning and application of *Rawlings* and *Knowles*

Even accepting the government's lower-court tally, however, it ignores the evident conflict and confusion about how to interpret and apply this Court's search-incident precedents. Courts and judges that have addressed the issue in the context of both *Rawlings* and *Knowles* have disagreed about how and how broadly to read both cases. Although a majority read *Rawlings* broadly and *Knowles* narrowly, a real and persistent minority -- for sound reasons -- do the reverse. *See, e.g.*, *Macabeo*, 384 P.3d at 1216-17; *Johnson*, 913 F.3d at 806 (Watford, J., concurring); *Powell*, 483 F.3d at 845-49 (Rogers, J., dissenting); *Lewis*, 147 A3d at 258 (Beckwith, J., with Washington, C.J., and Easterly, J., dissenting).

The government here fails to grapple meaningfully with these conflicts. It does not explain *Rawlings*' references -- twice within the single relevant paragraph -- to "formal arrest." 448 U.S. at 111. Some courts have disregarded any distinction between functional and custodial arrests. *See, e.g.*, *Lewis*, 147 A.3d at 240, 247 (noting that lower courts "have consistently understood [*Rawlings*' rule] to apply without regard to any distinction between formal arrest and arrest" and that they have applied *Rawlings* "broadly"); *United States v. Powell*, 483 F.3d 836, 839-40

(D.C. Cir. 2007) (en banc) (noting but disregarding *Rawlings* distinction between custodial and formal arrest). Other judges have read "formal arrest" within the factual context of *Rawlings* to limit application of the search-incident exception to situations where a not-yet-completed custodial arrest was at least "imminent and inevitable. *Lewis*, 147 A3d at 258 (Beckwith, J., with C.J. Washington and Easterly, J., dissenting); *accord Johnson*, 913 F.3d at 806 (Watford, J., concurring) ("At the time he was searched, the defendant in *Rawlings* had plainly been subjected to a Fourth Amendment seizure amounting to an arrest").

The government also discounts this Court's post-*Rawlings* decision in *Knowles*, Opp. 14-15, without acknowledging that the case directly undermines its proposed rule. In its reading, "[t]he result in *Knowles* . . . turned on the fact that, at the time of the search, the officer had already completed the encounter by issuing a citation." Opp. 15. But the government's rule says nothing about whether the encounter was completed at the time of the search: It would authorize pre-arrest searches as long as "(i) police have probable cause to make the arrest before the search, and (ii) the officers make the arrest shortly thereafter." Opp. 7-8; *accord id.* at 10, 11. Both these facts were present in *Knowles*, 525 U.S. at 114, yet this Court held that the pre-arrest search was not a lawful search incident to arrest.

The government also fails to acknowledge the contradictions inherent in its position that an arrest is necessary to justify a pre-arrest search, Opp. 7-8, 10, 11, yet courts may not consider whether or not an officer intended to arrest at the time of the search. Opp. 11-14, 19. As Petitioner argued, Pet. 25, the government bears

the burden of establishing that warrantless searches are valid at their inception, *Terry v. Ohio*, 392 U.S. 1, 20 (1968); a rule that "makes the legality of the search dependent upon events that occur after the search has taken place" is thus "doctrinally unsound." *Johnson*, 913 F.3d at 805 (Watford, J., concurring). Even if it were not, however, how could the government carry its burden of establishing that a pre-arrest search is lawful absent some indication at the time of the search that an arrest will occur?

Some of the cases upholding pre-arrest searches have, in fact, relied on officer testimony about their intent to arrest at the time of the search. *See, e.g.*, *Powell*, 483 F.3d at 839 (officer testified that he detained men because he was going to arrest them). Moreover, the government relies on an officer's statement of his intent in its effort to distinguish this case from *State v. Lee*, 402 P.3d 1095 (2017), an Idaho Supreme Court case rejecting the search-incident exception for pre-arrest searches. Opp. 17. The court in *Lee* relied on the officer's statement that he would issue the driver a citation as part of its totality-of-the-circumstances analysis about whether the exception applied to the pre-arrest search. 402 P.3d at 1105. The government does not explain how the statement in *Lee* is meaningfully different from McGoon telling Petitioner, "Until we can figure out what's going on I'm detaining you."[2] C.A. E.R. 150; C.A. Ex. C 00:40. Applying the government's rule

[2] In fact, the officer in *Lee* told the defendant "that he was being 'detained right now.'" 402 P.3d at 1099.

that a pre-arrest search requires only pre-search probable cause to arrest and a post-search arrest, *Lee* and this case would come out the same way.

This Court has not, since *Rawlings*, considered whether or under what circumstances police may conduct a search incident to arrest before making a custodial arrest. Although the defendant in *Rawlings* did not even argue in this Court that his search was invalid based on it preceding his arrest,[3] lower courts have applied its scant paragraph regularly and expansively to situations far beyond the facts of that case. Courts have relied on *Rawlings* to uphold warrantless searches where there was no ongoing investigation, as there was in *Rawlings*, where the probable-cause offense was a minor or traffic violation and where police testified that they did not intend to arrest before the search. *See, e.g.*, *Diaz*, 854 F.3d at 200 ("did not initially intend to arrest" the person searched, but "only to issue him a summons."); *Lewis*, 147 A.3d at 251 (possession of open alcohol container); *United States v. Lugo*, 170 F.3d 996, 1003 (10th Cir. 1999) (speeding and driving without valid license).

This lower-court expansion occurred even as this Court has reined in the search-incident exception by insisting that it remain tied to its original rationales of "disarm[ing] the suspect in order to take him into custody" and "preserv[ing] evidence for later use at trial." *Knowles*, 525 U.S. at 116; *accord Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176 (2016); *Riley v. California*, 573 U.S. 373, 386 (2014);

[3] *See Lewis*, 147 A.3d at 242 (acknowledging that "the defendant in *Rawlings* did not argue in the Supreme Court that a lawful search incident to arrest must follow arrest.").

Arizona v. Gant, 556 U.S. 332, 338 (2009). These rationales are not served when the government cannot show, as of the time of the search, that an arrest occurred or at least was imminent.

III. This case is a good vehicle to address the issue

The government argues that this case is not an appropriate vehicle for reviewing the question presented because "the evidence found during the search of the wallet would be admissible because it would inevitably have been discovered during an inventory search of petitioner's wallet at the jail." US 20. But even though the district court upheld the search based on the inevitable-discovery doctrine, App. 006a, the Ninth Circuit declined to address it. App. 004a. The government thus is wrong that the challenged evidence would not have been suppressed and the outcome of this case would not be different even if this Court agreed that the search was not valid as incident to arrest. Opp. 21. A reversal on the search-incident issue would return the case to the Ninth Circuit, which likely would reject the inevitable-discovery argument that it already declined to apply.

The government's inevitable-discovery argument in the district court relied on the facts that "Officer McGoon had probable cause to arrest" Petitioner and he "would have been subject to a thorough inventory search at the time of transport to the County jail." ER 000141. The government thus had to establish both that Petitioner *would have been arrested* absent the illegal searches of his person and wallet and that the ID card in his wallet *would have been discovered* during a valid inventory search. The government did not carry its burden on either element.

The government failed to prove that Petitioner would have been arrested absent the search of his person, the seizure of the wallet and the search of the wallet. *See United States v. Heath*, 455 F.3d 52, 55 (2d Cir. 2006) (government failed to prove inevitable discovery where evidence showed only that arrest could have occurred, not would have occurred, absent violation). The finding of probable cause to arrest that the district court relied on, App. 005a, 007, was not enough. McGoon's declaration stating that he "*could* arrest [Petitioner] without a warrant," was not enough. ER 110-11 (emphasis added). McGoon did not in fact arrest Petitioner before searching him, and there is no evidence in the record that he *would have* arrested Petitioner had he not first searched him and his wallet. *See Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984) ("inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment"); *cf. id.* at 448-49 (summarizing testimony on which courts relied in finding inevitable discovery).

The government also did not prove that, had McGoon arrested Petitioner without first searching him and his wallet, there would have been a valid inventory search of the wallet. *See Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) ("An arrested person is not invariably taken to a police station or confined"). The government's evidence was McGoon's sworn declaration that it was "standard police practice and procedure, prior to placing any individual in a police vehicle," to search the person "for all items, including indicia, weapons, narcotics, or any other contraband." *Id.* "Everything on the individual's person, except for clothing, is

removed and placed in one bag to be inventoried at the jail." *Id.* "[I]llegal items" are kept separately as evidence. ER 00113. This evidence does not show that McGoon would have searched Petitioner and his wallet based on a standardized policy or procedure that authorized such a search.

The practice McGoon mentioned may have allowed a search of Petitioner for "contraband," but there is no evidence that a wallet qualifies as "contraband." And the practice of removing everything from the person of someone about to be locked in a police car and bagging it for later inventory does not authorize the *search* of an item -- such as Petitioner's wallet -- removed from his person. Although "it is not 'unreasonable for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession," any such search must be "in accordance with established inventory procedures." *Lafayette*, 462 U.S. at 648. Without "standardized criteria . . . or established routine" to "regulate the opening of containers found during inventory searches," police may not justify the opening of containers as an inventory search. *Florida v. Wells*, 496 U.S. 1, 4 (1990).

The record here thus did not support either of the two necessary findings for inevitable discovery, as the Ninth Circuit implicitly acknowledged by relying on a different basis to uphold the searches. The Ninth Circuit has reversed district-court findings of inevitable discovery where, as here, the facts failed to support it. *See, e.g.*, *United States v. Lopez-Soto*, 205 F.3d 1101, 1107 (9th Cir. 2000) (district court clearly erred by applying inevitable-discovery exception where government failed to

provide evidence of what officer would have done had he not unlawfully stopped defendant); *United States v. Ramirez-Sandoval*, 872 F.3d 1392, 1400 (9th Cir. 1989) (inevitable discovery does not apply because government failed to prove officer would have exercised his discretion to ask certain questions). There is no reason to think the Ninth Circuit would rule otherwise on remand.

IV. The government's rule is unnecessary for officer safety and cuts too deep into the Fourth Amendment's protections from unreasonable searches

The government's claim that the "the concerns underlying the search-incident-to-arrest doctrine . . . may be even "greater before the police have taken a suspect into custody than they are thereafter,'" Opp. 8 (quoting *Lewis*, 147 A.3d at 240), is flatly inconsistent with this Court's search-incident precedent. "It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop." *United States v. Robinson*, 414 U.S. 218, 234-35 (1973). Conversely, "[w]here there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person." *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Before an arrest, police who fear danger can, for example, remove people from cars or pat-search them for weapons with reasonable suspicion that they are armed and dangerous. *Arizona v. Johnson*, 555 U.S. 323 (2009); *Maryland v. Wilson*, 519 U.S. 408 (1997); *Terry v. Ohio*, 392 U.S. 1 (1968). And if police legitimately misjudge whether or not an arrest has occurred and search before an

actual arrest, "[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." *Johnson*, 913 F.3d at 807 (Watford, J., concurring).

By contrast, the risk to individuals from unconstrained warrantless police searches are real, serious and not otherwise amenable to remediation. *See, e.g.*, *id.* (noting "the serious potential for abuse that otherwise exists when officers possess unfettered discretion as to whom to target for searches"); *Lewis*, 147 A.3d at 263-64 (Beckwith, J., dissenting) ("These concerns are by no means hypothetical and carry with them serious implications for disparate enforcement in policing practices."). Under the search-first regime, police are trained to arrest anyone "who commits an infraction in front of you," "which gives you the right to search. And what that search yields will determine whether you book him or release him on citation or with no further action." https://www.law.berkeley.edu/people-v-macabeo-training-materials/ Transcript of training video at 5, "Search incident to Infraction Arrest," California Commission on Peace Officer Standards and Training, with Devallis Rutledge, Special Counsel, Los Angeles County District Attorney's Office (discussing *People v. Macabeo*, 229 Cal. App. 4th 486 (2014)).

This Court has a strong responsibility to uphold the Fourth Amendment's protections against unreasonable searches. "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered government use of the

fruits of such invasions." *Terry*, 392 U.S. at 13. Limiting the search-incident exception to searches conducted during or after arrests strikes the appropriate balance between law-enforcement needs and the protections guaranteed by the Fourth Amendment and is reasonable.

CONCLUSION

For the reasons above and in his petition for a writ of certiorari, Mr. Lam respectfully asks this Court to issue the writ.

Dated: November 26, 2019

STEVEN G. KALAR
Federal Public Defender
JODI LINKER*
ROBIN PACKEL
Assistant Federal Public Defenders

Counsel of Record