No. 17–6606

In the
Supreme Court of the United States

Jose Diaz,

Petitioner,

v.

United States of America,

Respondent.

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

REPLY BRIEF OF PETITIONER

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

Counsel for Petitioner

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INTRODUCTION

Respondent concedes that the Second Circuit's opinion below creates a direct "conflict" with the opinion of the New York Court of Appeals in *People v. Reid*, 26 N.E.3d 237 (N.Y. 2014), on the question whether the Fourth Amendment permits a search "incident" to an arrest that is not completed, underway, or intended. Respondent acknowledges that the Second Circuit's affirmative answer is "inconsistent with" decisions from the highest state courts of California, Idaho, and Virginia. And respondent disputes neither the importance of the question nor petitioner's showing that it affects countless police-citizen encounters every day.

Instead, respondent minimizes the split as "shallow" (a description with which 20 million affected New Yorkers might disagree); and speculates that the Court of Appeals might "reconsider" *Reid* in light of the opinion below, even though that court declined a similar invitation a few months ago. In an effort to confuse matters, respondent fabricates vehicle problems—lack of preservation, an alternate ground for affirmance—that pose no obstacle to review. To the contrary, petitioner has preserved his argument that an incident search requires an actual, ongoing, or intended arrest. And respondent's argument that the search was a permissible *Terry* frisk (which, by the way, depends on respondent's misstating a key fact) was forfeited on appeal and not decided below. This case is straightforward. Where it is clear, based on the totality of the circumstances, that no arrest is to occur at the time of a search, it defies language, logic, and precedent to say that the search is nonetheless "incident" to that nonexistent arrest. The petition should be granted.

I. Respondent Concedes That The Opinion Below Conflicts With *Reid*.

Respondent acknowledges that the opinion below "squarely rejected" and thereby created a "conflict" with *Reid*. BIO 23. Respondent's effort to portray the split as "shallow" ignores that the Fourth Amendment rights of all New York's residents now vary in federal and state court, a circumstance that cries out for, and has many times prompted, this Court's intervention. *See* Pet. 15 (collecting cases). The conjecture that the New York Court of Appeals might "reconsider" *Reid* in light of the opinion below (BIO 23) disregards that court's precedent and recent practice. The Second Circuit's interpretation of federal constitutional law is "not binding" on the Court of Appeals. *People v. Kin Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991). Accordingly, not three months ago, the New York Court of Appeals rebuffed a request to revisit its Fourth Amendment jurisprudence concerning warrantless arrests in the threshold of a residence in light of the Second Circuit's intervening decision in *United States v. Allen*, 813 F.3d 76 (2d Cir. 2016). *People v. Garvin*, 30 N.Y.3d 174, 182–84 (2017). *Garvin* emphasized that it was "not bound" by *Allen* and admonished, contrary to respondent's prediction: "[W]e do not abandon our jurisprudence in response to every new lower federal court decision." *Id.* at 182 & n.6. *See also, e.g.*, *People v. Pignataro*, 3 N.E.3d 1147, 1150 n.3 (N.Y. 2013) (rejecting state's request to overrule precedent in light of Second Circuit decision "since the Second Circuit's interpretation of the Federal Constitution does not bind us"). In any case, New York state prosecutors have a far simpler option than urging the Court of Appeals to reverse itself: refer cases involving searches that violate

Reid, but comport with the opinion below, to respondent for prosecution. *See, e.g.*, Pet. 16 (citing *United States v. McIlwain*, 17 Cr. 385 (PAE) (S.D.N.Y.)).

Absent this Court's action, the conflict between the opinion below and *Reid* will persist, resulting in the disparate treatment of criminal (and 42 U.S.C. § 1983) litigants in New York's state and federal courts. Because New York's lower courts must follow the Court of Appeals, not the Second Circuit, in the event of a conflict between the two, *People v. Lugo*, 233 A.D.2d 197, 198 (1st Dep't 1996), panels of the Appellate Division continue to apply *Reid*, including in cases that postdate the opinion below. *E.g.*, *People v. Simmons*, 151 A.D.3d 628, 628–29 (1st Dep't 2017); *People v. Mangum*, 125 A.D.3d 401, 401–03 (1st Dep't 2015). Conversely, district courts within the Second Circuit must adhere to the opinion below. *E.g.*, *McIlwain*, *supra* (upholding incident search based on probable cause to arrest for littering); *United States v. Witty*, 2017 WL 3208528, at *10 (E.D.N.Y. July 26, 2017) (same, based on probable cause to arrest for unlawful presence in park after dark).

II. The Opinion Below Deepens A Broader Split.

The split between the Second Circuit and the New York Court of Appeals alone justifies plenary review. Icing the cake, petitioner has identified a broader division that implicates numerous federal courts of appeals and state courts of last resort, and includes multiple conflicts between state supreme courts and their regional circuits. Pet. 16–25. Respondent's attempt to show otherwise fails.

Start with respondent's treatment of the decisions of the highest state courts of California, Idaho, and Virginia (BIO 20–21). After grudgingly acknowledging (in a breathtaking understatement) that "aspects of the reasoning of those decisions is inconsistent with the decision below," BIO 20, respondent labors to distinguish those decisions on grounds that counsel in favor of certiorari, not against. For example, respondent says, in both *People v. Macabeo*, 384 P.3d 1189 (Cal. 2016), and *Lovelace v. Commonwealth*, 522 S.E.3d 856 (Va. 1999), state law precluded arrest for the relevant offense. BIO 20–21 & n.5. But, as petitioner has explained, the Fourth Amendment permits an arrest based on probable cause to believe a person has committed any crime, notwithstanding contrary state law. Pet. 22 n.4 (citing *Virginia v. Moore*, 553 U.S. 164, 171 (2008)); BIO 21 n.5. Therefore, the only conceivable relevance of the state-law bars at issue in *Macabeo* and *Lovelace* was that they confirmed that no arrests were going to occur at the time of the challenged searches, triggering the rule of *Knowles v. Iowa*, 525 U.S. 113 (1998). *See, e.g.*, *Macabeo*, 384 P.3d at 1197 (reading *Knowles* to stand for the proposition that "[o]nce it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative," and concluding that "[t]his case is analogous to *Knowles*"); *Lovelace*, 522 S.E.2d at 860 ("The fact that the officers could only have issued a summons ... negates the Commonwealth's argument that the existence of probable cause to charge Lovelace with drinking an alcoholic beverage in public allowed [the officer] to search him."). But on respondent's interpretation of the search-incident exception, it does not matter whether an arrest is going to occur at the time of the search, as long as an arrest in fact follows (as happened in *Macabeo* and *Lovelace*, and as is authorized by *Moore*). Respondent's distinction of these cases thus has significance only if petitioner is correct, and it is necessary to ask, before applying the exception, whether an arrest "is occurring, or is about to occur" at the time of the search. Pet. 33.

So too respondent's dismissal of *State v. Lee*, 402 P.3d 1095 (Idaho 2017). There, respondent says, the officer "'told [the driver] that he would issue him a citation' instead of making an arrest." BIO 21 (quoting *Lee*, 402 P.3d at 1104). But the officer had not issued a citation—the critical difference, respondent says, between this case and *Knowles*, BIO 18—and so retained the authority to arrest for the traffic offense. Rather, the significance of the officer's statement was that it enabled the Idaho Supreme Court to conclude that "it was clear than an arrest was not going to take place," so that "the historical rationales justifying the search were no longer present." 402 P.3d at 1104. Indeed, in complete agreement with *Reid* and petitioner's position here, *Lee* confirmed that the officer's statement was relevant because it supplied probative evidence of his *intention* not to arrest: "While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of the circumstances as to whether an arrest is to occur." 402 P.3d at 1105. Again, under respondent's interpretation of the search-incident exception, an officer's intention (not acted upon) to cite rather than arrest does not impact the constitutional analysis. The officer's statement in *Lee* matters only if petitioner is right about the kind of inquiry that the exception demands.

The Second Circuit below held that a permissible pre-arrest incident search has only two prerequisites: probable cause to arrest before the search, and a formal arrest shortly thereafter. Pet. App. 26a; *see* BIO 8 (same). In *Macabeo*, *Lovelace*, and *Lee*, both prerequisites were satisfied, yet all three courts held the searches invalid because, as respondent itself points out (BIO 20–21), some evidence—state law in *Macabeo* and *Lovelace*; the officer's expressed intention in *Lee*—established that no arrest was to occur at the time of the search. *Lee*, 402 P.3d at 1105–06 ("Because the totality of the circumstances, including [the officer's] statement that Lee was to get a citation, show that no arrest was to occur prior to finding marijuana and methamphetamine during the search, the search that occurred was a search incident only to an intended citation."); *Macabeo*, 384 P.3d at 1197; *Lovelace*, 522 S.E.2d at 860. The division could not be clearer. These searches would have passed muster under the opinion below, but did not because the California, Virginia, and Idaho courts answered the question that the Second Circuit refused to ask: "whether or not an arrest was impending at the time of the search." Pet. App. 25a.

Likewise, respondent discounts the Seventh Circuit's statement in *Ochana v. Flores*, 347 F.3d 266, 270 (2003)—an incident search requires that the suspect "must actually be held under custodial arrest"—as "erroneous ... *dicta*" that "is not the law in the Seventh Circuit." BIO 19. That is incorrect. The Seventh Circuit in *Ochana* expressly disagreed with the district court's ruling that the vehicle search in that case could be justified as incident to arrest. 347 F.3d at 270 (explaining that "we depart from the district court's analysis" and "find insufficient evidence in the summary judgment record to support a conclusion as a matter of law that this search was incident to a custodial arrest"). Although *Ochana* did, as respondent notes, uphold the search on other grounds, respondent's contention that *Ochana* does not state Seventh Circuit law is mistaken. *See United States v. Jackson*, 377 F.3d 715 (7th Cir. 2004). Consistent with *Ochana*, *Jackson* endorses petitioner's interpretation of *Knowles*, explaining that *Knowles* limits the search-incident exception to "custodial arrests," and "instantiates the principle that the reasonableness of a search depends on what the officers actually do, not what they might have done." 377 F.3d at 717. *See also ibid.* ("[A]s *Knowles* explained it is *custody* ... that makes a full search reasonable."). Thus, *Jackson* approved an incident search that occurred only *after* a suspect was "taken into custody." *Ibid. See also, e.g.*, *United States v. Cochran*, 309 F. App'x 2, 6 (7th Cir. 2009) ("[B]ecause Cochran was lawfully under arrest, the officers could search him and the passenger section of his vehicle as a search incident to the lawful arrest."(citing *Ochana*)). Respondent's reliance on *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015) (cited at BIO 19), is misplaced. Any discussion of the search-incident exception in that case was true dictum because the government there "never suggested ... that the police officers searched Leo's backpack incident to arrest." *Id.* at 748.[1]

[1] Respondent identifies various factual distinctions with the Massachusetts, Maryland, and Tennessee cases, BIO 19–20, but neglects that the logic of these cases compels petitioner's rule. *See, e.g.*, *Commonwealth v. Craan*, 13 N.E.3d 569, 575 (Mass. 2014) ("Where no arrest is underway, the rationales underlying the exception do not apply with equal force."); *Belote v. State*, 981 A.2d 1247, 1252 (Md. 2009) ("Where there is no custodial arrest, however, these underlying rationales for a search incident to an arrest do not exist."); *State v. Crutcher*, 989 S.W.2d 295, 302

This Court's two prior denials of certiorari (BIO 6) mean little. *Heaven v. Colorado*, No. 16–1225, an unpublished opinion from Colorado's intermediate appellate court, was a poor vehicle because the state courts had concluded that the petitioner "was under arrest" at the time of the challenged search. *Heaven* Pet. App. 5a ¶ 12 (quoting Pet. App. 13a); *see Heaven* BIO 6 ("The problem for Petitioner is that, according to the two courts below, at the time of the search Petitioner was *under arrest*."). *Powell v. United States*, No. 07–5333, predates most of the decisions on petitioner's side of the split, including, most importantly, *Reid*. *See also Lee*; *Macabeo*; *Craan*; *Belote*. The split has since spread, and now encompasses a square division between the Second Circuit and the New York Court of Appeals, a conflict that did not exist when this Court denied review in *Powell* more than a decade ago.

III. This Petition Is A Clean Vehicle.

Respondent does not dispute the significance of the question presented or the frequency with which it arises. Instead, bent on muddying the waters, respondent asserts two vehicle defects, both illusory.

First, respondent contends that petitioner failed to advance below "one of the two alternative rules he now urges this Court to adopt," namely, that an arrest must in all circumstances precede an incident search. BIO 23. *See also* BIO 9–10. That characterization of petitioner's position, which respondent extrapolates from a

(Tenn. 1999) ("[W]e are not prepared to hold that the police may conduct a warrantless search merely because they have probable cause to arrest the suspect. Having determined that [the defendant] was not under arrest at the time of the search, we conclude that the search was not incident to a lawful arrest.").

half-sentence in the petition's preliminary statement (Pet. 3), is not accurate. To the contrary, nothing is waived, because petitioner has advanced and preserved the same argument at each stage of this litigation: "[T]he Fourth Amendment permits an incident search if a custodial arrest has occurred, is occurring, or is about to occur (*i.e.*, is intended) at the time of the search." Pet. 33. To make this determination, a court should "consider all the facts, including an officer's intentions." *Ibid.* But where, as here, "the arrest would never have occurred but for the search, ... 'to say that the search was incident to the arrest does not make sense.'" Pet. 3 (quoting *Reid*, 26 N.E.3d at 239). That position appears in each of petitioner's filings below. *See, e.g.*, C.A. Dkt. No. 18, at 32 (opening brief) ("[T]he Fourth Amendment forbids an incident search, notwithstanding probable cause to arrest, where but for the search there was to be no arrest."); *id.* at 35 ("Because there was to be no arrest and Aybar was not in the process of making one ... Aybar's search violated the Fourth Amendment."); C.A. Dkt. No. 56, at 15 (reply brief) (arguing that "[t]o implement *Knowles*, a court must ascertain whether an officer was making an arrest or would have made an arrest absent the results of the search," and urging consideration of "the totality of the circumstances," including evidence of the officer's intent); D. Ct. Dkt. No. 18, at 4 ("[W]here there is to be no arrest, to say a search was incident to arrest makes no sense. This is because '[a] search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not.'") (quoting *Reid*, 26 N.E.3d at 239).

Thus, petitioner does not contend that an incident search is invalid solely because it precedes an arrest. *See Lee*, 402 P.3d at 1102; *Reid*, 26 N.E.3d at 239. (Although, to be sure, most lawful incident searches will follow arrest.) Rather, petitioner's argument is that the Fourth Amendment demands some nexus to an arrest *at the time of the search*. When all the evidence establishes that a suspect had not been arrested; was not in the process of being arrested, as in *Rawlings v. Kentucky*, 448 U.S. 98 (1980); and would never have been arrested had the officer not conducted the search, the search is unlawful because it bears no relationship to the doctrinal and historical rationales for the exception. *See infra* § IV.

Second, respondent contends (at greater length than it has at any previous point in this case) that Aybar's frisk of petitioner's person was justified as a protective frisk for weapons under *Terry v. Ohio*, 392 U.S. 1 (1968). BIO 24–28. Respondent forfeited this argument by failing to raise it in its brief on appeal. C.A. Dkt. No. 53. The Second Circuit, after *sua sponte* ordering supplemental briefs, expressly declined to reach this issue. Pet. App. 26a n.16. In this situation, this Court's standard practice is to grant review on the question presented and, if petitioner prevails, remand for the court below to address this alternative ground for decision in the first instance. *E.g.*, *Maples v. Thomas*, 565 U.S. 266, 290 (2012); *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011). The possibility that respondent might win on a different ground on remand poses no obstacle to review.

Moreover, respondent's *Terry* argument is meritless—which no doubt explains why it was "only half-heartedly" advanced and "swiftly rejected" in the district court. *See* Pet. 7 n.2. Indeed, respondent's argument in this Court depends upon a fact that the district court explicitly *declined to find*, namely, that "[w]hen Officer Aybar asked petitioner for his identification, he did not immediately produce it." BIO 25 (citing C.A. App. 52). As the district court explained, it "decline[d] to credit Officer Aybar's testimony" that petitioner "'refused to give' his identification to her when asked," and thus was "not prepared to find" that petitioner "refused to provide identification." Pet. App. 31a.

Stripped of that misstatement, respondent's reasonable suspicion argument reduces to this: Officers on routine patrol in a building not known for high crime encountered petitioner, who was doing nothing more serious than drinking alcohol from a plastic cup with two companions on a Saturday evening. The officers had no information to suggest that petitioner was armed and did not observe a telltale sign (a bulge, a low-hanging pocket) on his person. In response to a request for identification, petitioner, who had so far obeyed all of the police's instructions (to stand up from the stairs, to put his cup down, and to move to the wall, Pet. App. 30a), reached into his jacket pocket and touched his waistband, which, of course, sits above one's pants pocket. That is, petitioner searched for identification in the most obvious places to find one, just what any person seeking his driver's license in response to an officer's order would do. While an otherwise inexplicable movement to one's pocket or waist might support reasonable suspicion, an easily explained movement does not. *See, e.g.*, *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) (no reasonable suspicion based on driver's reach for center console because it was "consistent with reaching for a driver's license or registration, a perfectly lawful action that is to be expected when one is pulled over by the police").

Respondent's newfound suggestion—not mentioned in its supplemental brief below, C.A. Dkt. No. 94—that the district court's contrary conclusion depended "exclusively" on inapposite law concerning *Terry* stops rather than frisks (BIO 26–28 & n.6) is inaccurate. *See United States v. Sanders*, 2000 WL 268577, at *1 (2d Cir. March 9, 2000) (unpub.) (addressing lawfulness of "investigative stop and frisk") (cited at Pet. App. 36a and BIO 26 n.6). Moreover, the cases that the district court consulted addressed the relevant legal question, namely, whether the police had reason to suspect that petitioner was armed. *See, e.g.*, *United States v. Doughty*, 2008 WL 4308123, at *7 (S.D.N.Y. Sept. 19, 2008) ("[M]erely adjusting a waistband is not directly indicative of a firearm.") (cited at Pet. App. 35a–36a and BIO 26 n.6).

IV. The Opinion Below Is Wrong.

On the merits, the BIO, like the opinion below, is wrong. "[I]t is the fact of lawful custodial arrest which gives rise to the authority to search." *United States v. Robinson*, 414 U.S. 218, 236 (1973). Respondent does not dispute that at the time of the search, Aybar had not arrested petitioner and, consistent with her uniform practice, would not have arrested him, but would only have written him a citation, had she not found the firearm during the challenged frisk. On these facts, the frisk implicates neither of the interests promoted by the search-incident exception—officer safety and evidence preservation—and respondent does not even try to show that it does. As to officer safety, this Court has clarified that the relevant "danger" is that associated with "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." *Robinson*, 414 U.S. at 234–35. When no arrest is to occur, this danger is not present. As to evidence preservation, "[w]here there is no formal arrest, ... a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person." *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). If the suspect is to be cited and released, the concern for destruction of evidence is absent. In extending the exception to situations that implicate neither rationale, the Second Circuit committed, and respondent perpetuates, an error that this Court has many times corrected. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 335 (2009); *Knowles*, 525 U.S. at 119; *Chimel v. California*, 395 U.S. 752, 763 (1969). Likewise, respondent has no answer for petitioner's point that the constitutionality of a search must be measured "at its inception" (Pet. 30)—except the strange suggestion that what "follows quickly after the search" forms part of the inception analysis. BIO 13.

Moreover, respondent errs in contending that petitioner "seeks to place dispositive weight" on Aybar's subjective intent. BIO 15. Because *Knowles* establishes that the search-incident exception is inapplicable once it is clear that no arrest is to be made, *see Reid*, 26 N.E.3d at 240, the pertinent question, after *Knowles*, is whether an arrest was occurring or about to occur at the time of the search. In answering that question, a court should consider the totality of the circumstances, including an officer's testimony about what she planned to do. *See Lee*, 402 P.3d at 1105–06; Pet. 33–34. But evidence of the officer's intent will not invariably dictate the outcome: in many cases, including this one, objective evidence will supply a sufficient basis for ascertaining whether an arrest would have occurred but for the search. Here, objective factors and Aybar's testimony align, leaving this Court free to articulate a rule that does (as in *Reid* and *Lee*), or does not, accommodate consideration of an officer's intent. Pet. 27.

Finally, contrary to respondent's extended argument (BIO 13–17), there is nothing anomalous about considering an officer's intentions in this predictive context, nor is *Florida v. Jardines*, 569 U.S. 1 (2013), the only case of this Court's approving the practice. In applying the independent source doctrine, this Court has said that the pertinent question is whether the police's "decision to seek the warrant" authorizing a subsequent search is "*prompted* by what they had seen" during an initial illegal search. *Murray v. United States*, 487 U.S. 533, 542 (1988) (emphasis added). Lower courts applying *Murray* have correctly understood this rule not only to permit, but to compel, consideration of an officer's "subjective intent." *E.g.*, *United States v. Jadlowe*, 628 F.3d 1, 10–12 (1st Cir. 2010); *United States v. Restrepo*, 966 F.2d 964, 971–72 (5th Cir. 1992). *See also, e.g.*, *United States v. Rodriguez*, 834 F.3d 937, 942 (8th Cir. 2016) (noting government's argument that independent source doctrine applied because officer "had already announced his intent to apply for a search warrant"). Similarly, the precise question at issue here—whether an arrest would have occurred had the officer not conducted a search—often arises in inevitable discovery cases, and courts have no difficulty considering officer testimony just like Aybar's. *See, e.g.*, *United States v. Heath*, 455

F.3d 52, 61 (2d Cir. 2006) (explaining that "evaluating a police officer's discretionary decision to arrest as part of the inevitable discovery analysis is nothing new," and that "an officer's testimony 'as to what he would have done or how he would have behaved' is 'deserving of careful consideration'"). When ascertaining the existence of probable cause, an objective approach makes sense. But when asking a forward-looking question—would an arrest have occurred but for the search?—that limitation is misplaced, as independent source and inevitable discovery doctrine confirm.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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

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