No. 06-1082

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether an arrest (and incident search) for a nonarrestable offense is unreasonable under the Fourth Amendment because the legislature has determined that an arrest furthers no governmental interest.

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OPINIONS BELOW

The decision of the Supreme Court of Virginia (Pet. App. 1-11) is published at 636 S.E.2d 395 (Va. 2006). The *en banc* decision of the Court of Appeals of Virginia (Pet. App. 12-34) is published at 622 S.E.2d 253 (Va. App. 2006) (*en banc*). The panel decision of the Court of Appeals of Virginia (Pet. App. 35-56) is published at 609 S.E.2d 74 (Va. App. 2005).

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has

jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 19.2-74 of the Virginia Code provides, in pertinent part:

> A.1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such

> person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.
>
> Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT

1. Virginia law defines four classes of misdemeanor offenses. Va. Code § 18.2-11. For such offenses, the State has generally forbidden arrest. If an individual commits one of these offenses, officers may issue the individual a ticket, referred to under state law as a "summons." *Id.* § 19.2-74, 46.2-388. They may "detain[]" the individual in order to "take [his] name and address * * * and issue [the] summons." *Id.* § 19.2-74(A)(1). But, as long as the officer does not believe the individual poses a danger or will fail to comply with the summons, "[u]pon the giving by such person of his

written promise to appear at such time and place, the officer shall forthwith release him from custody." *Id.*[1]

Virginia enacted its citation arrest statute to conform to standards promulgated by the American Bar Association that called for states to subject minor offenses only to citation, not arrest. *See* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARD 2.2 (1968). The Virginia Supreme Court sponsored, and the State financed, a study to evaluate the ABA's recommendations. The study recognized that, with the exception of provisions relating to traffic offenses, there was at that time "no other authority in Virginia authorizing a police officer to release a person charged with other offenses by the issuance of a summons or citation." RICHARD E. WALCK *ET AL.*, COMPARATIVE

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[1] The Attorney General has explained that, with respect to misdemeanors, the "citation release" statute supersedes the more general authority to arrest for an offense committed in the officer's presence. *See* 1991 Va. A.G. 127 (discussing Va. Code § 19.2-81); *see also* Va. Code § 46.2-936 (recognizing force of local court orders); *id.* § 46.2-936 (if an officer detains an individual for a motor vehicle offense "punishable as a misdemeanor," the officer shall "take the name and address of such person and the license number of his motor vehicle and issue a summons"; "Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody."); *id.* § 46.2-937 ("For purposes of arrest, traffic infractions shall be treated as misdemeanors. Except as otherwise provided by this title, the authority and duties of arresting officers shall be the same for traffic infractions as for misdemeanors."); *id.* § 19.2-76.2 (providing for the service by mail of a summons "for a violation of a county, city or town parking ordinance" or "for a violation of a county, city or town trash ordinance punishable as a misdemeanor"; even if the individual does not appear on the date specified by the summons, no arrest is permitted "of a person summoned by mailing").

ANALYSIS OF AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE WITH VIRGINIA LAWS, RULES, AND LEGAL PRACTICE II-3 (undated). The Virginia Legislature adopted the study's recommendation that "[c]onsideration should be given to making [the use of a summons] mandatory for minor offenses." *Id.* at II-4.

2. On February 20, 2003, two city police detectives detained respondent David Lee Moore for driving with a suspended license, which is a Class 1 misdemeanor under Virginia law. Va. Code § 46.2-301(C). Notwithstanding the fact that Virginia law generally forbids officers from arresting motorists for this conduct, the detectives who stopped respondent decided to make a full custodial arrest rather than write him a ticket. The officers later conceded that they had no reason to make an arrest rather than issue the summons required by law, and the State did not attempt to establish that the officers had made an innocent mistake. Rather, when asked why they did not issue a summons, one of the detectives answered that it was "[j]ust our prerogative, we chose to effect an arrest." Pet. App. 2 n.2.

The two detectives illegally handcuffed respondent, placed him in a police vehicle, and took him not to a police station but to his hotel room. There, they conducted a full search of respondent's person and found crack cocaine in his pocket. *Id.* at. 2, 14-15.

The State charged respondent with possession with intent to distribute cocaine. The trial court denied respondent's motion to suppress the fruits of the search under the Fourth Amendment. *Id.* at 37. In a bench trial, respondent was convicted and sentenced to five years imprisonment. *Id.* On respondent's appeal, a panel of the Court of Appeals of Virginia reversed (*id.*

at 42-44) but the full court reinstated the conviction by a divided vote (*id.* at 13, 27).

The Supreme Court of Virginia, in turn, unanimously held that the officers' conduct violated the Fourth Amendment. The court rejected petitioner's assertion that the search of respondent's person was constitutional because it was conducted incident to an arrest supported by probable cause. *Id.* at 6-7. That argument, the court explained, rested on the incorrect premise that the Fourth Amendment permits a warrantless search of an individual whenever an officer chooses to arrest him, even if state law forbids the officer from conducting an arrest for that particular offense. *Id.* at 7. The court explained that the Fourth Amendment generally prohibits warrantless searches, subject to limited exceptions that include "a search incident to arrest exception * * * which allows a full field-type search of the person incident to a lawful custodial arrest." *Id.* at 5. The court stressed, however, that this exception does not extend to every case in which officers have probable cause to believe that an individual has violated the law. To the contrary, this Court's decision in *Knowles v. Iowa*, 525 U.S. 113 (1998), established "that the Fourth Amendment forbids expansion of the search incident to arrest exception to include a search incident to citation." Pet. App. 6.

3. This Court subsequently granted certiorari. 128 S. Ct. 28 (2007).

SUMMARY OF ARGUMENT

This Court has squarely held that an arrest for a state law offense and attendant search are unconstitutional when forbidden by state law. The

Fourth Amendment permits a search incident only to a "lawful arrest." *E.g.*, *United States v. Robinson*, 414 U.S. 218, 224 (1973). In *Johnson v. United States*, this Court applied that rule in holding that an arrest in violation of Washington law also violated the Fourth Amendment because "[s]tate law determines the validity of arrests without warrant." 333 U.S. 10, 15 n.5 (1948). The Court subsequently sustained the arrest in *Michigan v. DeFillippo* only because it comported with Michigan arrest law, reasoning that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." 443 U.S. 31, 36 (1979).

Those precedents reflect the principle that the Fourth Amendment's prohibition on "unreasonable" searches and seizures requires balancing the individual and governmental interests implicated by the police practice in question. Under that well-settled standard, petitioner loses. Officers here arrested respondent for a misdemeanor offense that is nonarrestable. The arrest and subsequent search were significant intrusions on respondent's liberty and privacy that were subject to the protections of the Fourth Amendment. On the other side of the balance, however, Virginia's prohibition on arrest embodies the State's determination that taking an individual into custody for such conduct does not further any governmental interest. To the contrary, the arrest squanders scarce police resources and is wholly unnecessary to ensure that the subject is held to account for the offense. The arrest was accordingly unreasonable.

The role of state law in this case is thus not to deem an otherwise constitutional arrest violative of the Fourth Amendment. Virginia's arrest law does not

trump the United States Constitution. Rather, to conduct a seizure or search under the Fourth Amendment, the government must have a good reason. Here it has none. The assessment of governmental interests in the Fourth Amendment balancing inquiry properly accounts for the legislature's determination that this intrusion on individual liberty is in fact *contrary* to the government's own interests. Because Virginia has, through its legislature, expressly disavowed any assertion that it has an interest in taking an individual into custody for this offense, the arrest is necessarily unreasonable.

An example illustrates the point. Assume hypothetically that, during the traffic stop of respondent, the officers had seen crack cocaine in plain view. Consistent with the Fourth Amendment, they then could have seized the drugs and placed respondent under arrest because drug offenses are arrestable. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). Virginia's prohibition on misdemeanor arrests would be irrelevant in that circumstance. In this case, by contrast, petitioner defends the arrest *only* on the ground that Virginia makes it a crime to drive with a suspended license. But because that conduct is nonarrestable under Virginia law, no justification exists under the Fourth Amendment that made it "reasonable" to take respondent into custody.

The statutes relevant to the Fourth Amendment reasonableness determination are thus the narrow but critical group of provisions that determine whether conduct is arrestable *vel non*. Petitioner cites a variety of other restrictions on the process of conducting an arrest, such as rules regarding whether officers must be in uniform and whether arresting officers must be

within their own jurisdictions. But the Solicitor General correctly acknowledges that provisions such as those were "enacted for reasons other than the protection of Fourth Amendment interests" (Br. 6), and this Court has held that such "trivialities" do not implicate the Fourth Amendment reasonableness determination. *Whren v. United States*, 517 U.S. 806, 815 (1996). By contrast, the fundamental legislative judgment that conduct is nonarrestable because an arrest furthers no governmental interest is centrally relevant to the determination of constitutional reasonableness.

Petitioner asserts that legislative determinations – and state legislative determinations in particular – are irrelevant under the Fourth Amendment. *Johnson* and *DeFillippo* hold precisely the contrary. Petitioner's argument also cannot be reconciled with many other cases. Nore does it make sense: an arrest for a state law offense plainly violates the Fourth Amendment if the State actually defines that conduct as legal. In that scenario, the arrest is unreasonable because it is unjustified. The same is true here – there is no justification for the seizure and incident search of respondent.

Petitioner's remaining argument is that it is sufficient that officers had "probable cause" to believe that respondent had committed an offense under state law. But this Court has repeatedly rejected the argument that probable cause is a license to conduct any "search" or "seizure" that officers please. *E.g.*, *Knowles v. Iowa*, 525 U.S. 113 (1998) (probable cause does not justify search of individual's person); *Payton v. New York*, 445 U.S. 573 (1980) (probable cause does not justify entry into the home to conduct arrest). Under

the bedrock Fourth Amendment balancing inquiry, the police practice in question must be tailored to further the asserted governmental interest – here, enforcing the prohibition on driving with a suspended license. Probable cause to believe respondent had committed that offense did justify the initial traffic stop because officers were entitled to issue him a ticket. But the further arrest and incident search violated the Fourth Amendment because they did not further any legitimate governmental purpose.

The judgment should accordingly be affirmed.

ARGUMENT

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment (*see Mapp v. Ohio*, 367 U.S. 643, 655 (1961)) provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. In this case, officers subjected respondent to a prototypical "seizure" and "search," which accordingly can be sustained as constitutional only if "reasonable." The Virginia Supreme Court's unanimous holding that the officers' conduct was unreasonable under the Fourth Amendment because they arrested respondent for a state law offense that the State classifies as nonarrestable comports with this Court's precedents. No state interest justifies arresting someone for

conduct that the state already has already determined does not justify imposing on a person's liberty and privacy in that manner.

I. An Arrest For An Offense That State Law Deems Nonarrestable Is Unreasonable Because It Furthers No Substantial Governmental Interest.

A. An Arrest And Search Constitute Significant Intrusions On Individual Liberty That Are "Reasonable" Under The Fourth Amendment Only If Justified By A Significant Governmental Interest.

As the text of the Fourth Amendment specifies, the "touchstone" of constitutionality is "the reasonableness in all the circumstances" of the law enforcement practice at issue. *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (citations omitted). The reasonableness inquiry balances "on the one hand, the degree to which [a seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (internal citations omitted); *see, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). More specifically, "in judging reasonableness," this Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

Take traffic stops as an example. "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendment[]." *Prouse*, 440 U.S. at 653. But when officers "have probable cause to believe that a traffic violation has occurred," a traffic stop is "reasonable"; the officers' obvious interest in stopping the individual in order to issue a ticket outweighs the imposition that results from the brief seizure. *Whren v. United States*, 517 U.S. 806, 810 (1996).

The officers in this case had probable cause to believe that respondent had committed a misdemeanor offense. It was therefore reasonable for them to stop his vehicle and issue him a ticket. If respondent had then been ticketed and allowed to go on his way, no Fourth Amendment problem would have arisen.

But the officers instead placed respondent in custody. An arrest "is a *wholly different* kind of intrusion upon individual freedom" from a limited traffic stop (*Terry v. Ohio*, 392 U.S. 1, 26 (1968) (emphasis added)):

- "[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984); *see also Prouse*, 440 U.S. at 653 ("the purpose of the stop is limited and the resulting detention quite brief"). By contrast, during a custodial arrest, the subject is placed completely within the government's control for a significant period of time, potentially indefinitely.

- A traffic stop does not authorize a search of the individual or his vehicle. *Knowles v. Iowa*, 525 U.S.

113 (1998). By contrast, as this case well illustrates, an arrest is almost invariably combined with another intrusion on the individual's privacy in the form of a search incident to arrest of his person and surroundings. *See United States v. Robinson*, 414 U.S. 218, 224 (1973) (person); *Chimel v. California*, 395 U.S. 752, 763 (1969) (surroundings).

- "[C]ircumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of police," in part because a stop "is public, at least to some degree." *Berkemer*, 468 U.S. at 438. By contrast, in a custodial arrest, the individual, already in handcuffs, will often be placed in the rear of a police car and transported to a jail. He may be cut off from all contact with his family and friends, with the exception of a single telephone call. A judicial officer might not review the decision to detain the individual for as long as two days. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

- Finally, "questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." *Berkemer*, 468 U.S. at 437-38.

When, as in this case, the severity of an intrusion on liberty or privacy escalates beyond a mere brief stop to a full arrest, the balancing required by the Fourth Amendment "reasonableness" inquiry necessarily requires an equivalently enhanced governmental interest to justify that significant intrusion on individual liberty and privacy. It is not enough that the initial stop was justified. This Court has firmly rejected the proposition that "simply because some

interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed." *Chimel*, 395 U.S. at 767 n.12. The constitutionality of a seizure instead depends on whether the *particular police practice* in question – here, the arrest – is tailored to the asserted governmental interest. "The scope of [a] detention must be *carefully tailored* to its underlying justification" (*Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (emphasis added)), and an intrusion that "is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope" (*Terry*, 392 U.S. at 18).

B. A Legislative Determination That Conduct Is Not Arrestable Embodies A Definitive Judgment That The Government's Interests Are Not Furthered By Custodial Detention.

1. In this case, the question under the Fourth Amendment "reasonableness" inquiry is whether an objective justification for the arrest existed. The justification cited by petitioner is the fact that respondent was driving with a suspended license in violation of Virginia law. As noted, under this Court's precedents, that offense rendered the *initial* stop of respondent reasonable so that the officer could issue the required citation.

The Virginia Legislature has provided, however, that a misdemeanor offender may only be ticketed and then must be allowed to go on his way. Va. Code § 19.2-74. Virginia's prohibition on arrest specifically embodies a determination that, for misdemeanor offenses, the individual's significant interest in remaining free from custodial detention generally is not

outweighed by the government's interest in arrest. The United States Department of Justice commissioned a study by the American Bar Association which examined this balancing of interests. *See* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, COST ANALYSIS OF CORRECTIONAL STANDARDS: ALTERNATIVES TO ARREST (1975). The Report concluded that "use of citation and summons in lieu of arrest is critical" for minor offenses because it "assur[es] the liberty of an accused prior to his or her first court appearance," and accordingly "is a far less drastic means of guaranteeing that appearance than are traditional arrest and detention." *Id*. at 3. The Report proposed that "individual jurisdictions" would identify "eligible offenses" for which "citations would substitute for much of the traditional field arrest activity." *Id.* "From this perspective, citation release may be viewed as a logical extension of the basic constitutional precept of 'innocent until found guilty.'" DEBRA WHITCOMB ET AL., CITATION RELEASE 20 (Washington, D.C., National Institute of Justice, 1984). A strict rule requiring issuance of a ticket rather than an arrest furthers other significant governmental interests as well. As another U.S. Department of Justice Report on the practice recognizes, Virginia's approach of requiring citation release for certain offenses "offers the greatest potential for benefits both to the defendant and the criminal justice system: Patrol officers are removed from service for only a brief period of time, typically thirty minutes or less; no transportation costs are incurred; [and] defendants are subject to the least amount of disruption." *Id.* at vii.

Of course, where the crime is sufficiently serious, the governmental interest in detention and public safety outweighs those costs. "[N]o state mandates

citation for *any* felony." *Id.* at 24 (emphasis in original). But many States have determined, within their expert judgment, that jaywalkers are different from murderers and that, for minor crimes, immediate custody is not required and does not serve any governmental interest in protecting community safety, deterring crime, or efficiently prosecuting criminal activity. There is "a trend toward mandatory use of field citations for all misdemeanor offenses (except if certain conditions are present)." *Id.* at 3 (footnote omitted). "As of 1981, all but nine states had adopted statutes or rules of criminal procedure which authorize the use of citation release for certain criminal offenses." *Id.* at 3. The practice is not a novelty but instead "an outgrowth of procedures for responding to traffic law violations." *Id.* at 1.

The judgments underlying these statutory enactments parallel those reached by the most respected organizations in the field. Citation release has been "endorsed by a number of national police and criminal justice standard setting organizations." *Id.* at 2. "The procedure has gained the *unanimous* support of several national commissions and standard setting groups." *Id.* at 8 (emphasis added). Three sets of uniform laws have endorsed the use of citation release. *See* INTERSTATE COMMISSION ON CRIME, UNIFORM ARREST ACT (1941); AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.2 (1975); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE, Rules 211, 221 (1974). The formative 1974 *Corrections* Report by the National Advisory Commission on Criminal Standards and Goals of the U.S. Department of Justice's Law Enforcement Assistance Administration similarly recommended that "[e]ach

criminal justice jurisdiction, state or local as appropriate, should immediately develop a policy," providing for "[e]numeration of minor offenses for which a police officer should be required to issue a citation in lieu of making an arrest or detaining the accused," absent specified exceptional circumstances. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS std. 4.3 (1973).

2. The Fourth Amendment properly accounts for these legislative determinations that an arrest does not further governmental interests. In the case of a state law offense, the function of the Fourth Amendment is not to divine governmental purposes that the government itself denies, but to take the State's asserted interests as it finds them and balance them under a federal constitutional standard against the individual's interests in privacy and liberty. Because the justification for placing respondent in custody for driving with a suspended license is lacking – and petitioner points to no other – the arrest of respondent was unconstitutional.

The Fourth Amendment, as incorporated through the Fourteenth Amendment, thus *constrains* the authority of governmental officials to conduct searches and seizures; it does not *create* such authority in the first instance. Under the Constitution's scheme of separated federal and state powers, the States are the primary architects of criminal law and law enforcement procedures. When a law duly enacted by the legislature and signed into law by the executive formally and expressly withholds the authority to arrest for an offense – thereby specifically disavowing any important governmental interest in depriving individuals of their liberty for the offense – nothing in

the Fourth Amendment displaces or trumps that judgment. States are well aware of the cost that an arrest inflicts not only on individual liberty, but also on the time and resources of law enforcement officials, who must divert themselves from other policing efforts to perform the time-consuming process of transporting, booking, and otherwise processing an arrestee. *Cf. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (noting that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions") (internal quotation marks omitted).

For state officers pursuing state offenses, the authority to make arrests and to undertake searches is granted by state law. The elected branches of state government determine whether and when a sufficient governmental interest exists to invest state officers with the authority to effect arrests and searches. By the same token, state law can define when arrests or searches cannot be made by these officers. The positive authority of state police officers to exercise law enforcement authority thus is purely a product of state law. The Fourth Amendment no more supplements an officer's authority to arrest than it could create such policing authority in the first instance. Indeed, petitioner accepts (Br. 16-17) that the Fourth Amendment forbids an arrest for conduct that is lawful and does not implicate officers' community caretaking function. In the absence of criminality or an alternatively compelling justification (such as dangerousness to self or others), such an arrest is necessarily "unreasonable" because it lacks any reasonable justification.

In this respect, respondent's rule would continue the Fourth Amendment's long tradition of respect for and consideration of state judgments by permitting state legislatures to experiment with differential arrest schemes based on the resources, needs, and concerns of their individual jurisdictions. This Court's Fourth Amendment precedents are appropriately deferential to the judgments of the States, "recogniz[ing] the desirability of flexibility and experimentation." *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975); *see also County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (acknowledging the importance of allowing jurisdictions to be flexible in developing their criminal procedures); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (giving weight to the state law determination of "the gravity of the underlying offense for which the arrest is being made").

Of course, the required justifications for an arrest are not static or provided only by state law. For example, even when state law forbids an arrest for the particular conduct for which an officer subjectively makes a stop, a different ground for the arrest may exist. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (the "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"). In addition, during the initial stop, new justifications for a search or a more intrusive seizure may arise. Evidence seen in "plain view" during the stop may justify charging the driver with a federal or state crime (*see Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971)), and the law defining that newly identified criminal activity – *e.g.*, a drug offense – may itself authorize an arrest. *See, e.g.*, *Adams v. Williams*, 407 U.S. 143, 148 (1972) (only after the arresting officer found a gun during a *Terry* stop and

frisk did "probable cause exist[] to arrest Williams for unlawful possession of the weapon"). The critical point remains, however, that the reasonableness inquiry requires a justification for placing an individual into custodial detention and subjecting him to a search, and when the *only* asserted justification is the offense underlying the initial stop (as in this case), the arrest is unreasonable if the legislature has forbidden it.

3. The conclusion that the Fourth Amendment reasonableness inquiry respects state legislative judgments also follows from the practice at the time of the Constitution's framing. This Court recounted that history in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), concluding that it was a significant guide to the determination whether an arrest is "reasonable." *Id.* at 326-27. *Atwater* specifically considered the constitutionality of a warrantless arrest, authorized by state law, for a nonviolent misdemeanor (driving without a seatbelt). This Court rejected the argument that the common law categorically "forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace." *Id.* at 340.

Critically, *Atwater* reasoned that, at the time of the framing, the reasonableness of an arrest instead depended on *legislative* determination, both in England and in the colonies. Most relevant here, this Court in *Atwater* relied heavily on the fact that, in the era of the founding, legislatures had conferred authority to arrest for such offenses. *Id.* at 328 ("[I]n the years leading up to American independence, Parliament repeatedly extended express warrantless arrest authority to cover misdemeanor-level offenses not amounting to or involving any violent breach of the peace."); *id.* at 337

("colonial and state legislatures, like Parliament before them * * * regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace"); *id.* at 342 (citing "numerous early- and mid-19th-century decisions expressly sustaining (often against constitutional challenge) state and local laws authorizing peace officers to make warrantless arrests for misdemeanors not involving any breach of the peace"); *accord* Pet. Br. 1 (variation in state arrest law has existed "[f]rom the ratification of our Constitution").[2] That history squarely supports respondent's position that the reasonableness of an arrest for an offense depends on the predicate of legislative authorization.[3]

Noteworthy in this respect are the class of so-called "summary convictions," for which legislatures forbade arrest outright. *See* W. PALEY, THE LAW AND

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[2] Congress, in turn, did not authorize arrest for all offenses but instead more narrowly granted federal law enforcement officers "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." Act of May 2, 1792, c. 28, § 9, 1 Stat. 265. *See generally United States v. Watson*, 423 U.S. 411, 420 (1976). Congress subsequently supplemented that statutory authority by granting federal officers uniform authority to arrest for any felony, and misdemeanors committed in their presence. 18 U.S.C. § 3053.

[3] In this case, petitioner makes essentially the reverse of the claim considered in *Atwater* – it argues that the Fourth Amendment *permits* every warrantless misdemeanor arrest, notwithstanding that Virginia forbids an arrest for driving with a suspended license. Br. 12-13. As discussed in the text, that assertion cannot be reconciled with *Atwater*'s recitation of the common-law-era history.

PRACTICE OF SUMMARY CONVICTIONS 228 (V. B. Bateson ed., 9th ed. 1926) (1814) ("for misdemeanors arising under penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognizance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but could only summon him to attend, and in default of his appearance proceed ex parte."). Parliament created the summary conviction offenses and also established the procedure for prosecuting offenders. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV L. REV. 917, 926 (1926). Colonial governments in the United States used such statutes as well. *See* J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 415-19 (1944).[4]

4. Rather than acknowledging the above points, petitioner argues (Br. 23) that States should determine the appropriate remedies for violations of their own laws. So they should, and nothing in the Virginia Supreme Court's decision precludes the use of tort law or police disciplinary proceedings to respond to abuses of the arrest power. The question in this case is not whether States may sanction their own employees, but whether official state determinations that use of the arrest power is unnecessary and unwarranted bear on

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[4] While the number of prosecutions by summary conviction is unknown, it was likely significant, as Blackstone devoted an entire chapter of the fourth volume of his *Commentaries on the Laws of England* to discussing summary convictions, and complained about the backlog of work that they created for magistrates. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 277, 279 (1769).

the Fourth Amendment's "constitutional reasonableness" inquiry. Giving effect and force to such state legislative judgments does not encroach on state remedial powers. Quite the opposite, a rule of federal constitutional law that state legislative judgments can be ignored – and thus that renegade police officers can reward their own misconduct – will make it harder for States to rein in, regulate, and punish the actions of their own officers.

C. Holding That Arrests For Nonarrestable Offenses Nonetheless Are Constitutional Would Contradict The Purpose Of The Fourth Amendment To Prevent Unwarranted And Unjustified Intrusions On Individual Liberty And Privacy.

The significant consequences of overriding these legislative judgments by deeming all infractions arrestable are palpable. This Court's Fourth Amendment precedents establish that the best way to ensure that an arrest is not a pretext for an unconstitutional search is to require that the arrest rest on an objective basis. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996). A categorical prohibition on arrest, such as the one Virginia has adopted, establishes that there is no objective basis for such a seizure. The statute thereby effectuates an "essential purpose" of the Fourth Amendment's proscriptions – "to impose a standard of 'reasonableness' upon the exercise of discretion" by law enforcement "in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)

(footnote and some internal quotation marks omitted); *see Illinois v. Rodriguez*, 497 U.S. 177, 186 n.* (1990).

The record in this case illustrates the potential for abuse of the search power under petitioner's contrary rule. After arresting respondent, the officers did not take him to a police station for booking. Instead, forty-five minutes after the arrest, they drove to respondent's hotel room and searched him and the premises. Pet. App. 2, 36. When asked why they did not release respondent with a summons as required by state law, an officer asserted that it was "[j]ust our prerogative" and that "we were also conducting a narcotics investigation." J.A. 15. Indeed, the officer's only justification for the arrest was that "narcotics were eventually recovered." *Id.* But "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63 (1968).

The Virginia Supreme Court correctly perceived that a contrary holding that police may arrest in contravention of state law would render this Court's unanimous decision in *Knowles v. Iowa* a dead letter for Fourth Amendment purposes. *Knowles* held that officers may not search an individual on the basis of a citation. 525 U.S. 113, 114 (1998). On petitioner's view, officers can easily evade *Knowles* because they will have a categorical right under the Constitution to conduct a custodial arrest in every case in which they may issue a citation, no matter how trivial the offense, and notwithstanding the absence of any lawful authority to do so.

If petitioner's position is accepted, opportunities for custodial arrest will be almost limitless. Virginia has defined many forms of conduct as nominal but

nonarrestable misdemeanors, from moral offenses (public spitting (Va. Code § 18.2-322) and public cursing (§ 18.2-388)) to minor offenses involving animals (failing to provide "companion animals" with "[a]dequate exercise" (§ 3.1-796.68(A)(5)); violating a local dog leash ordinance (§ 3.1-796.128(A)(3)); and harboring an unlicensed cat (§ 3.1-796.128(A)(7))), to the truly esoteric (buying a milk crate belonging to a third party without consent (§ 18.2-102.2(1)); opening and leaving open another person's gate (§ 18.2-143); and scaring poultry with a spotlight (§ 18.2-509)).

Indeed, petitioner's position that the Fourth Amendment permits an arrest for any crime (Br. 16-17) knows no outer bound. Beyond the minor offenses just noted, there is no principled basis under petitioner's theory to differentiate numerous common regulatory offenses – such as parking violations – as nonarrestable under the Fourth Amendment. The common law recognized public wrongs enforceable by the criminal law and private civil wrongs enforceable through civil actions. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1769). Modern law, however, recognizes a third class of illegality – known as "infractions," "violations," or "petty offenses" (*see* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 1.04 cmt. (1985)) – that is effectively quasi-criminal. Virginia, for example, does not distinguish between non-criminal infractions and minor misdemeanors for arrest purposes. "Traffic infractions are violations of public order * * * and not deemed to be criminal in nature." Va. Code § 18.2-8. But "[f]or purposes of *arrest*, traffic infractions shall be treated as misdemeanors. * * * [T]he authority and duties of arresting officers shall be *the same* for traffic

infractions as for misdemeanors." *Id.* § 46.2-937 (emphases added).

The State has also authorized local governmental entities to enact their own regulatory schemes. For example, "[t]he governing bodies of counties, cities, and towns may enact ordinances requiring pedestrians to obey signs and signals erected on highways therein for the direction and control of traffic, [and] to obey the orders of law-enforcement officers engaged in directing traffic on such highways." *Id.* § 46.2-935; *see, e.g.*, Code of Alexandria, Va. § 10-5-4 ("[p]edestrians shall obey signs and signals erected on the streets" under penalty of fine "not more than five dollars"). These offenses may carry "penalties not exceeding those of a traffic infraction." Va. Code § 46.2-935; *see also id.* § 46.2-941 ("violation of an ordinance of any county, city, or town regulating parking" is subject to a summons if the violator does not pay the parking fine); *id.* § 15.2-901 (violation of local trash ordinance may be punishable as misdemeanor). If the Virginia Supreme Court's decision is reversed, all of these local offenses will presumably permit an arrest under the Fourth Amendment, notwithstanding the express legislative judgment that they should carry no consequence beyond that associated with a misdemeanor.[5]

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[5] To be sure, this Court held in *Atwater* that the Fourth Amendment permitted a warrantless arrest for a nonviolent misdemeanor *that was authorized by state law*. 532 U.S. at 323. Petitioner's position would dramatically expand the sweep of the Fourth Amendment arrest authority to the many offenses for which arrest is forbidden. Before trivial and anachronistic misdemeanor offenses that are committed by almost every American – for example, minor speeding infractions – trigger the

D. This Court's Precedents Establish That An Arrest And Search Violate The Fourth Amendment If Prohibited By State Law.

Petitioner's argument not only misconceives the purpose and role of legislative judgments under the Fourth Amendment, but also is directly contrary to this Court's precedents, which have required that arrests for state law offenses be permissible under state law as a precondition to their constitutional reasonableness under the Fourth Amendment.

In *Johnson v. United States*, 333 U.S. 10 (1948), police officers in Washington State entered a hotel room after smelling opium, arrested the occupant, and then found drugs in a search of the premises. *Id.* at 12. This Court first held that the initial entry violated the Fourth Amendment because the intrusion into the private living space required a warrant (*id.* at 15) and was non-consensual (*id.* at 13). With respect to the argument that the search should nonetheless be upheld as "valid because incident to an arrest" (*id.* at 15), the Court explained that the "determin[ation] whether the arrest itself was lawful" (*id.*), would turn on the governing "Washington law" (*id.* at 15 n.5). More specifically, the Court held that "[s]tate law determines the validity of arrests without warrant." *Id.* Because the warrantless arrest was not permitted as a matter of Washington law (*id.* at 15-16), this Court held that the evidence must be suppressed under the Fourth Amendment. *Id.*

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power to arrest and search, legislatures must make that judgment, for which they can be held accountable by the electorate.

The Court again held that the Fourth Amendment permits the seizure of evidence incident to an arrest only if the arrest itself was authorized by state law in *Michigan v. DeFillippo*, 443 U.S. 31 (1979). In that case, officers used their state law arrest power to take the defendant into custody for violating a local criminal ordinance requiring any person to identify himself at the request of police. The officers found drugs in a search incident to the arrest. The defendant successfully argued in the lower courts that the identification ordinance was unconstitutional. *Id.* at 34-35. This Court nevertheless held that the evidence was not seized in violation of the Fourth Amendment, reasoning that the *arrest* was independently constitutional because it was authorized by state law. *Id.* at 37, 40. The Court stressed that "[t]he fact of a *lawful* arrest, standing alone, authorizes a search" (*id.* at 35) and, following *Johnson*, held that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law" (*id.* at 36 (citing *Johnson*, *supra*)). Because it was uncontested that the arrest of the defendant was "authorized by Michigan law" through its general arrest statute (*id.*), and because the officer "had abundant probable cause to believe that respondent's conduct violated the terms of the ordinance," the Court held that the arrest and attendant search did not violate the Fourth Amendment:

> Once respondent refused to identify himself as the presumptively valid ordinance required, the officer had probable cause to believe respondent was committing an offense in his presence, and Michigan's general arrest statute, Mich. Comp. Laws. § 764.15 (1970), authorized the arrest of respondent,

> independent of the ordinance. The search which followed was valid because it was incidental to that arrest. The ordinance is relevant to the validity of the arrest and search only as it pertains to the "facts and circumstances" we hold constituted probable cause for arrest. The subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed.

Id. at 39-40.

Johnson and *DeFillippo* are consistent with this Court's broader Fourth Amendment jurisprudence, which confirms that the requirement of a state law predicate to arrest for state offenses is deeply ingrained into the determination of "reasonableness." For example, the Court held in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), that police may enter a home on the basis of exigent circumstances only if state law deems the offense sufficiently serious. The Court reasoned, "The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. * * * *Given this expression of the State's interest*, a warrantless home arrest cannot be upheld simply because" evidence of the offense might otherwise dissipate. *Id.* at 754 (emphasis added).

Still other decisions of this Court look to state law as a means of ensuring that police do not act arbitrarily in conducting searches and seizures that do not rest on probable cause. In cases involving inventory searches,

traffic checkpoints, and administrative warrants, the Court's Fourth Amendment analysis has relied on external legal rules such as state law to ensure evenhandedness by the police. *See South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (inventory searches); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (same); *Cooper v. California*, 386 U.S. 58, 60-61 (1967) (same); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453-55 (1990) (traffic checkpoint); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976) (same); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (administrative warrant for housing inspections); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978) (administrative warrant for business inspections). As the Solicitor General concedes, in such cases, "the Court has looked to the existence of state policies in determining that the actions are *reasonable* under the Fourth Amendment." Br. 12 n.3 (emphasis added). As discussed above, giving Fourth Amendment effect to the State's judgment that arrests are not necessary similarly promotes the evenhanded administration of the law. [6]

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[6] Respondent's position no more constitutionalizes state law than do the decisions of this Court considering governmental purposes advanced by the State in balancing tests required by other constitutional provisions. Giving effect under the Fourth and Fourteenth Amendments to the State's legislative judgment that arrests are an unwarranted and unnecessary intrusion on individual liberty parallels this Court's repeated decisions holding that state laws can create liberty interests protected by the Fourteenth Amendment's Due Process Clause – which is the source of respondent's Fourth Amendment protections against state officers. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221-22 (2005); *Bd. of Pardons v. Allen*, 482 U.S. 369, 370, 381 (1987); *Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974).

E. The Search Incident To Arrest Was In Any Event Unconstitutional Because It Was Contrary To Law.

The foregoing establishes that respondent's arrest violated the Fourth Amendment. It follows that the incident search of his person was tainted by that illegality and hence unconstitutional. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). It is therefore not necessary to decide whether the fact that the arrest violated state law independently renders the search unconstitutional without regard to the arrest. But to the extent the Court elects to reach the question, the search itself violated the Fourth Amendment.

The search incident to arrest doctrine is a special exception to this Court's general requirement that a warrant accompany a search. *Robinson*, 414 U.S. at 224. This Court has never held that the doctrine permits a search regardless of the officer's legal authority to effect the underlying arrest. To the contrary, in *Robinson*, this Court took care to state nine times that its holding applied only to searches incident to a "lawful" arrest. *E.g.*, *id.* at 224 ("It is well settled that a search incident to a *lawful* arrest is a traditional exception to the warrant requirement of the Fourth Amendment.") (emphasis added).[7] This Court's decisions in *Johnson* and *DeFillippo*, *supra*, make clear

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[7] This careful language reflects the long-established constitutional understanding of the search incident to arrest exception. *See, e.g.*, *Preston v. United States*, 376 U.S. 364, 367 (1964); *United States v. Di Re*, 332 U.S. 581, 587 (1948); *Harris v. United States*, 331 U.S. 145, 150 (1947); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914).

that by "lawful" arrests, the *Robinson* Court was referring to *authorized* arrests, and not merely to arrests supported by probable cause to believe that an offense had occurred.[8]

Limiting the search incident to arrest exception to cases of authorized arrests is also consistent with the common law tradition that gave rise both to the exception and to its limitation to "lawful arrests." *See Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The common law did not permit searches incident to arrests for offenses not subject to arrest under local law. In an opinion relied upon by this Court in *Robinson*, 414 U.S. at 232, then-Judge Cardozo explained this "basic principle" as follows: "Search of a person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds yet unknown for arrest or accusation." *New York v. Chiagles*, 237 N.Y. 193, 197 (1923) (citing *Entrick v. Carrington*, 19 Howell's State Trials 1030). At common law, an officer's unauthorized or unjustified arrest of a citizen constituted a trespass (*see Payton v. New York*, 445 U.S. 573, 592 (1980)), rendering any subsequent search unlawful as well. *See New York v. DeFore*, 150 N.E. 585, 586 (N.Y. 1926) (holding that "[t]he search was unreasonable in the light of common law traditions" because the underlying arrest was not

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[8] Both *Johnson* and *DeFillippo* separately considered and found critical to their Fourth Amendment holdings the question whether the arrest was "lawful" under state law. *Johnson*, 333 U.S. at 15; *DeFillippo*, 443 U.S. at 35. "Lawful arrest," moreover, is a term of art regularly used to incorporate both state and federal requirements that might give rise to a claim for wrongful arrest. *Heck v. Humphrey*, 512 U.S. 477, 486 n.6 (1994).

authorized by state law, and thus "[t]here was no lawful arrest to which the search could be an incident").

Finally, invalidating the incident search in this case is consistent with the principle that "manufactured exigencies" do not justify intrusions under the Fourth Amendment. Although this Court has not confronted the question, the courts of appeals have recognized that, although exigent circumstances may justify an arrest or search, they "do not meet Fourth Amendment standards if the government deliberately creates [them]." *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006) (citing cases). An officer's subjective intent to avoid the warrant requirement by creating exigencies is sufficient to invoke this rule, but it is not necessary; even in the absence of bad faith, exigent circumstances cannot justify a search if they were created by "tactics or procedures" that were "unreasonable or contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions)." *United States v. Gould*, 364 F.3d 578, 591 (5th Cir. 2004). This prohibition on manufactured exigencies sensibly denies officers the power to circumvent the Fourth Amendment by creating circumstances that might justify a warrantless search. When, as here, the underlying arrest violated state law, an officer should not be permitted to rely upon that arrest to justify an incident search, any more than the officer can rely on equally unreasonable conduct to establish exigent circumstances in other contexts.

II. Petitioner's Arguments For Reversal Lack Merit.

A. Mere Probable Cause To Believe An Offense Has Occurred Does Not Render A Custodial Arrest Reasonable Under The Fourth Amendment.

The crux of petitioner's argument for reversal is that "probable cause" categorically justifies any arrest, no matter whether it furthers any governmental interest. Petitioner's position is in essence that the "probable cause" standard supplants the balancing inquiry set forth in this Court's Fourth Amendment jurisprudence. Br. 14-17. But this Court has never so held. Nor does that argument make logical sense. "Probable cause" does not supplant the prohibition on "unreasonable" searches and seizures. The Constitution presents those dual requirements in the disjunctive: The protection against "unreasonable searches and seizures" is distinct from the requirement that "no Warrants shall issue but upon probable cause." U.S. CONST. amend. IV. Petitioner fails to offer any reasoned explanation – indeed, anything beyond *ipse dixit* – for the view that it is "reasonable" to arrest any individual for any trivial offense, even when the legislature has concretely determined that the arrest not only would be an excessive intrusion on individual liberty and privacy, but also would be directly contrary to the government's own interests as it unnecessarily squanders scarce police resources. Put another way, "probable cause" to believe an offense has occurred is not the same thing as "probable cause" *to arrest*. The latter exists only if there is a sufficient governmental interest to justify the intrusion of custodial detention.

At bottom, petitioner's position that an arrest requires only "probable cause" amounts to the proposition that the arrest is constitutional notwithstanding that it is – under the Fourth Amendment balancing inquiry – "*unreasonable*." This is a case in which the government candidly does not contest that the balancing of individual and governmental interests overwhelmingly favors the individual. But the bedrock principle that the Fourth Amendment permits only "reasonable" seizures – such that an arrest requires a substantially greater justification than a mere traffic stop – demonstrates that petitioner errs in asserting that "probable cause" categorically justifies an arrest under the Fourth Amendment.

It is in fact settled that "probable cause" to believe that an offense has occurred justifies only certain intrusions upon liberty and not others. Thus, the Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), that officers with probable cause to arrest ordinarily may not use deadly force to effectuate that arrest. *Garner* establishes that "the 'reasonableness' of a particular seizure depends not only on *when* it is made" – *i.e.*, upon probable cause to believe an offense has occurred – "but also on *how* it is carried out." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphases in original). Likewise, probable cause to arrest for an offense does not justify the further intrusion of an entry into the home. *Payton v. New York*, 445 U.S. 573, 587-89 (1980).

Petitioner contends (Br. 10-13, 44) that a probable cause standard is sufficient because it limits the prospect that arrests will be arbitrary, such that the arrest in this case does not implicate the same concerns

as the "general warrants" that were a principal motivation for the adoption of the Fourth Amendment. In support of this proposition, petitioner (Br. 12) quotes this Court's statement in *Payton*, 445 U.S. at 583, that "indiscriminate searches and seizures under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."

As noted above, the Virginia statute in fact does reduce the prospect of arbitrary detentions by constraining officers' discretion in conducting arrests. But in any event, the Fourth Amendment is concerned with privacy and liberty more broadly, not merely with arbitrary detention. Petitioner thus tellingly omits *Payton*'s conclusion only a few lines later that it is "*perfectly clear* that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant." *Id.* at 585 (emphasis added). Indeed, this Court unanimously rejected an indistinguishable argument in *Knowles v. Iowa*, 525 U.S. 113 (1998). The stop in that case was based on probable cause, and hence the individual was not "arbitrarily" subjected to an intrusion on his liberty. Yet this Court held that officers could not search him without further justification. *Id.* at 118-19.

Petitioner relies on language in this Court's opinions indicating that an officer may arrest if he has probable cause to believe the suspect has committed an offense. Br. 14 & n.6, 17. But in *every* case petitioner quotes, the legislature had authorized an arrest for the offense in question. Thus, in *Atwater*, the Court noted at the outset of its opinion that "Texas law expressly authorizes '[a]ny peace officer [to] arrest without warrant a person found committing a violation' of th[e]

seatbelt laws [at issue]." 532 U.S. at 323 (quoting Tex. Transp. Code Ann. § 543.001 (1999)). Underscoring the point, the Court appended to its decision a list of statutes that render misdemeanor offenses arrestable. *Id.* at 355-60; *accord Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148, 1157 (D.C. Cir. 2004) (arrest for eating on train indistinguishable from arrest sustained in *Atwater* because "[a]s in this case, there was no dispute [in *Atwater*] that the plaintiff had violated the statute in the presence of the arresting officer and that state law authorized her arrest"); Pet. Br. 31 ("Given the background of state law in *Atwater*, the issue presented by [this case] was not present.").[9]

Further, none of the cases cited by petitioner considered the question presented here, even in dictum. It is in fact uncontested that the excerpts petitioner quotes were not intended to be taken as absolute statements of the full scope of the Fourth Amendment's requirements, regardless of context. The Solicitor General, for example, acknowledges that those excerpts do not describe the rule for arrests inside the home. Br. 7-8. The quoted statements also omit any requirement that a misdemeanor offense be committed in the

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[9] *See also Devenpeck v. Alford*, 543 U.S. 146 (2004) (arrest authorized by Wash. Rev. Code § 10.31.100 (1997)); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (noting arrest authority under Md. Ann. Code, Art. 27, § 594B (1996) (repealed 2001)); *Whren v. United States*, 517 U.S. 806 (1996) (arrest authorized by D.C. Code § 23-581(a)(1)(B) (1981 & 1989 Supp.)); *Michigan v. DeFillippo*, 443 U.S. 31, 33 n.1 (1979) (city ordinance made failure to identify oneself to an officer arrestable offense); *United States v. Robinson*, 414 U.S. 218 (1973) (D.C. Code Ann. § 40-302(d) (1967) authorized arrest); *United States v. Watson*, 423 U.S. 411, 415-17 (1976) (federal law authorized warrantless arrest for postal service violations).

officer's presence, yet *Atwater v. City of Lago Vista* expressly left open whether the Fourth Amendment imposes such a requirement. 532 U.S. 318, 340 n.11 (2001). The Court has also said just as often that only a "legal" arrest authorizes an arrest and incident search. *See* Part I.E, *supra*.

When one reviews this Court's actual holdings, as opposed to snippets of language in inapposite cases, this Court's decisions uniformly support respondent. None of the cases cited by petitioner states – much less holds – that state legislative determinations are irrelevant to the determination of an arrest's reasonableness. When the Court considered that issue in both *Johnson* and *DeFillippo*, it squarely rejected petitioner's position. *See* Part I.D, *supra*.

B. Giving Effect To The Legislature's Judgment That An Offense Is Nonarrestable Is Consistent With Constitutional Law And Federalism Principles.

1. Petitioner's Argument That Fourth Amendment Jurisprudence Precludes Accounting For State Legislative Judgments Gains Petitioner Nothing And In Any Event Is Directly Contrary To This Court's Decisions.

a. Incorporating into the Fourth Amendment's reasonableness inquiry the legislative judgment that no governmental interest would be advanced by an arrest would not, as petitioner contends (Br. 8, 9, 39), constitutionalize every violation of state law. Rather, the Virginia Supreme Court's holding stands for the

much more modest proposition that, when courts apply the Fourth Amendment's balancing of governmental and private interests affected by a seizure, they will consider and respect the State's official articulation of that governmental interest. *See* Part I, *supra*.

Petitioner's argument that respecting the legislative judgment that arrest is unnecessary would require the federalization of other procedural constraints on police authority (Br. 39-44) is wrong. The restrictions on the arrest authority that petitioner cites have nothing to do with the Fourth Amendment's long-established weighing of the public interest served by a custodial arrest, and would have no logical role in assessing the "constitutional reasonableness" of an arrest. Those measures do not inform the question whether officers have probable cause to arrest, as this Court has held that such "trivialities" are not relevant to the Fourth Amendment reasonableness inquiry. *Whren v. United States*, 517 U.S. 806, 815 (1996) *See, e.g.*, *Bovie v. Indiana*, 760 N.E.2d 1195, 1199 (Ind. Ct. App. 2002) (purpose of requirement that arresting officer be in uniform is "to protect drivers from police impersonators and to protect officers from resistance should they not be recognized as officers"); *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1145 (Mass. 1986) (defendant's right to have an opportunity to respond to a misdemeanor charge before process is issued "was designed to encourage informal resolution of private disputes and minor criminal matters"); *Michigan v. Hamilton*, 638 N.W.2d 92, 98 (Mich. 2002) (purpose of territorial limits on arrest powers is "to protect the rights and autonomy of local governments in the area of law enforcement") (internal quotation omitted); *accord* S.G. Br. 6 (restrictions of that sort

were "enacted for reasons other than the protection of Fourth Amendment interests"), 23.

Likewise, petitioner's list of cases (Br. 36-37 nn.26-28) involving compliance with such procedural and technical restrictions on the arrest authority do not speak to the government's foundational interest deeming conduct arrestestable, which is what concerns the Fourth Amendment. If anything, state laws and rules regulating *how* an arrest should be made underscore that there is a distinct public interest in making an arrest that the Fourth Amendment can weigh in its reasonableness calculus. Such laws confirm that arrest is expected and necessary; they do not disavow any need for custodial detention, as Virginia has done here.[10]

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[10] Some of petitioner's cases involve particular state law warrant requirements. *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998); *United States v. Walker*, 960 F.2d 409 (5th Cir. 1992). Others involve jurisdictional limits on the particular officer's arrest authority. *New Hampshire v. Smith*, 908 A.2d 786 (N.H. 2006); *Michigan v. Hamilton*, 638 N.W.2d 92; *Maine v. Jolin*, 639 A.2d 1062 (Me. 1994); *Colorado v. Hamilton*, 666 P.2d 152 (Colo. 1983). Several involve peculiar procedural requirements. *Gordon v. Degelmann*, 29 F.3d 295 (7th Cir. 1994) (failure to provide a hearing to defendant before removing him as a trespasser); *United States v. Wright*, 16 F.3d 1429 (6th Cir. 1994) (failure to meet state's heightened standard of suspicion for arrest based upon information of an informant); *Ohio v. Droste*, 697 N.E.2d 620 (Ohio 1998) (type of officer authorized to arrest); *Lyons*, 492 N.E.2d 1142 (failure to provide defendant notice to challenge misdemeanor complaint). A number involve no violation of state law at all. *Malone v. County of Suffolk*, 968 F.2d 1480 (2d Cir. 1992); *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989); *Anderson v. Haas*, 341 F.2d 497 (3d Cir. 1965). The only possible exception involves decisions holding that the Fourth Amendment is not violated by arrests that are contrary to state law, when that

The better-reasoned lower court authority agrees that the Fourth Amendment forbids placing an individual in custody for a nonarrestable offense. *See United States v. Mota*, 982 F.2d 1384, 1389 (9th Cir. 1993) ("Given the state's expression of disinterest in allowing warrantless arrests for mere infractions, we conclude that a custodial arrest for such an infraction is unreasonable, and thus unlawful, under the Fourth Amendment."). The Eighth Circuit is the only federal appellate court to reach the opposite conclusion, but judges of that court have harshly criticized that decision. *Compare United States v. Bell*, 54 F.3d 502 (8th Cir. 1995), *with United States v. Lewis*, 183 F.3d 791, 794-95 (8th Cir. 1999) (Heaney, J., concurring), *id.* at 796 (Goldberg, J., concurring), *and United States v. Pratt*, 355 F.3d 1119, 1123 n.3 (8th Cir. 2003) (panel questioning the correctness of *Bell*, especially "in light of the [Supreme] Court's dependence on state law in *Atwater*").

b. Petitioner nonetheless makes a broadside objection to *any* consideration of legislative judgments – and state legislative judgments, in particular – in the Fourth Amendment reasonableness determination. That argument is deeply flawed from the outset, because it cannot gain petitioner anything. There must be *some* means for determining whether an arrest is reasonable. Petitioner assumes that, if the legislative determination to authorize an arrest is not the correct

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state law permits arrests only for misdemeanors that occur in the officer's presence. *See, e.g.*, *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir. 1997). As noted in Part II.A, *supra*, this Court has not yet resolved the predicate question whether the Fourth Amendment itself incorporates a common law presence requirement, and in any event that question is not presented here.

measure of the government's interest, then the appropriate course would be to hold that the Fourth Amendment categorically authorizes every arrest for any offense, however trivial and whatever the circumstances. But such a rule would fly in the face of the reasonableness requirement itself, as it would eschew any assessment of whether the substantial intrusion on liberty and privacy that results from an arrest and search furthers a significant governmental interest.

To be sure, there are a few instances in which this Court has held that no case-by-case inquiry into the particular circumstances surrounding a search are required, instead adopting an "automatic" or "bright line" rule under which one Fourth Amendment intrusion authorizes another. Principally, an arrest *per se* authorizes an incident search. *See United States v. Robinson*, 414 U.S. 218, 235 (1973). But as this Court explained in refusing to extend that rule to other intrusions, the search incident to arrest power is "automatic" (*Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983)), only because *every* arrest distinctly furthers one or both of the government's interests in the search – officer safety and securing evidence of the crime. *See Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998) (Fourth Amendment forbids search incident to citation); *Long*, 463 U.S. at 1032 (Fourth Amendment forbids search incident to *Terry* stop).

Critically, petitioner does not even attempt to identify a governmental interest that justifies an equivalently "automatic" rule that the Fourth Amendment always permits an arrest upon probable cause, whatever the offense. Nor do any of petitioner's *amici*, including the Solicitor General. That silence is

telling, and its reason is obvious. There is no basis in experience, logic, or the law to say that any legitimate interest is served by a categorical rule that officers may arrest for minor transgressions. It cannot be presumed that the police have a need to take an individual into custody, search him and his car, take him in handcuffs to a police station, book him, and hold him for two days without review by a neutral magistrate for failing to use his turn signal, driving with a suspended license, or committing any of the innumerable other offenses that legislatures routinely make subject to a fine while mandating that only a ticket may be issued for such an infraction.[11]

Hence, if petitioner were right that state legislative judgments are irrelevant, the logical rule would instead be that the reasonableness of the arrest would depend on the specific circumstances of each case. The Court has adopted just such a context-specific assessment in a variety of analogous

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[11] Under the Fourth Amendment reasonableness inquiry, it is not enough that the Constitution recognizes the government's generalized interest in combating crime. Rather, the particular intrusion must be "appropriately tailored" to "advance[] this grave public concern to a significant degree." *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). For example, in *City of Indianapolis v. Edmond*, this Court acknowledged the "severe and intractable nature of the drug problem" served by the narcotics checkpoints operated by the City of Indianapolis. 531 U.S. 32, 42 (2000). The Court nevertheless invalidated the checkpoint program because the means chosen to advance that important public purpose was not reasonably tailored to align the governmental purpose with the intrusion on liberty. As this Court explained, "the gravity of the threat alone cannot be dispositive of questions concerning what *means* law enforcement officers may employ to pursue a given purpose." *Id.* (emphasis added).

circumstances. Among many examples, officers conducting a permissible *Terry* stop may go further and conduct a patdown search only if they have a reasonable suspicion that the individual is armed. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). Officers conducting an arrest in a home pursuant to a warrant may conduct a further protective sweep of the premises only if they have reasonable suspicion that "the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334 (1990). And the force that officers may use in conducting an arrest depends on their assessment of the likelihood of a suspect's escape and probable cause to believe that the suspect presents a danger of "death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 1 (1985).

In this case, the appropriate context-specific rule would be that officers may conduct an arrest for a minor offense if they possess a reasonable belief that custodial detention is required. After extensive consultation, the American Bar Association has promulgated a Standard that identifies the circumstances in which the government has a genuine reason to take an individual into custody. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE std. 10-2.2 (3d ed. 2007). The Standards preclude an arrest for a minor offense unless the individual represents a continuing threat or is unlikely to answer the summons. *Id.* 10-2.2(c). This Court has "long referred to the[] ABA Standards as 'guides to determining what is reasonable.'" *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (original brackets and citations omitted). Virginia's arrest statute is itself modeled on the relevant ABA Standard, under which the arrest in this case lacked justification and

accordingly violated the Fourth Amendment. *See generally supra* at 3-6.[12]

But in any event, for the reasons discussed in the next section, such a contextual federal standard is unnecessary because there is no merit to petitioner's claim that this Court's Fourth Amendment jurisprudence precludes accounting for legislative judgments such as Virginia's determination that an arrest for misdemeanor offenses generally does not further governmental interests.

2. The Authority Cited By Petitioner And The United States Is Distinguishable Or Supports The Judgment Below.

As discussed above, this Court held in *Johnson* and *DeFillippo* that the constitutionality of an arrest for a state law offense turns on compliance with state law. A long line of other cases looks to state legislative determinations in assessing whether searches and seizures are reasonable. *See* Part I.D, *supra*. The authority on which petitioner relies does not in fact support its position.

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[12] The ABA maintains that governments should "requir[e] police officers to issue citations (rather than to arrest the offender) for minor offenses, except in" specified circumstances, because "pretrial custody by police is generally unwarranted for minor offenses." PRETRIAL RELEASE, *supra*, at 67 (commentary). With respect to the question presented by this case, the ABA concludes that although "the Fourth Amendment permits searches incident to arrests that do not result in the detention of the arrested person in a police or correctional facility, once a citation is issued the police officer has no authority to search unless a basis other than incident to arrest is apparent (e.g., plain view)." *Id.* at 70 n.31.

a. Petitioner argues that *California v. Greenwood*, 486 U.S. 35 (1988), holds categorically "that the constitutional standard must operate independently of state law." Br. 18. That of course cannot be right: as noted, petitioner concedes – as it must – that state law plays a central role in the Fourth Amendment inquiry in a variety of contexts, including in defining the offense. *Greenwood* in fact stands for a more modest proposition and is properly distinguished.

The question in *Greenwood* was whether officers conducted a Fourth Amendment "search" when they examined garbage that the defendant had left outside the curtilage of his home. This Court's precedents provide that such a "search" occurs when the government intrudes on an expectation of privacy that society accepts as reasonable. This Court concluded in *Greenwood* that the defendant had no such expectation in his garbage, particularly given that the trash was effectively open to the public. The defendant (a California resident) nonetheless relied on the California Supreme Court's holding that such a search requires a warrant under that state's constitution (which imports its own distinct privacy standard). This Court deemed that fact irrelevant because it does not inform the relevant question under the Fourth Amendment: whether the defendant had an expectation of privacy that society was prepared to accept as reasonable. *See* 486 U.S. at 43 (rejecting defendant's assertion that his "expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law").

The role of Virginia law in this case is very different from the defendant's attempt to rely on the California Constitution in *Greenwood*. Here, the Fourth Amendment supplies the relevant inquiry: The arrest of respondent was a seizure and was "reasonable" if it was supported by a sufficient justification. Virginia law simply establishes that no such justification exists because the State has no interest in effecting the arrest. In *Greenwood*, by contrast, state law was invoked in an attempt to substitute a new state-law standard for the Fourth Amendment inquiry into whether the defendant had a reasonable expectation of privacy. That argument was properly rejected.

b. For its part, the United States relies on two further decisions – *Cooper v. California*, 386 U.S. 58 (1967), and *Whren v. United States*, 517 U.S. 806 (1996) – as supposedly deeming state law irrelevant to the Fourth Amendment reasonableness determination. S.G. Br. 5; *see also id.* at 11-12. Again, that is not correct, as it is clear that state law is highly relevant. Indeed, the Solicitor General misdescribes both cases, which in fact support the judgment below.

Cooper is an inventory search case. The police arrested the defendant and, pursuant to a specific directive in state law, impounded his car. 386 U.S. at 60. They then searched it, finding evidence of heroin sales. The defendant argued that the search violated the Fourth Amendment because state law did not expressly "authorize the officers to search [his] car." *Id.* at 61. In the language quoted by the Solicitor General, this Court held that the reasonableness of the search was not undermined by the fact that state law did not by its terms specify that a search could be conducted:

"Just as a search authorized by state law may be an unreasonable one under [the Fourth] [A]mendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Id.*

The Solicitor General asserts that *Cooper* deems state law irrelevant. In fact, precisely the opposite is true. The United States omits that the *reason* this Court deemed the search reasonable in the absence of express statutory authority was that *state law* empowered the officers to seize and hold the vehicle for a long period of time. It was thus essential to this Court's Fourth Amendment inquiry that "the officers seized petitioner's car because they were *required to do so by state law*." *Id.* at 61 (emphasis added). The search, in turn, "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained": "It would be unreasonable to hold that the police, *having to retain the car* in their custody for such a length of time, had no right, even for their own protection, to search it." *Id.* at 61-62 (emphasis added).

Cooper thus actually holds, consistent with the inventory search rulings noted in Part I.D, *supra*, that state law plays a central role in the Fourth Amendment calculus. *Compare Coolidge v. New Hampshire*, 403 U.S. 443, 464 n.21 (1971) ("In *Cooper*, the seizure of the petitioner's car was mandated by California statute, and its legality was not questioned. The case stands for the proposition that, *given an unquestionably legal seizure*, there are special circumstances that may validate a subsequent warrantless search.") (emphasis added), *with* S.G. Br. 5 (citing *Cooper* as "holding that state limitations on searches and seizures do not affect the reasonableness of the searches and seizures under

the Fourth Amendment"), *and id.* at 11 (discussing *Cooper* as the lead precedent for that proposition).

The other decision cited by the Solicitor General, *Whren v. United States*, is a pretext stop case. This Court held that the Fourth Amendment permits a traffic stop that is objectively justified by a violation of the law, whatever the officer's subjective intent. 517 U.S. at 813. The petitioners, however, urged the Court to reject the "normal" inquiry "of whether probable cause existed to justify the stop" (*id.* at 810), arguing that the officer's pretext could be demonstrated objectively by the fact that he had violated "usual police practices" embodied in a local police policy (*id.* at 814). The policy provided that a particular subgroup of officers – those in plainclothes who are traveling in unmarked vehicles – should generally not enforce traffic laws. *Id.* at 815. In addition to broadly rejecting any inquiry into pretext, this Court stated – in the language quoted by the Solicitor General – that "[w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Id.* (internal citations omitted).

As with *Cooper*, the Solicitor General misapprehends *Whren*, which in fact treats state law (in that case, the law of the District of Columbia) as highly relevant to the Fourth Amendment inquiry. The government omits that the petitioners, who were stopped after the officer observed them turning a corner without signaling and then speeding off, "accept[ed] that [the officer] had probable cause to believe that various provisions of the *District of Columbia traffic code* had been violated." 517 U.S. at 810 (citing 18 D.C. Mun. Regs. §§ 2213.4, 2204.3, and

2200.3) (emphasis added). A violation of state law was thus the basis for the stop in *Whren* because (as this Court explained) it is settled that, "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* The Court simply held that the local police practice did not overcome the settled understanding that a violation of state law authorizes a traffic stop. *Id.*

In the language cited by the government regarding "trivialities," this Court in *Whren* merely held that the right to stop the vehicle was not undercut by local police practices. This Court recognized that such a "basis of invalidation would not apply in jurisdictions that had a different practice" or even in the same jurisdiction if the officer "had been wearing a uniform or patrolling in a marked police cruiser." *Id.* at 815. Respondent's rule is perfectly consistent with *Whren*'s determination that incidental provisions of local law that do not go to the government's interest in a seizure do not figure in the Fourth Amendment reasonableness determination. As discussed, *supra*, an arrest is not reasonable if the suspect has not committed an arrestable offense. Other limitations on the arrest authority – such as whether the officer was in uniform or outside his jurisdictional boundaries – do not inform that determination.

C. Petitioner's Theory For Permitting Arrests That Are Forbidden Under State Law Will Undermine The Administrability Of The Criminal Laws.

Petitioner argues (Br. 39-44) that a rule which gives effect to state-law judgments concerning the necessity for an arrest would be inadministrable. In

fact, the opposite is obviously true. As the Solicitor General emphasizes, "[a] single, familiar standard is essential to guide police officers." Br. 16 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). The decision below aligns state law and the Fourth Amendment on the questions of whether the conduct is arrestable and thereby produces an administrable rule. Officers are trained in state law and there is no evidence that they face any difficulties in conforming their conduct to those rules. If an officer has probable cause to believe that an arrestable offense has occurred, the Fourth Amendment requirement of reasonableness is met. *Compare Atwater v. City of Lago Vista*, 532 U.S. 318, 418 (2003) (rejecting argument that Fourth Amendment should forbid arrests permitted by state law whenever offense was sufficiently minor because such a rule would "expect every police officer to know the details of frequently complex penalty schemes"). Contrary to petitioner's assertions that this approach is not practicable, the relevant U.S. Department of Justice report recognizes that, in fact, under citation release statutes, "screening procedures in the field are straightforward and uncomplicated." DEBRA WHITCOMB ET AL., CITATION RELEASE 11 (Washington, D.C., National Institute of Justice, 1984).

Petitioner's approach, by contrast, is less easily administered by officers on the street. By divorcing the Fourth Amendment reasonableness inquiry from the other rules that govern police conduct, it invites significant confusion as officers are held to conflicting state and federal standards as they effectuate custodial arrests. Petitioner's rule would also require creating a complicated overlay of federal jurisprudence to determine which minor regulatory offenses are "arrestable" as a matter of federal constitutional law,

notwithstanding that state law permits only the issuance of a citation.

Petitioner responds that under the Virginia Supreme Court's decision, arrests constitutional in one State may violate the Fourth Amendment in another. Br. 21. That is true but totally unexceptional, and it poses no concern for law enforcement officers on the street. The Fourth Amendment does not enforce universal homogeneity in governmental law enforcement interests and purposes. The legality of conduct, and hence the restrictions imposed by the Fourth Amendment on police activity, frequently varies from state to state. Thus, police activity that is perfectly constitutional in Virginia – such as arrests in pursuit of gambling activity – may violate the Fourth Amendment in Nevada. In addition, among many other examples, under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), identically conducted checkpoints may be constitutional in the city where their primary purpose is sobriety or license checks, while unconstitutional in another city which has as its primary purpose narcotics detection – and would certainly be unconstitutional where the checkpoint avowedly served no purpose at all. *See id.* at 46-47 & n.2.

Petitioner also expresses concern that it is sometimes difficult to determine whether an individual has committed an arrestable offense. Br. 42. But the Fourth Amendment does not require certainty; it only requires probable cause to believe that the offense supports arrest. A reasonable error does not violate the Fourth Amendment. As this Court stated long ago, "[i]n dealing with probable cause, * * * as the very name implies, we deal with probabilities." *Brinegar v.*

United States, 338 U.S. 160, 175 (1949). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed"; "[e]vidence required to establish guilt is not necessary." *Henry v. United States*, 361 U.S. 98, 102 (1959). "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (internal quotation omitted). Additional protection is provided by the rule that reasonable mistakes are immune from liability under 42 U.S.C. § 1983. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Beyond that, to the extent that any genuine uncertainty exists (and petitioner offers no evidence that it does), it is by definition precisely the uncertainty that officers face every day in their application of state law. Here, of course, the officers made no such mistake. At trial, they claimed that the power to arrest was "just our prerogative." J.A. 15. In this Court, petitioner has abandoned any assertion that the officers had any reason to believe – even a mistaken one – that respondent had engaged in arrestable conduct.

But in any event, while administrative ease may inform this Court's evaluation of constitutional reasonableness, this Court has never held that administrability can supplant the Fourth Amendment's reasonableness balancing inquiry altogether, which is what petitioner's approach advocates. Hard or not, the Fourth Amendment forbids "unreasonable" searches and seizures. Petitioner's discomfort with the state interest side of that balance is understandable, but

such discomfort provides no justification for rewriting the Fourth Amendment's text to provide that persons are protected against unreasonable searches and seizures "unless it would be administratively difficult."[13]

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[13] The only issue for this Court to decide in this case is whether the officers' conduct violated the Fourth Amendment. The petition for certiorari and petitioner's merits brief did not squarely ask this Court to hold that, even if officers violated the Fourth Amendment, the exclusionary rule does not apply. Further, petitioner has waived that argument by not raising it in the Virginia Supreme Court. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Although petitioner's brief below contained a section nominally addressed to the "exclusionary rule," that section argued only that the officers' conduct did not violate the Fourth Amendment; petitioner did *not* argue that the evidence should not be excluded even if a Fourth Amendment violation had occurred. *See* Br. for the Commonwealth, *Moore v. Virginia*, 636 S.E.2d 395 (Va. 2006), 2006 WL 3910658 at *7-15. In any event, this Court has long "required suppression of evidence that was the product of a search incident to an unlawful arrest." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681 (2006) (citing *Miller v. United States*, 357 U.S. 301, 305 (1958)). This case falls squarely within the settled bounds of the exclusionary rule because the unlawful arrest and search were "sufficiently related to the later discovery of evidence to justify suppression." *Hudson v. Michigan*, 126 S. Ct. 2159, 2170 (2006) (Kennedy, J., concurring in part and concurring in the judgment).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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