Case No. S221852

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

PAUL MACABEO,
Defendant and Appellant.

After a Decision of the Court of Appeal, Second Appellate District, Division Five, Case No. B248316, from Superior Court of California, County of Los Angeles, Case No. YA084963, Hon. Mark Arnold

APPELLANT'S REPLY BRIEF ON THE MERITS

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The courts below ruled that probable cause for any infraction gives officers authority to conduct a full custodial search incident to arrest. In other words, an actual arrest is not required, either before or after a search. Mr. Macabeo pointed out in his Opening Brief that this expansion of the warrant exception encourages police to stop people for any infraction, and then conduct an indiscriminate, exploratory search for evidence of other crimes. While the prosecution disputes this consequence, calling it a mere "parade of horribles" (Respondent's Answer Brief on the Merits (RB) 31, 35), the California Department of Justice (DOJ) has trained police that they may do exactly that. As we show, DOJ's training arm has instructed law enforcement officers throughout California that with probable cause to arrest for any infraction, they may conduct a full custodial search and only later decide—on the basis of what the search reveals—whether to release, cite or arrest.

Although DOJ's message to law enforcement is unmistakably clear, its arguments in this Court are more difficult to discern. In much of its brief, Respondent appears to seek the same search-first, decide-later rule it obtained below. However, in asking this Court to uphold the search of Mr. Macabeo, the prosecution emphasizes that he was actually arrested, and argues that the arrest was contemporaneous with the search. Thus, it is possible that Respondent is simultaneously proposing an alternative rule: an

arrest *is* required for an incident search, but a subsequent arrest may validate an otherwise unconstitutional earlier search. Neither theory withstands scrutiny.

As DOJ's training demonstrates, Respondent's proposed search-first, decide-later rule substantially expands the warrant exception and encourages indiscriminate searches. Moreover, this expansion is counter to the justifications for the warrant exception, conflicts with binding precedent, and will lead to unconstitutionally-prolonged detentions. The prosecution's possible alternative argument should also be rejected. It cannot be reconciled with the bedrock principle that a search must be justified at its inception. Nor does it give officers clear guidance or cohere with precedent. Finally, the good faith exception to the exclusionary rule, as construed in *Davis v. United States* (2010) 564 U.S. __ [131 S.Ct. 2419, 180 L.Ed.2d 285], cannot save this search.

A. The Search-First, Decide-Later Rule Expands the Warrant Exception, and Encourages Indiscriminate, Exploratory Searches for Evidence of Unrelated Crime.

The courts below found that officers may conduct a search incident to arrest if there is probable cause to arrest; the courts did not require that an arrest actually take place before or even after a search. (See *People v. Macabeo* (2014) 229 Cal.App.4th 486, 491 [177 Cal.Rptr.3d 311] ["Since the defendant could have been arrested, he could also have been subjected to a search incident to a lawful arrest" and "[t]he fact that the officer didn't

do that is irrelevant . . . ."].) Respondent appears to seek this same search-first, decide-later rule here. (See RB 27 ["[T]he officers had probable cause to arrest appellant for the traffic infraction at the time of the search. Therefore, they could search incident to the authority to arrest for that offense."]; RB 36 [arguing against "creat[ing] an incentive for officers to make custodial arrests" in order to search].) The only limitation the prosecution explicitly admits "is 'bootstrapping'; when the search *itself* provides the only probable cause for arrest." (RB 20, italics original.)

DOJ has now trained police in this new approach, which substantially broadens the scope of the warrant exception.

1. Officers have been trained to search-first, decide-later.

After the court of appeal's ruling in this case, the California Commission on Peace Officer Standards and Training (POST)[1]—DOJ's law enforcement training body—prepared a video to instruct officers about the decision. POST made the video available to officers throughout California on its "Learning Portal." (See POST, Video Program Guide, *Case Law Today* (Nov. 2014) <https://www.post.ca.gov/Data/Sites/1/post_docs/caselawguides/2014/Nov2014.pdf> [as of Oct. 26, 2015] [noting

[1] POST is an agency within the California Department of Justice. (Pen. Code, § 13500, subd. (a).) POST has 15 commissioners appointed after consultation with the Attorney General, who also serves ex officio. (*Id.*, subd. (a), (c).) POST's core mission is "providing training and other services to local law enforcement agencies." (Pen. Code, § 13505.)

release date, and availability on POST's Learning Portal].)[2]

> According to POST's Program Guide, the video instructs:
>
> > Probable cause to arrest for an infraction justifies a search incident to arrest, under the 4th Amendment; if the search yields evidence of a bookable offense, the suspect can be arrested for both the infraction and the bookable offense; if nothing is found during the search, the suspect may be released from arrest on citation, or without further action, per PC § 849(b)(1). (*Ibid.*)

In the video itself, the instructor emphasizes that the decision whether to arrest will turn on what the exploratory search reveals:

> So those are your options when you have somebody who commits an infraction in front of you. You have PC to arrest him for that, 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.* (Transcript, POST, "Search Incident to Infraction Arrest," *Case Law Today* (Nov. 2014), p. 5, italics added.)[3]

2. Search-first, decide-later vastly expands search authority, and increases the incidence of exploratory searches.

If no arrest is required and probable cause to arrest suffices for a search, the result is "a wholly new exception for a 'search incident to probable cause to arrest.'" (*Commonwealth v. Washington* (Mass. 2007) 869 N.E.2d 605, 612.) This encourages indiscriminate searches for evidence of unrelated criminal activity. And if a search fails to turn up any

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[2] Case Law Today videos are free to California law enforcement officers through POST's Learning Portal, which has over 85,000 users. (<https://lp.post.ca.gov/post/default.aspx> [as of Oct. 26, 2015].)

[3] Mr. Macabeo has filed a Request for Judicial Notice of the Program Guide, video, and transcript, and has provided copies to the Court and parties. For convenience, all three are available online at: https://www.law.berkeley.edu/people-v-macabeo/.

evidence, suspects will likely not be arrested and the searches will never be the subject of judicial review. (See AOB 41-45.)[4]

This recast warrant exception removes the only meaningful limitation on searches during stops for minor offenses: the necessity of making an arrest. Under current law, officers are deterred from making petty arrests because those arrests come with "costs that are simply too great to incur without good reason." (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 352 [121 S.Ct. 1536, 149 L.Ed.2d 549].)[5] By uncoupling search authority from the fact of arrest, officers may search without the costs—or the good reason.

The expanded warrant exception places "unfettered discretion" in the hands of the police to search whenever they witness a traffic infraction, which "permits and encourages an arbitrary and discriminatory enforcement of the law." (*Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 168, 170 [92 S.Ct. 839, 31 L.Ed.2d 110].) "A rule that gives

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[4] Under arrest-first, decide-later, even searches like those in *Washington*, *supra*, 869 N.E.2d 605, *Commonwealth v. Craan* (Mass. 2014) 13 N.E.3d 569, *People v. Evans* (N.Y. 1977) 371 N.E.2d 528, *Belote v. State* (Md. 2009) 981 A.2d 1247, and *State v. Taylor* (Ariz. Ct. App. 1990) 808 P.2d 324 would be permissible. Respondent argues that these cases "are easily distinguishable" because arrests either occurred later than the searches, or never at all. (RB 22.) But that is the point. Allowing searches based only on probable cause to arrest, without an actual arrest, transforms the exception. (See AOB 34-36.)

[5] In addition to the expense incurred by arresting and supervisory officers, costs may include booking fees imposed by counties with jail facilities. (See Gov't Code, § 29550.)

police the power to conduct [an intrusive] search whenever an individual is caught committing a traffic offense . . . creates a serious and recurring threat to the privacy of countless individuals." (*Arizona v. Gant* (2009) 556 U.S. 332, 345 [129 S.Ct. 1710, 173 L.Ed.2d 485].) This threat "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." (*Ibid.*)

Such expanded search authority is particularly problematic in light of officers' ability to stop individuals on pretextual grounds. (See *Whren v. United States* (1996) 517 U.S. 806 [116 S.Ct. 1769, 135 L.Ed.2d 89].) "The sheer volume and range of conduct that may constitute a citable offense makes it easy for an officer to identify probable cause for *some* offense, should he wish to do so." (Brief of Amici Curiae California ACLU Affiliates (ACLU) 23, italics original [listing jaywalking, improper use of carpool lanes, and parking violations as examples].) Officers cite roughly one in eight California residents for infractions every year. (AOB 43-44.) Search-first, decide-later would give police "the opportunity . . . to conduct millions of additional searches per year," which would disproportionately impact communities of color, poor communities, and other vulnerable populations. (ACLU 15, 27, 30.)

Respondent's brief glosses over or mischaracterizes these points. Rather than address how the expanded warrant exception will afford greater

authority to search, the prosecution mistakenly suggests that Mr. Macabeo's "real concern seems to be the constitutionality of custodial arrests for minor offenses—in other words, the rule articulated in *Atwater*, *McKay*, and *Moore*." (RB 30.) Respondent then attacks this straw argument, contending that arrests for minor offenses do not violate the Fourth Amendment—and indeed are not common. (RB 30-31, 35.)

This turns the problem on its head. Mr. Macabeo does not dispute that police can arrest for an infraction without violating the Fourth Amendment. Had officers first arrested Mr. Macabeo for the traffic infraction, they could subsequently have searched him without contravening the Fourth Amendment. The point is that search-first, decide-later eliminates the damper that an arrest requirement provides. The relative scarcity of petty-offense arrests under the current rule is one of the reasons why Respondent's proposal would be so impactful. Allowing a search any time an officer intends to issue a citation—or witnesses a minor offense but does not even cite—would substantially increase the incidence of these searches.

The prosecution proposes that officers will be deterred from conducting unnecessary searches by "countervailing incentives" such as internal investigations. (RB 32.) This suggestion is unrealistic, particularly since Respondent does not clearly state what searches are in fact unlawful. Moreover, POST has instructed officers in search-first, decide-later. Police

departments are unlikely to discipline officers for conduct consistent with POST training; after all, police training materials show officers and their supervisors "how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline." (*Hudson v. Michigan* (2006) 547 U.S. 586, 599 [126 S.Ct. 2159, 165 L.Ed.2d 56].)

Nor may civil suits deter officers from conducting unlawful searches unless courts first deem the searches to be improper. Lawsuits cannot curb indiscriminate searches if, as Respondent contends, those searches are legal. And POST's own training illustrates the weak effect of state law restrictions on arrest. The instructor fails to remind officers that state law does not authorize an arrest for an infraction. He instead emphasizes that the arrest will not violate the Fourth Amendment, and that the resulting evidence will be admissible. (See Transcript, *supra*, at pp. 2-4.)

Respondent further argues that "[t]he United States Supreme Court's decisions limiting the scope of a vehicle-search incident to arrest would still apply." (RB 33-34.) Mr. Macabeo never suggested that the law of vehicle searches would change. But police will be able to search vehicles incident to the hypothetical "arrest" of the driver for a traffic infraction when they lack probable cause to search under the automobile exception. (See AOB 41.)

Likewise, the definition of a *Terry* stop and frisk would remain the same, but *Terry*'s limitations would become largely superfluous. Officers

regularly stop people with probable cause to believe they have committed an infraction, and these individuals are usually warned or cited. In these non-arrest stops, *Terry v. Ohio* (1968) 392 U.S. 1, 27 [88 S.Ct. 1868, 20 L.Ed.2d 889] only permits a limited frisk for weapons, and officers must articulate a reasonable suspicion to believe a suspect is armed. But under search-first, officers could conduct the more intrusive full custodial search without any reason to believe a person is armed. (See AOB 40-41.)

Stripping the arrest requirement from the warrant exception vastly expands the authority to search. Officers who can search without bearing the costs of arrest will search more often, and the searches will disproportionately impact the most vulnerable communities, those with the least trust in police.

B. The Search-First, Decide-Later Rule is Disconnected From the Justifications for the Warrant Exception, Conflicts with *Knowles*, and Will Lead to Unconstitutionally-Prolonged Detentions.

Respondent's search-first, decide-later rule is unsupported by the justifications for the search incident exception and should not be applied to those who have not had their privacy interests diminished by an arrest. As the high court made plain in *Knowles v. Iowa* (1998) 525 U.S. 113 [119 S.Ct. 484, 142 L.Ed.2d 492], an incident search must be based on an arrest, not mere probable cause. An alternative rule would incentivize officers to

conduct exploratory searches for evidence of unrelated crimes and lead to unconstitutionally-prolonged detentions.

1. The expanded search incident exception is untethered from the grounds for it.

Respondent's search-first, decide-later rule severs the warrant exception from its underlying justifications. The high court has repeatedly emphasized that the scope of the exception must be determined in light of the justifications for it. (See *id.* at pp. 116-117; *Arizona v. Gant*, *supra*, 556 U.S. at p. 343; *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2484, 2485, 89 L.Ed.2d 430]; AOB 29-31.) These justifications are officer safety and preventing the concealment or destruction of evidence. (*Chimel v. California* (1969) 395 U.S. 752, 762-763 [89 S.Ct. 2034, 23 L.Ed.2d 685].) Deciding whether the exception applies requires weighing these governmental interests against an individual's expectation of privacy. (AOB 30-31.) Arrestees have "reduced privacy interests upon being taken into police custody." (*Riley*, *supra*, 134 S.Ct. at p. 2488.)

The prosecution does not directly engage this analysis, asserting instead that officers are not required to re-balance the *Chimel* factors in advance of every search. Respondent's brief proceeds as though the incident search doctrine ceased to evolve after *United States v. Robinson* (1973) 414 U.S. 218 [94 S.Ct. 467, 38 L.Ed.2d 427], a case it claims fully disposes of the issues here. (RB 37-39.) There is a difference between

requiring officers to conduct a *Chimel* analysis in their heads before each search and this Court considering whether the warrant exception applies to a *category* of searches. The Supreme Court has continued to assess the application of the search incident to arrest doctrine to *categories* of searches, as it did in rejecting the searches in *Knowles*, *Gant* and *Riley*.

Riley is instructive. The high court analyzed whether the warrant exception applied to searches of cell phones by weighing the government's interests in officer safety and evidence preservation against an individual's privacy interest in his or her phone. (*Riley*, *supra*, 134 S.Ct. at p. 2485.) True to *Robinson*, it did not require a "case-by-case adjudication . . . ." (*Ibid.*, quoting *Robinson*, *supra*, 414 U.S. at p. 235.) It "ask[ed] instead whether application of the search incident to arrest doctrine to this particular category of effects would 'untether the rule'" from its justifications. (*Ibid.*, quoting *Gant*, *supra*, 556 U.S. at p. 343.)

This Court should adhere to *Riley* and proceed in the same fashion. The justifications for the search incident to arrest exception do not support its application where no arrest has taken place or is underway. (AOB 32-36.) Respondent contends that "officer safety is promoted by permitting a search incident to precede a custodial arrest, before any danger is created by the escalation of the police-citizen encounter from a detention to an arrest." (RB 39.) That argument presupposes that officers are always entitled to

search.[6] But it is "the extended exposure" following an arrest that triggers the exception and allows the search. (*Robinson*, *supra*, 414 U.S. at pp. 234-235.) Further, without an arrest, the need to prevent a suspect from concealing or destroying evidence is substantially diminished. (*Knowles*, *supra*, 525 U.S. at p. 119.) Perhaps most significantly, these governmental concerns must be weighed against an individual's privacy. It is only *the fact of an arrest* that diminishes the person's privacy interests. (*Robinson*, *supra*, 414 U.S. at p. 237 (conc. opn. of Powell, J.).)

2. *Knowles* is squarely on point.

The high court in *Knowles* refused to extend *Robinson*'s categorical rule to people who are cited and not arrested. (*Knowles*, *supra*, 525 U.S. at pp. 118-119.) *Knowles* should require the same outcome here, since that case holds that an incident search is premised upon the *fact* of an arrest, and not merely the theoretical grounds for it. The prosecution cannot distinguish *Knowles* and, indeed, its theory to do so was expressly rejected in *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 191 L.Ed.2d 492].

[6] As a general proposition, the argument also lacks empirical support. (See Moskovitz, *A Rule In Search of A Reason: An Empirical Reexamination of* Chimel *and* Belton (2002) 2002 Wisconsin L. Rev. 657, 665-667, 671 fn. 66, 675-677 [officers are generally trained to handcuff an arrestee before searching].)

In *Knowles*, the Iowa Supreme Court applied the same reasoning as the proponents of search-first, decide-later: probable cause to arrest is all that matters. A prior Iowa case had concluded that "the 'search incident to an arrest' doctrine . . . is dependent on facts that provide a legal basis for making a custodial arrest rather than the act of arrest itself." (*State v. Doran* (Iowa 1997) 563 N.W.2d 620, 622). Affirming Knowles' conviction, the Iowa Supreme Court simply followed *Doran*. (See *State v. Knowles* (Iowa 1997) 569 N.W.2d 601, 602.)

The U.S. Supreme Court unanimously reversed, making clear that an arrest is what matters, not probable cause. The "underlying rationales" for the warrant exception "'flow[] from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.'" (*Knowles*, *supra*, 525 U.S. at p. 117, quoting *Robinson*, *supra*, 414 U.S. at p. 234 fn. 5.) The Court declined to "extend [*Robinson*'s] 'bright-line rule'" to a situation where these concerns are not present to the same degree as with an arrest. (*Id.* at pp. 118-119.) As New York's highest court recently held, "[i]f a search could be justified by an arrest that, but for the search, would never have taken place, the Supreme Court would not have decided *Knowles* in the way it did." (*People v. Reid* (N.Y. 2014) 26 N.E.3d 237, 240.)

Respondent seeks to distinguish *Knowles* because the search in that case took place *after* the officer had issued the citation. (RB 16-17.) But the

prosecution does not explain why the rationales for an incident search are furthered by permitting the search of a non-arrested person before a citation issues.

Nor should Respondent's theory survive *Rodriguez*. The petitioner in *Rodriguez* also proposed a bright-line rule: it was unreasonable to prolong a traffic stop to conduct a canine sniff beyond the point where the officer actually issued the ticket. (See Pet. Br., *Rodriguez v. United States*, No. 13-9972, p. 15.) Much of his oral argument was consumed by questions about the rule. The justices were critical:

> Justice Alito: If we hold that it's okay to have a dog sniff so long as it's before the ticket is issued, then every police officer other than those who are uninformed or incompetent will delay the handing over of the ticket until the dog sniff is completed. So . . . what does that accomplish?

(Transcript of Oral Argument, *Rodriguez v. United States*, No. 13-9972 (Jan. 21, 2015) p. 11; see also *id.* at p. 8 [Justice Sotomayor: "[Y]ou've tied it to . . . just writing the ticket, which is crazy"]; *id.* at pp. 12-13 [Justice Ginsburg: "[T]hen the police can just say, I'm going to defer that a few minutes until the dog sniff occurs. . . . [Y]ou're not going to accomplish any protection for individuals if that's your position]; *id.* at p. 13 [Justice Scalia: "You just sit there because the traffic stop is not – is not terminated until I give you your ticket. You're going to allow that?"].)

While the eventual decision favored Rodriguez—the Court refused to tolerate even a *de minimis* extension of a detention for purposes that

"detour" from a stop's traffic mission (*Rodriguez*, *supra*, 135 S.Ct. at p. 1616)—seven justices expressly refused to give constitutional significance to the timing of the citation. "The critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—*i.e.*, adds time to—'the stop'." (*Ibid.*; see also *id.* at p. 1624 (dis. opn. of Alito, J.).)

In every way that matters, *Knowles* is on all fours with this case. A search incident to arrest depends on the fact of arrest, not the theoretical basis for one. The justifications for an incident search are not furthered by extending the warrant exception to the period before a warning or citation is issued. The prosecution's proposed basis to distinguish *Knowles* is every bit as manipulable as the petitioner's suggestion in *Rodriguez*, and should likewise be rejected.[7]

3. Search-first, decide-later will unconstitutionally prolong detentions.

Fourth Amendment principles must be read together, the search incident to arrest exception included. It is well-settled that a traffic stop

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[7] In *In re Arturo D.*, this Court upheld officers' authority to conduct a limited search of a vehicle "for the narrow purpose of discovering required documentation that the driver had failed to produce upon demand and that was needed for the officer to issue a citation." (*In re Arturo D.* (2002) 27 Cal.4th 60, 75 [115 Cal.Rptr.2d 581, 38 P.3d 433].) But the analysis did not depend on the timing of the search. Rather, the Court approved the search because the officers did not conduct a full search and needed the license and registration information in order to issue the citation.

"can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." (*Illinois v. Caballes* (2005) 543 U.S. 405, 407 [125 S.Ct. 834, 160 L.Ed.2d 842]; see also *Rodriguez*, *supra*, 135 S.Ct. at pp. 1614-1615.) Allowing officers to conduct exploratory searches for evidence of unrelated crimes will lead to unconstitutionally-prolonged detentions.

This Court should construe the search incident to arrest exception in harmony with the Fourth Amendment rule expressed in *Caballes* and *Rodriguez*. "[W]hen constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted. [Citations.]" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371 [285 Cal.Rptr. 231, 815 P.2d 304].) There is no necessary war between the scope of the incident search exception and the constitutional obligation not to unduly prolong a detention. But Respondent's construction may very well provoke one.

We know the result of the ruling below: DOJ has instructed officers that so long as they have probable cause for any minor infraction, they may conduct an intrusive, exploratory search and decide later whether to release, cite, or arrest. But officers who prolong resolving an infraction, just to search for evidence of unrelated criminal activity, will violate *Caballes* and *Rodriguez*. This Court can avoid this conflict by construing the search

incident to arrest exception to require that an arrest have taken place or be underway at the time of the search.

C. A Possible Alternative Rule—a Search Is Lawful So Long as Any Arrest Follows—Also Cannot Withstand Scrutiny.

The prosecution argues that the search of Mr. Macabeo should be upheld because officers "had probable cause to arrest him for the traffic infraction at the time of the search, and the search was substantially contemporaneous with the arrest." (RB 18.) Respondent *may* be suggesting an alternative rule: the Fourth Amendment requires that an arrest in fact take place, but a post-search arrest may validate an earlier search.

Under this search-first, arrest-later variant, the legality of the search will depend on post-search events. Justifying the search based on later events conflicts with the basic principle that a search must be lawful at its inception, and fails to give clear guidance to officers. Nor is this rule supported by *Rawlings v. Kentucky* (1980) 448 U.S. 98 [100 S.Ct. 2556, 65 L.Ed.2d 633] or older cases addressing whether a search is contemporaneous with an arrest.

1. Allowing an after-the-fact arrest to validate an earlier search conflicts with the principle that a search must be lawful at its inception, and fails to give clear guidance to police.

It is difficult to state a more basic Fourth Amendment principle than a search must be lawful at its start. In determining whether a search was reasonable, courts ask "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." (*Terry*, *supra*, 392 U.S. at p. 20.) Put more plainly, a search "is good or bad when it starts . . . ." (*United States v. Di Re* (1948) 332 U.S. 581, 595 [68 S.Ct. 222, 92 L.Ed. 210].) This makes sense, since a Fourth Amendment violation "is 'fully accomplished' at the time of an unreasonable governmental intrusion. [Citation.]" (*United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 264 [110 S.Ct. 1056, 108 L.Ed.2d 222]; see also *United States v. Balsys* (1998) 524 U.S. 666, 692 [118 S.Ct. 2218, 141 L.Ed.2d 575] ["breaches of privacy are complete at the moment of illicit intrusion . . . ."].) The U.S. Supreme Court's search incident to arrest decisions apply these principles by requiring "the fact" of an arrest that is complete or at least underway in order to justify a search. "[T]he *fact of prior lawful arrest* distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." (*Thornton v. United States* (2004) 541 U.S. 615, 630 [124 S.Ct. 2127, 158 L.Ed.2d 905] (conc. opn. of Scalia, J., first italics added, second italics original).)

The search-first, arrest-later variant departs from these bedrock principles, with unacceptable consequences. Most significantly, the legality of the search will depend on an officer's actions *after* the search is completed. Without doubt, there will be cases where a search is fruitless, and a suspect will be released without arrest. Under a rule that requires an

eventual arrest to validate a search, this search would violate the Fourth Amendment. And, of course, incentivizing an officer to arrest a suspect who would not otherwise be arrested—simply to immunize the officer for the unreasonable search—serves neither justice nor the purposes of the warrant exception, as Respondent seems to agree. (See RB 36 [arguing against a rule that would incentivize officers "to make custodial arrests routinely for all offenses where arrest is permitted under state statutory law . . . ."].)

Moreover, if the only probable cause to arrest is provided by an infraction that does not permit an arrest under state law (such as failing to stop at a stop sign), and the subsequent search is fruitless, the officer will truly be in an untenable position. The officer will have to choose one of two unlawful paths: (a) arrest the suspect in order to avoid *federal* civil rights liability for *a Fourth Amendment violation*, but thereby violate *state law* by arresting for a non-arrestable infraction; or (b) refrain from arresting in order to avoid possible disciplinary or state-law actions for violating *state* law, but thereby *violate the Fourth Amendment* by conducting an incident search without an arrest.

Relatedly, allowing an after-the-fact arrest to immunize an earlier unconstitutional search will fail to give police clear guidance in deciding whether to search or not. Time and again, the high court has emphasized the need for simple and clear rules for police. (See, e.g., *Atwater*, *supra*,

532 U.S. at p. 350 [rejecting a possibly difficult-to-apply rule that would restrict arrests to jailable offenses, noting that an officer's mistake would lead to "the prospect of evidentiary exclusion or (as [in *Atwater*]) personal § 1983 liability for the misapplication of a constitutional standard . . . ."]; *Riley*, *supra*, 134 S.Ct. at p. 2491 [rejecting some proposed fallback options for warrantless cell phone searches as "contraven[ing] our general preference to provide clear guidance to law enforcement through categorical rules."].) Officers can easily administer a simple rule requiring an arrest to be complete or underway before conducting a full custodial search. But search-first, arrest-later fails to give police clear guidance, and leaves them at risk for civil liability and departmental discipline.

2. Neither *Rawlings* nor older authority support search-first, arrest-later.

The search-first, arrest-later variant rests upon an expansive interpretation of *Rawlings*, the only U.S. Supreme Court case to uphold an incident search that preceded a formal arrest. The prosecution characterizes Mr. Macabeo's search as "substantially contemporaneous" with his arrest. (RB 18.) Then, citing *Rawlings*, Respondent argues that a search should be upheld so long as there was probable cause to arrest before the search and the "formal arrest . . . 'followed quickly on the heels' of the search." (*Ibid.*) But *Rawlings* does not support a broad search-first, arrest-later rule. Nor should this Court apply a more amorphous "substantially

contemporaneous" test in place of *Rawlings*, *Gant*, *Riley* and other recent authority.

Since Respondent's argument hinges on *Rawlings*, it is important to examine that case carefully, beginning with the facts. They show that Rawlings' arrest was actually underway when the search began: (1) Rawlings was already detained for 45 minutes by six police officers; (2) he was given *Miranda* warnings; and (3) he had just admitted that he owned the 1800 tablets of LSD and other narcotics in his companion's purse, sufficient quantities to convict him of drug trafficking. (*Rawlings, supra*, 448 U.S. at pp. 100-101.) These objective circumstances demonstrate that officers were taking control of Rawlings for the purpose of criminal prosecution when they physically seized and began searching him.

Second, the Supreme Court's repeated use of the word "formal" to qualify the word "arrest" indicates that the high court considered Rawlings' actual arrest to be already underway when he was searched. (See *Rawlings, supra*, 448 U.S. at p. 101 [after the search, the officer "then placed petitioner under *formal* arrest," italics added]; *id.* at p. 111 ["the *formal* arrest followed quickly on the heels of the challenged search," italics added].) Following the search, then, only a formality remained.

Third, if, as Respondent claims, *Rawlings* can be read to validate search-first, arrest-later, the search would have been upheld in *Knowles*. In *Knowles*, the State of Iowa argued that the officer had probable cause to

arrest for a traffic infraction, and Knowles' arrest "followed quickly on the heels" of the search. (Resp. Br., *Knowles v. Iowa*, 1998 U.S. S.Ct. Briefs LEXIS 667, 35, quoting *Rawlings*, *supra*.) Yet *Rawlings* was not employed to uphold Knowles' search (even though the same justice authored both opinions).

Fourth, the facts and circumstances of *Rawlings* caution against using the case to justify a sweeping transformation of the warrant exception. Officers had probable cause to arrest Rawlings after he "admitted ownership of the sizable quantity of drugs . . . ." (*Rawlings*, *supra*, 448 U.S. at p. 111.) Given that he was clearly going to be arrested on a narcotics charge, and his arrest was at least underway at the time of the search, Rawlings did not even raise an issue in the Supreme Court regarding the timing of the search and arrest. (AOB 20-21 fn. 9.) In the 35 years since the case was decided, the Court has never relied on *Rawlings*' one-sentence discussion of the timing of the search and arrest. What the high court has instead emphasized time and again is that it is the *fact* of an arrest that justifies an incident search (see AOB 17-18; *Riley*, *supra*, 134 S.Ct. at p. 2485) and, as Mr. Macabeo has explained, that the scope of the search must be tethered to the justifications for it. Under these circumstances, it is inappropriate to use the single sentence in *Rawlings* about timing to expand the warrant exception and sweep aside the more recent holdings in *Knowles*, *Gant*, and *Riley*.

Nor may Respondent rely on a more generalized notion that a search is good so long as there is probable cause to arrest at the outset and the later arrest is "substantially contemporaneous." The prosecution cites *People v. Terry* (1969) 70 Cal.2d 410, 429 [77 Cal.Rptr. 460, 454 P.2d 36] for this proposition (RB 19), but the "contemporaneous" language originated in older U.S. Supreme Court cases, the most significant of which is *Agnello v. United States* (1925) 269 U.S. 20 [46 S.Ct. 4, 70 L.Ed. 145].[8] *Agnello* and the other Supreme Court cases often employed this phrase to limit the *places* where searches could occur in relation to arrest; it captured more than a temporal requirement.[9] Since *Agnello* was decided 90 years ago, we have had much more specific guidance from the high court about incident searches. More recent cases provide direction—tied to the justifications for the warrant exception—as to the places and things that may be searched

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[8] *Terry* takes the phrase from *People v. Cockrell* (1965) 63 Cal.2d 659, 666 [47 Cal.Rptr. 788, 408 P.2d 116], which in turn cites *Agnello*. In *Agnello*, the search was not "contemporaneous" because officers first arrested the suspects in one location and then searched a home several blocks away. (*Agnello, supra*, 269 U.S. at pp. 30-31.) *Cockrell*—which imported the "contemporaneous" phrase into California—expressly acknowledged that the high court had not decided whether a search could precede an arrest, saying only that the phrase "does not preclude" that possibility. (*Cockrell, supra*, 63 Cal.2d at p. 666.)

[9] In addition to *Agnello*, *Cockrell* cites *United States v. Rabinowitz* (1950) 339 U.S. 56 [70 S.Ct. 430, 94 L.Ed.2d 653] [search of a one-room office upheld after a warrant arrest in that office], *Stoner v. California* (1964) 376 U.S. 483 [84 S.Ct. 889, 11 L.Ed.2d 856] [search of hotel room in California several days before arrest in Nevada was not incident to arrest], *Preston v. United States* (1964) 376 U.S. 367 [84 S.Ct. 881, 11 L.Ed.2d 777] [search of car towed to police station after arrest was too remote in place or time].

when there is the fact of an arrest.[10] *Rawlings* remains the only case where the high court has allowed a search right before the formality of arrest.

Finally, the prosecution suggests that Mr. Macabeo has somehow forfeited any claim that the search and subsequent arrest were not "substantially contemporaneous." (RB 23-24, citing *People v. Williams* (1999) 20 Cal.4th 119, 136 [83 Cal.Rptr.2d 275, 973 P.2d 52].) This is an odd argument given that the suppression hearing established the location and timing of the arrest and search. (1CT 60:13-61:2, 62:4-12, 77:15-22.) And any suggestion about lack of notice *to the district attorney* is doubly odd since it was the *prosecutor* who gave late notice. The prosecution originally opposed suppression on other grounds (1CT 38-41) but then submitted a supplemental brief shortly before the hearing to raise the search

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[10] Even if this Court were inclined to apply a loose "contemporaneous" test, all of the examples cited on pages 19-20 of Respondent's brief (other than *Terry*) involve defendants who were actually arrested for the offenses for which officers had probable case to arrest. (See AOB 22, fn. 12 [describing the court of appeal decisions except *People v. Gomez* (2004) 117 Cal.App.4th 531 [12 Cal.Rptr.3d 398], which is discussed *infra* at pp. 33].) In *Terry*, the officers *would* have arrested the defendant for the offenses for which they had probable cause, but he avoided capture. (*Terry, supra*, 70 Cal.2d at pp. 425, 429.) In a number of these cases, it is fair to characterize the searches as occurring during the arrests.

Respondent also cites *People v. Ingle* (1960) 53 Cal.2d 407, 413-414 [2 Cal.Rptr. 14, 348 P.2d 577] for the proposition that a search may precede an arrest, but in that case the arrest actually came first. In any event, *Ingle* relies upon *People v. Simon* (1955) 45 Cal.2d 645 [290 P.2d 531] for that statement. Mr. Macabeo respectfully suggests that *Simon* and its progeny have been displaced by more recent high court decisions, which afford greater respect for privacy. (See AOB 21 fn. 10, 43 fn. 20.)

incident to arrest theory. (1CT 44-46.) POST's trainer, a prosecutor, characterized the trial court proceedings this way: "[E]verybody here, the prosecutor, the magistrate who's hearing the motion, everybody's scratching around trying to come up with the right way to justify the search." (Transcript, *supra*, p. 2.)

In propounding a search-first, arrest-later rule, the prosecution puts more weight on *Rawlings* than that case may bear. Nor may Respondent rely upon a more amorphous "contemporaneous" doctrine that has been supplanted by decisions tethering the warrant exception to its justifications.

D. The Existing Requirement of an Actual Arrest or One That Is Underway Can Be Determined Objectively, Accommodates All of Law Enforcement's Legitimate Interests, and Compels Reversal.

"It is the fact of the lawful arrest which establishes the authority to search" (*Robinson*, *supra*, 414 U.S. at p. 235; see AOB 17-18), and *Rawlings* does not derogate from this principle. Mr. Macabeo has already explained why only a rule that demands a prior or ongoing arrest coheres with the justifications for the warrant exception, and provides clear guidance to police. Although Respondent asserts that an officer's subjective assessment of probable cause is not relevant to the validity of the search (RB 24-29), the fact of an arrest can be determined objectively, and the warrant exception should not be extended to merely hypothetical arrests. The necessity of an actual or ongoing arrest accommodates all of law

enforcement's legitimate interests. This principle requires reversal here.

1. Arrests are determined objectively.

An arrest is traditionally defined as seizing a person *for the purpose of prosecution.* (AOB 18-19; see also *California v. Hodari D.* (1991) 499 U.S. 621, 625 [111 S.Ct. 1547, 113 L.Ed.2d 690] [arrest can include merely touching the accused "by the party making the arrest *and for that purpose*," quoting Cornelius, Search and Seizure (2d ed. 1930) pp. 163-164, italics added].) Courts apply an objective test to distinguish an arrest from a lesser seizure. (See AOB 23-28.) Respondent does not dispute any of these points—nowhere does the prosecution contest the definition of arrest, that arrests are determined objectively, or that courts routinely distinguish stops from arrests. Nor does Respondent deny that, viewed objectively, Mr. Macabeo was not arrested until after his phone was searched. Instead, Respondent continues to insist that the officers' purpose in seizing Mr. Macabeo is irrelevant to the lawfulness of their actions. Not so. Purpose matters, and purpose is determined objectively.

In many instances, purpose is what will distinguish an arrest from a *Terry* stop or other seizure. (See *People v. Celis* (2004) 33 Cal.4th 667, 674 [16 Cal.Rptr.3d 85, 93 P.3d 1027] ["Important to this assessment . . . are the 'duration, scope, and purpose' of the stop. [Citation.]"].) Purpose may also distinguish a reasonable from an unreasonable search or seizure. In *Florida v. Jardines*, the high court held that "*whether* the officer's conduct

was an objectively reasonable search . . . depends upon the purpose for which [officers] entered" the premises. (*Florida v. Jardines* (2013) __U.S. __ [133 S.Ct. 1409, 1417, 185 L.Ed .2d 495], italics original; see also *Rodriguez*, *supra*, 135 S.Ct. at p. 1614 ["addressing the infraction is the purpose of the stop," which cannot last longer than necessary to effectuate that purpose].)[11]

Purpose matters here too: the lawfulness of the search depends on the *purpose* for Mr. Macabeo's continued seizure. If the detention was to facilitate a suspicionless search for evidence of other criminal activity, the search was beyond the scope of a lawful traffic stop or a limited *Terry* frisk. If officers detained Mr. Macabeo for the purpose of bringing him to court to effect his criminal prosecution, then he was under arrest and the search was lawful. Purpose is determined by what the officers' "behavior objectively reveals . . . ." (*Jardines*, *supra*, 133 S.Ct. at p. 1417.) Here the officers' behavior objectively reveals that Mr. Macabeo was not seized for the purpose of criminal prosecution (see AOB 24-28), and Respondent does not even attempt to argue otherwise.

Although it does not dispute that purpose may generally be

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[11] Purpose is relevant in other contexts. (See, e.g., *Indianapolis v. Edmond* (2000) 531 U.S. 32, 44 [121 S.Ct. 447, 148 L.Ed.2d 333] [lawfulness of suspicionless checkpoint stops turns on whether the "primary purpose" is "the ordinary enterprise of investigating crimes."].) *Jardines* and *Rodriguez* make clear that considerations of purpose are not limited to special needs or administrative search cases, as Respondent contends. (RB 25 fn. 12.)

established objectively, Respondent instead discusses precedents that apply where a search or seizure is lawful at its inception. In *Devenpeck v. Alford*, an officer arrested Alford for an offense for which the officer believed there was probable cause. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 150 [125 S.Ct. 588, 160 L.Ed.2d 537].) Alford claimed that there was no probable cause, but the high court determined that his arrest would be lawful if "the facts known to the arresting officers give probable cause to arrest" for a different offense. (*Id.* at p. 155; see also *Whren*, *supra*, 517 U.S. at p. 813 [officer had probable cause for a traffic infraction and subjective intentions "play no role in ordinary, probable-cause" analyses]; *Ashcroft v. al-Kidd* (2011) __ U.S. __ [131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149] [arrest on proper material-witness warrant may not be challenged for pretextual use of the warrant].) *Devenpeck* does not "validate" "hypothetical" or unexecuted future arrests, as Respondent claims (RB 26)—*Devenpeck* does not hypothesize an arrest that never took place. Alford was *in fact arrested*, and his arrest was not unlawful because officers had another motivation for actually effecting it or had probable cause for a different offense.

Devenpeck, *Whren*, and *al-Kidd* do not speak to searches or arrests that could only be justified by hypothetical actions that police could have but did not take. Had officers actually arrested Mr. Macabeo based on probable cause for the traffic infraction, they could have searched him based on *the fact* of that prior arrest even if the arrest was motivated by a

desire to conduct a search. But no arrest took place prior to the search, and so these cases do not aid the prosecution. Purpose is relevant to *the fact* of an arrest, and the officers indisputably had no purpose to arrest Mr. Macabeo prior to the search.

2. This rule accommodates the prosecution's legitimate interests.

All of the justifications for the incident search warrant exception—officer safety, preservation of evidence, reduced privacy of arrestees—are respected by requiring an actual arrest or one that is underway prior to a search. Officers can take all necessary steps to secure evidence and their own safety when they arrest suspects. This rule is simple, easy for courts to administer objectively, and straightforward for officers to apply, since police will presumably know their purpose when they seize individuals. And there is a safety valve, the inevitable discovery doctrine, that may also come into play.

Under this doctrine, unlawfully obtained evidence may be admitted if it is shown by a preponderance that the evidence would have been found later through other means. (See *Nix v. Williams* (1984) 467 U.S. 431, 444 fn. 5, 449-450 [104 S.Ct. 2501, 81 L.Ed.2d 377] [admitting evidence that a search team "inevitably" would have discovered]; *People v. Redd* (2010) 48 Cal.4th 691, 721 [108 Cal.Rptr.3d 192, 229 P.3d 101] [upholding an incident search, and ruling in the alternative that the defendant would have

been arrested anyway and the evidence inevitably discovered, citing *Nix*]; see also *Murray v. United States* (1987) 487 U.S. 533, 542 [108 S.Ct. 2529, 101 L.Ed.2d 472] [applying the related "independent source" rule, and remanding to determine "if the agents' decision to seek the warrant was prompted" by what they saw in a prior unlawful search].)

Taking these doctrines together, evidence will be admitted if the prosecution shows that an arrest was complete or underway at the time of the search, or that the suspect would inevitably have been arrested. By rejecting these principles, the prosecution makes plain what it seeks here: carte blanche to conduct intrusive searches on individuals whom officers stop for minor infractions but have no intention to arrest. This "unbridled discretion to rummage at will among a person's private effects" (*Gant*, *supra*, 556 U.S. at p. 345) ought not be left to police "engaged in the often competitive enterprise of ferreting out crime." (*Johnson v. United States* (1948) 333 U.S. 10, 14 [68 S.Ct. 367, 92 L.Ed. 436].)

3. Mr. Macabeo's conviction must be reversed.

Under a proper view of the search incident to arrest warrant exception, Mr. Macabeo's conviction must be overturned. By any measure, no arrest had taken place or was underway at the time of the search. The officers rummaged through Mr. Macabeo's phone without a warrant or, indeed, even probable cause to believe that it contained evidence of any crime. The photographs on the phone were seized in violation of the Fourth

Amendment. Since his prosecution was wholly based on the photographs, Mr. Macabeo's conviction must be reversed.

E. The Good Faith Exception to the Exclusionary Rule Does Not Permit Admission of the Evidence Obtained Through the Unconstitutional Search of Mr. Macabeo's Cell Phone.

Respondent acknowledges the high court held that the search incident warrant exception does not apply to searches of the digital contents of cell phones. (RB 40.) It nonetheless asserts that the evidence derived from the search is admissible because the police conducted it "in objectively reasonable reliance on binding precedent from this Court," specifically *People v. Diaz* (2011) 51 Cal.4th 84 [119 Cal.Rptr.3d 105, 244 P.3d 501]. (RB 40, 42.) But *Diaz* only addresses cell phone searches incident to arrest (AOB 50-53) and, as Mr. Macabeo has shown, there was no valid incident search here.

Respondent directs the Court to a series of cases permitting admission of cell phone data obtained after *Diaz* and before *Riley* (RB 44), but these cases support Mr. Macabeo, as each actually involved a valid search incident to arrest. (See *United States v. Garcia* (N.D. Cal. 2014) 68 F.Supp.3d 1113, 1120; *United States v. Peel* (N.D. Cal. Aug. 25, 2014) 2014 WL 4230926, *7.) More on point is *United States v. Martinez* (N.D. Cal. Aug. 12, 2014) 2014 WL 3956677, in which the court rejected the claim that *Diaz* authorized the warrantless search of a cell phone where there was no incident search. It explained that it "need not decide whether

Davis and *Diaz* apply in light of *Riley*, because on this record, *the search of Martinez's iPhone was not incident to his arrest.*" (*Id.* at *4, emphasis added.) The same is true here.

Respondent then seeks to rely on the more general exclusionary rule principles set out in *Herring v. United States* (2009) 555 U.S. 135 [129 S.Ct. 695, 172 L.Ed.2d 496], suggesting that application of the good faith exception is appropriate because the officers' conduct was not sufficiently deliberate or culpable to trigger exclusion. (RB 45-46.) But *Davis* specifically sets out the test for determining whether case law can serve as the basis for application of the good faith exception to the exclusionary rule. (AOB 48-50.) In *Davis*, the high court held that "when binding appellate precedent *specifically authorizes* a particular police practice," the "deterrent effect of exclusion in such a case can only be to discourage the officer from do[ing] his duty. [Citation.]" (*Davis, supra*, 131 S.Ct. at p. 2429, internal quotation marks omitted.) The general balancing principles of *Herring* may apply in other contexts, but not where the high court has already struck the rule.[12]

[12] How far the prosecution has strayed from the high court's guidance is apparent from its reformulation of the rule of *Davis*. The prosecution suggests that "because there was case law supporting the officers' conduct—and no case law prohibiting it," the good faith exception should apply. (RB 46.) *Davis* requires *binding* authority directly authorizing an officer's conduct, not simply an absence of contrary authority.

Respondent contends that *People v. Gomez* (2004) 117 Cal.App.4th 531 [12 Cal.Rptr.3d 398] "upheld a search conducted during a de facto arrest for a traffic infraction." (RB 46.) But this mischaracterizes *Gomez*, which does not even involve the search incident to arrest doctrine. The defendant's argument was that "his prolonged detention was unreasonable and constituted a de facto arrest without probable cause." (*Gomez*, *supra*, 117 Cal.App.4th at p. 537.) The court agreed that the detention was unduly prolonged, but approved it as a de facto arrest because the police had probable cause, based either on evidence of involvement in narcotics trafficking or the traffic violation. (*Id.* at p. 538.) *Gomez* provides no basis for officers to believe that their search of Mr. Macabeo was lawful.

Finally, even if this Court concludes that Mr. Macabeo was subjected to a valid search incident to arrest, *Diaz* still cannot serve as the basis for application of the good faith exception to the exclusionary rule. At the time the officers acted, the Court had not yet expanded the search incident to arrest doctrine to encompass conduct of the type engaged in here. The prosecution rejects this argument by suggesting that they do not seek an expansion. (RB 46.) As Mr. Macabeo demonstrated in Part A, *supra*, this is incorrect. A post hoc expansion of the search incident to arrest doctrine should not excuse officers from the consequences of conduct that, at the time it took place, was inconsistent with prevailing doctrine. *Davis* provides no basis to admit this unconstitutionally-obtained evidence.

CONCLUSION

For the reasons set forth here and in the Appellant's Opening Brief, the decision below should be reversed.

Dated: October 30, 2015

Respectfully submitted,

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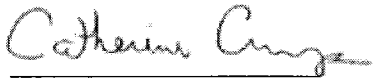
CERTIFICATION OF WORD COUNT

Pursuant to Rules 8.204(c)(1) and 8.520(d)(2), I hereby certify that, according to our word processing software, the word count for the attached APPELLANT'S REPLY BRIEF ON THE MERITS is 8,350 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 30, 2015 at Berkeley, California.



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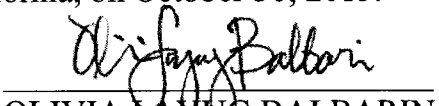

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