No. 16-1225

In the Supreme Court of the United States

JACQUELINE HEAVEN,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

REPLY BRIEF FOR PETITIONER

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For many years, the lower courts have been deeply divided over the meaning of a single sentence in *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980): "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." Many lower courts wrongly understand this sentence to have overruled a century of caselaw and to have newly authorized searches incident to arrest before the arrest even begins. Pet. 6-17. But many other lower courts recognize that *Rawlings* did not change the traditional rule requiring searches incident to arrest to take place during or after the arrest. Pet. 18-21.

In the jurisdictions adhering to the traditional rule, the exception to the warrant requirement is for searches incident to *arrest*. In the jurisdictions that have misunderstood *Rawlings*, by contrast, the exception is for searches incident to *probable cause for an arrest*. In the latter jurisdictions, if the police have probable cause, they can search first, see what they find, and only then decide whether to make the arrest. This result would have been unthinkable for most of the 20th century, because it is so contrary to the traditional understanding of searches incident to arrest.

In our case, the police took full advantage of this license to search first and arrest later. Officer Schenk had probable cause to arrest Jacqueline Heaven for shoplifting. Pet. App. 8a. But he did not arrest her for shoplifting. Instead, he searched her purse. Pet. App. 2a. He found no stolen items, but he

found drugs. He then arrested Heaven for possessing drugs. Pet. App. 2a. When Heaven challenged the lawfulness of the search, the Court of Appeals justified the search as incident to the subsequent arrest. Pet. App. 7a-8a.

Colorado does not dispute that before *Rawlings* this Court consistently required searches incident to arrest to take place during or after the arrest. Nor does Colorado dispute that many lower courts, relying on *Rawlings*, have allowed searches incident to arrest preceding the arrest. Rather, Colorado claims that Jacqueline Heaven actually *was* under arrest before she was searched (BIO 5-7), and that the lower court cases on both sides of the split can be reconciled (BIO 8-18). These claims are simply incorrect.

I. The Court of Appeals below correctly found that Jacqueline Heaven was searched before she was arrested.

As we explained in the certiorari petition, the trial court thought the arrest preceded the search (Pet. 2-3), but the Court of Appeals disagreed. The Court of Appeals explicitly found that the search came first. Pet. App. 2a ("The search of Heaven's purse did not reveal any shoplifted items, but revealed drugs and drug paraphernalia. Officer Schenk then placed Heaven under arrest."); Pet. App. 8a ("That Officer Schenk's search preceded his formal arrest of Heaven is not determinative of the lawfulness of the search.").

The Court of Appeals decided the case on the basis of this finding that the search preceded the arrest. The Court of Appeals held: "if an officer is entitled to make an arrest on the basis of the information then

available to the officer, there is nothing unreasonable in the officer's conducting a search before, rather than after, the actual arrest." Pet. App. 7a (citation and internal quotation marks omitted). This is precisely the erroneous view that has been spreading among the lower courts since *Rawlings*. The Court of Appeals held that so long as Schenk had probable cause to arrest Heaven, he could search her without a warrant and arrest her afterwards.

The Brief in Opposition overlooks these passages from the Court of Appeals' opinion. Colorado relies instead on an earlier portion of the opinion, Pet. App. 4a-6a, but this portion of the opinion does not support Colorado's view either.

In the portion of the opinion on which Colorado relies, the Court of Appeals observed that "the trial court did not clearly articulate the legal standard for arrest." Pet. App. 5a. The trial court took the view that an arrest occurs when a person would reasonably believe she is not free to leave, but the Court of Appeals held that the proper standard is whether a reasonable person "would have believed that she was being arrested, rather than merely temporarily detained for a brief investigation." Pet. App. 5a (brackets and internal quotation marks omitted).

The Court of Appeals concluded this portion of the opinion charitably, by observing that although the trial court had misstated the law, "we cannot conclude that the court's articulation of the 'free to leave' standard was in error," because the "free to leave" language had appeared in the briefs, and because the trial court "correctly indicated that whether a person is told they are free to leave is a factual consideration in determining whether that person is

under arrest." Pet. App. 6a. This is apparently the sentence on which Colorado relies, in claiming (BIO 6-7) that the Court of Appeals approved the trial court's finding that arrest came before the search. But the Court of Appeals said nothing of the kind. The Court of Appeals did not find that the arrest preceded the search. Nor did the Court of Appeals approve the trial court's conclusion that such was the order of events. To the contrary, the Court of Appeals held that the trial court misstated the law when it found that the arrest came first. In the rest of its opinion, the Court of Appeals held that the search was lawful despite the fact that it took place before, not after, the arrest.

The Court of Appeals was correct in finding that Schenk searched Heaven's purse before he arrested her. A reasonable person in Heaven's position would have believed that she was being temporarily detained for a brief investigation, not that she was being arrested. Schenk and Heaven were at a Walmart. Schenk did not draw his gun. He did not place handcuffs on Heaven. He did not physically restrain her. He did not tell her she was under arrest. He did not tell her that she was not free to leave. He did not accuse her of shoplifting, or indeed of committing any crime. In short, there were no indicia of arrest. The arrest came only after the search, when, to his great surprise, Schenk unexpectedly found drugs instead of Walmart merchandise in Heaven's purse. As the case comes to this Court, therefore, it squarely raises the question whether a warrantless search incident to arrest may precede the arrest.

II. The division among the lower courts is real.

Colorado also errs in claiming the lower court cases are reconcilable. Colorado arrives at this conclusion by ignoring the holdings of these cases, and by focusing instead on whether "the supporting rationales" (BIO 15) for a warrantless search incident to arrest were present or absent in each case. But none of these cases was decided on that ground. In each case, the crucial question was whether a search incident to arrest may precede the arrest.

On that question, the split is quite large, and indeed it has grown even larger since we filed our certiorari petition. *See United States v. Diaz*, 854 F.3d 197, 205-09 (2d Cir. 2017) (relying on *Rawlings* to hold that a search incident to arrest may precede the arrest); *see also id.* at 207-08 (disagreeing with the New York Court of Appeals' contrary view in *People v. Reid*, 26 N.E.3d 237 (N.Y. 2014)), 208 n.15 (disagreeing with the California Supreme Court's contrary view in *People v. Macabeo*, 384 P.3d 1189 (Cal. 2016)).

Moreover, Colorado misunderstands several of the cases that make up the split. For example, Colorado asserts (BIO 16) that in *Macabeo*, "the officers never made an arrest." In fact, the officers did arrest Macabeo, right after they searched him. *Macabeo*, 384 P.3d at 1192 ("Defendant was then arrested."). The California Supreme Court rejected the state's theory "that probable cause to arrest will always justify a search incident as long as an arrest follows." *Id.* at 1197. Because the search preceded the arrest, the court held, "the search did not qualify as incident to arrest under the Fourth Amendment." *Id.* If our case

had arisen in California, the evidence would have been suppressed.

Colorado similarly misunderstands (BIO 16-17) the line of Maryland cases holding that "[i]t is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search." *Bouldin v. State*, 350 A.2d 130, 132 (Md. 1976); *see also Bailey v. State*, 987 A.2d 72, 95 (Md. 2010) (quoting this sentence from *Bouldin*); *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."). It could hardly be clearer that in Maryland the search may not precede the arrest. Colorado's recitation of the facts of *Bailey* and *Belote* ignores that in both cases the Maryland Court of Appeals found searches unlawful precisely because the police had not yet commenced an arrest. *Bailey*, 987 A.2d at 95 ("because Officer Lewis did not make a lawful arrest when he seized the petitioner, the subsequent warrantless search of the petitioner was not within an exception to the warrant requirement"); *Belote*, 981 A.2d at 1262 (reversing denial of suppression motion because at the time of the search the officer had not "manifested an intention to effect a custodial arrest").

Colorado likewise misunderstands (BIO 16) *Ochana v. Flores*, 347 F.3d 266 (7th Cir. 2003). The police detained Ochana without arresting him. *Id.* at 268. They searched his car, found drugs, and then placed him under arrest. *Id.* at 268-69. The Seventh Circuit held that the search could not be justified as incident to the arrest, because in order to search a vehicle incident to arrest, "the occupant of the vehi-

cle must actually be held under custodial arrest." *Id.* at 270. (The Seventh Circuit went on to uphold the search under a different exception to the warrant requirement. *Id.*) Colorado's description of *Ochana* completely overlooks all of these points.

We could make similar corrections to Colorado's descriptions of many of the other cases that make up the split, but we're already beating a dead horse. Colorado's capsule summaries studiously ignore the most important thing about each case—whether the court allowed a search incident to arrest that preceded the arrest.

Finally, Colorado appears to misunderstand our argument on the merits. We are not saying, as Colorado seems to think (BIO 9-10 n.2), that the lawfulness of a search incident to arrest should turn on the subjective motivation of the officer. We *are* saying that the lawfulness of a search incident to arrest should turn on the objective fact of whether it precedes the arrest. The traditional rule, going back to the common law, has always been that a search incident to arrest must actually *be* incident to an arrest—that is, the search may not precede the arrest. Pet. 6-9 (citing cases). The police may not stop someone without making an arrest, conduct a full-blown warrantless search, make an arrest afterwards, and then justify the search as incident to the arrest. *See Maryland v. Buie*, 494 U.S. 325, 332 (1990) (when police make a *Terry* stop, they may conduct only "a limited pat-down for weapons," not a full-blown search).

As we explained in our certiorari petition (Pet. 10-13), many of the lower courts have taken *Rawlings v. Kentucky* in a direction the *Rawlings* Court did not

intend. Many other lower courts, by contrast, have recognized that in *Rawlings* the Court did not mean to depart from the traditional rule. This case provides a perfect opportunity to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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