No. 06-1082

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

DAVID LEE MOORE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Fourth Amendment requires the suppression of evidence obtained in a search incident to an arrest that is based upon probable cause but not authorized by state law.

In the Supreme Court of the United States

No. 06-1082

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

DAVID LEE MOORE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a search incident to an arrest by state police officers violates the Fourth Amendment if the arrest is based upon probable cause but contravenes state law. The United States prosecutes cases using evidence discovered through arrests made by state authorities, including arrests that violate state procedural rules. In addition, the decision in this case could affect the remedies required for violations of federal laws governing arrests by federal officers. The United States therefore has a substantial interest in this case.

STATEMENT

1. Under Virginia law, driving on a suspended license is a misdemeanor, punishable by a year in jail and

a $2500 fine. Va. Code Ann. §§ 18.2-11, 18.2-272, 46.2-301(C) (2004). A Virginia police officer may arrest an individual who commits that crime in the officer's presence if the offender fails or refuses to discontinue the offense, if the officer believes the offender is likely to disregard a summons, or if the officer reasonably believes the offender is likely to harm himself or others. *Id.* § 19-2.74. An officer may also make an arrest for that offense in any jurisdiction where "prior general approval has been granted by order of the general district court." *Id.* § 46.2-936. In other circumstances, the officer generally may only issue a summons and notice to appear in court. *Id.* § 19-2.74.

2. In February 2003, respondent's car was stopped by two Virginia police officers, who determined that he was driving on a suspended license. Believing they had the prerogative to make an arrest, the officers took respondent into custody. A search incident to the arrest revealed that he was carrying 16 grams of crack cocaine and $516 in cash. Pet. App. 1-2, 13-15; J.A. 15.

Respondent was indicted for possessing cocaine with intent to distribute it, in violation of Virginia law. He then moved to suppress the evidence obtained in the search. Although he conceded that the officers had probable cause to stop his vehicle and to charge him with driving on a suspended license, he argued that they violated Virginia law and the Fourth Amendment by arresting him rather than issuing a summons. Pet. App. 2; J.A. 19.

The trial court concluded that the arrest violated neither Virginia law nor the Fourth Amendment and denied the motion. J.A. 20-21. After a bench trial, the court found respondent guilty and sentenced him to five

years in prison, with eighteen months suspended. Pet. App. 2.

3. The Court of Appeals of Virginia reversed. Pet. App. 35-48. The court concluded that none of the exceptions to Virginia's prohibition on arrests for driving on a suspended license applied, and the officers were therefore required by state law to issue a summons. *Id.* at 37-39, 45-48. Because state law did not authorize respondent's arrest, the court held that the search incident to the arrest violated the Fourth Amendment. *Id.* at 39-44. The court stated that its holding was "a logical and necessary extension of" *Knowles* v. *Iowa*, 525 U.S. 113 (1998), which held that the Fourth Amendment prohibits a full search incident to the issuance of a traffic citation. Pet. App. 43-44. The court further ruled that the Fourth Amendment violation required suppression of the evidence obtained in the search and dismissal of the indictment against respondent. *Id.* at 48.

One judge dissented. Pet. App. 48-56. She concluded that, under *Atwater* v. *City of Lago Vista*, 532 U.S. 318 (2001), the Fourth Amendment permits arrest for any crime if the arresting officers have probable cause to believe the offense was committed in their presence, and state limitations on arrest have no bearing on the constitutional analysis. Pet. App. 49. Because Virginia does not apply the exclusionary rule for state law violations absent statutory direction, the dissent would have affirmed the denial of the motion to suppress. *Id.* at 51.

4. The en banc court of appeals reversed the panel. Pet. App. 12-27. The court held that, although the arrest violated Virginia law, the arrest and resulting search did not violate respondent's Fourth Amendment rights. *Id.* at 17. Relying on *Atwater*, the court explained that the arrest was constitutional because it was

based on probable cause, and "the issue of probable cause is determined separate and apart from whether an arrest violates a state statute." *Id.* at 22. The court further explained that the search incident to the arrest was likewise constitutional because "a search incident to an arrest that is based upon probable cause complies with the Fourth Amendment." *Ibid.* Because Virginia does not provide an exclusionary remedy for violations of its statutory restrictions on misdemeanor arrests, the court affirmed the trial court's denial of respondent's motion to suppress. *Id.* at 17. Four judges dissented on the ground that *Knowles* "compels the conclusion" that the search of respondent violated the Fourth Amendment. *Id.* at 27.

5. The Supreme Court of Virginia reversed. Pet. App. 1-11. Relying on *Knowles* and its own decision in *Lovelace* v. *Commonwealth*, 500 S.E.2d 267 (Va. 1998), which interpreted *Knowles*, the court held that the search of respondent violated the Fourth Amendment. Pet. App. 11. The court stated that, under Virginia law, the "officers were authorized to issue only a summons," and therefore, "under the holding in *Knowles*, the officers could not lawfully conduct a full field-type search." *Ibid.* Because the court concluded that the search violated the Fourth Amendment, it dismissed the indictment against respondent. *Ibid.*

SUMMARY OF ARGUMENT

The Fourth Amendment permits a search incident to an arrest based on probable cause even if the arrest violates state law.

A. This Court has consistently held that, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his pre-

sence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001). When a police officer makes a constitutionally valid arrest, the Fourth Amendment permits a search of the person incident to that arrest, in order to protect the officer's safety and to recover evidence of crime. *United States* v. *Robinson*, 414 U.S. 218 (1973). The Virginia Supreme Court held that a search incident to an arrest based on probable cause nonetheless violates the Fourth Amendment if the arrest contravenes state law. That ruling conflicts with numerous cases of this Court holding that state limitations on searches and seizures do not affect the reasonableness of the searches and seizures under the Fourth Amendment. See *Whren* v. *United States*, 517 U.S. 806, 819 (1996); *California* v. *Greenwood*, 486 U.S. 35, 43 (1988); *Cooper* v. *California*, 386 U.S. 58, 61 (1967); *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960).

B. Constitutionalizing state restrictions on searches and seizures also cannot be squared with this Court's repeated admonitions that Fourth Amendment rules should be uniform and easily administrable. The States place a multitude of restrictions on the arrest powers of law enforcement officers. Constitutionalizing those state rules would cause Fourth Amendment protections to vary from State to State, within the same State, and over time as States modify their rules of arrest. Moreover, many state restrictions on arrest turn on complex, fact-intensive inquiries that may be difficult for both arresting officers and reviewing courts to resolve. Constitutionalizing the myriad and often technical state restrictions on arrest therefore risks creating a "bog of litigation." *Wyoming* v. *Houghton*, 526 U.S. 295, 305 (1999).

C. Incorporating state restrictions on arrest into the Fourth Amendment would also seriously disrupt the traditional balance of federal and State authority. States would acquire the ability to expand and contract Fourth Amendment protections by changing their procedural rules governing arrest. At the same time, States would lose their traditional authority to calibrate the penalties for violations of their own laws, because violations of state arrest laws would automatically become Fourth Amendment violations and trigger constitutionally mandated remedies. And federal courts hearing damages actions under 42 U.S.C. 1983 would become the enforcers of state law arrest rules incorporated into the Fourth Amendment.

D. Constitutionalizing state restrictions on arrest might also expand the exclusionary rule, by greatly increasing the class of unconstitutional arrests. That would be particularly inappropriate, because those state law restrictions are often enacted for reasons other than the protection of Fourth Amendment interests and do not require suppression as a state-law remedy.

E. The Virginia Supreme Court mistakenly believed that its decision was compelled by *Knowles* v. *Iowa*, 525 U.S. 113 (1998). That decision is inapplicable. *Knowles* holds that a search incident to arrest is not justified when an officer merely issues a citation, but, here, respondent was actually arrested and taken into custody. Respondent mistakenly contends this Court has held that a search incident to an arrest violates the Fourth Amendment when the arrest contravenes state law. The Court, however, has never so held. See *United States* v. *Di Re*, 332 U.S. 581 (1948) (supervisory-powers rule to remedy in federal court an illegal, but not unconstitutional, arrest by federal officers); *Johnson* v. *United*

States, 333 U.S. 10, 15 & n.5 (1948) (dictum); *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979) (dictum).

Finally, respondent erroneously suggests that an arrest complies with the Fourth Amendment only if officers have probable cause to believe the suspect committed an "arrestable" offense under state law. That proposed limitation on an officer's search authority lacks any support in precedent and contradicts basic principles underlying the Fourth Amendment.

ARGUMENT

A SEARCH INCIDENT TO AN ARREST BASED ON PROBABLE CAUSE IS REASONABLE UNDER THE FOURTH AMENDMENT EVEN IF THE ARREST VIOLATES STATE LAW

A search is reasonable under the Fourth Amendment if it is incident to an arrest based on probable cause to believe that the person arrested was committing a crime. The Virginia Supreme Court has added to that established rule an additional and unjustified requirement that the arrest must also comply with state law. This Court should reject that effort to absorb state arrest law into the basic requirements of reasonableness under the Fourth Amendment.

A. The Fourth Amendment Permits A Search Incident To An Arrest Based On Probable Cause, And State Limitations On Searches And Seizures Do Not Affect The Constitutional Analysis

1. "With rare exceptions," the reasonableness of a search or seizure under the Fourth Amendment "is not in doubt where [it] is based upon probable cause." *Whren* v. *United States*, 517 U.S. 806, 817 (1996). Thus, outside the home, this Court has never required any-

thing more than probable cause for an arrest to comply with the Fourth Amendment. On the contrary, a long line of cases establishes that "[a] warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003).

The probable cause standard "has roots that are deep in our history." *Henry* v. *United States*, 361 U.S. 98, 100 (1959). It reflects the "ancient common-law rule" that warrantless arrests were permissible for misdemeanors or felonies committed in the arresting officer's presence, and for felonies committed outside his presence, if there was reasonable ground to believe a crime was committed. *United States* v. *Watson*, 423 U.S. 411, 418 (1976); *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 327-339 (2001). The probable cause test also comports with "traditional standards of reasonableness." *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999). As this Court has explained, it "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975). Probable cause "is a practical, nontechnical conception" that constitutes "the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of [police] officers' whim or caprice." *Ibid.* (citation omitted).

The probable cause test "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations," and regardless of the seriousness of the offense under state law. *Dun-*

away v. *New York*, 442 U.S. 200, 208 (1979). In *Atwater*, this Court recently reaffirmed the long-prevailing rule that,"[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. The offense in *Atwater*—failure to wear a seatbelt—was punishable only by a fine, *id.* at 323, and was therefore less serious than respondent's crime of driving on a suspended license, which is punishable by a year in jail. Although state law authorized the arrest in *Atwater*, *ibid.*, this Court did not suggest that the authorization was relevant to whether the arrest complied with the Fourth Amendment. And, although the Court noted that many jurisdictions impose additional restrictions on warrantless arrests, *id.* at 352, it never suggested that those restrictions might be incorporated into the constitutional analysis, which the Court held turned solely on probable cause, *id.* at 354.

2. When a police officer makes a constitutionally valid arrest, it is reasonable under the Fourth Amendment for the officer to search the person arrested as an incident to that arrest. The propriety of such searches was "always recognized under English and American law" and "has been uniformly maintained in many cases." *Weeks* v. *United States*, 232 U.S. 383, 392 (1914).

In *United States* v. *Robinson*, 414 U.S. 218 (1973), the Court rejected a Fourth Amendment challenge to a search incident to arrest for a crime virtually identical to respondent's—"operating a motor vehicle after the revocation of [an] operator's permit." *Id.* at 220. The Court explained that searches incident to arrest are justified for two reasons: the need to ensure the safety of law enforcement officers and the interest in discovering

additional evidence. *Id.* at 234. The Court concluded that those justifications warrant a bright-line rule that a search is reasonable under the Fourth Amendment whenever there has been a constitutionally valid arrest, without inquiry into whether the justifications are actually implicated in a particular case. *Id.* at 236.

Although the Court described the authority to search as triggered by a "lawful arrest," it made clear that "lawful" means "constitutional." *Robinson*, 414 U.S. at 236. The Court explained that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* at 235. Other cases are in accord. For example, in *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964), the Court stated that "[t]he constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest," which turned on "whether, at the moment the arrest was made, the officers had probable cause." And, in *Adams* v. *Williams*, 407 U.S. 143, 149 (1972), the Court stated that, because the defendant's arrest "was supported by probable cause," "the search of his person and of the car incident to that arrest was lawful."

3. Respondent's arrest was validly based on probable cause under *Atwater*, and the officers conducted a valid search incident to arrest under *Robinson*. The Virginia Supreme Court nonetheless held that the search violated the Fourth Amendment because respondent's arrest violated Virginia law. That ruling conflicts with numerous cases of this Court holding that state limitations on searches and seizures do not affect the reasonableness of those searches or seizures under the Fourth Amendment.

As for searches, in *Cooper* v. *California*, 386 U.S. 58 (1967), the Court upheld the constitutionality of the search of an automobile impounded upon the defendant's arrest. Noting the lower court's conclusion that state law did not authorize the search, this Court held that the lack of authorization was irrelevant to the constitutionality of the search under the Fourth Amendment: "Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Id.* at 61.[1]

In *California* v. *Greenwood*, 486 U.S. 35 (1988), the Court again refused to incorporate state law into the Fourth Amendment. The Court held that a search of the defendants' garbage did not violate the Fourth Amendment because they had no reasonable expectation of privacy in their trash. The Court rejected the contention that a reasonable expectation of privacy existed because the search was prohibited by California law. The Court explained that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution. We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.* at 43.

The same principle holds true for seizures. In *Whren*, the Court held that a traffic stop complies with

---

[1] Even before *Cooper*, in *Elkins* v. *United States*, 364 U.S. 206 (1960), the Court had stressed that the test for whether a search is constitutional "is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 224. See *Preston* v. *United States*, 376 U.S. 364, 366 (1964) (applying *Elkins* to a search incident to arrest).

the Fourth Amendment, regardless of the motivation for the stop, if police officers have probable cause to believe that the motorist committed a traffic violation. 517 U.S. at 819. In so holding, the Court rejected the defendants' reliance on a local police regulation that prohibited the stop. *Id.* at 815. The Court explained that such limitations "vary from place to place and from time to time," but the Fourth Amendment's protections are not "so variable." *Ibid.*[2]

State law, of course, is relevant to the reasonableness of an arrest in one sense: the relevant substantive law informs whether officers can reasonably believe that a person is engaged (or has engaged) in conduct that violates that law, and thus whether the officer has probable cause. But the States' responsibility for defining crimes does not justify a rule that state procedural limits on searches and seizures define Fourth Amendment protections. That rule is foreclosed by precedent and inconsistent with the Amendment's role in guaranteeing all citizens certain fundamental protections that reflect our national heritage and common law traditions. See *Weeks*, 232 US. at 391.[3]

---

[2] The Fourth Amendment rule is also consistent with the treatment of violations of state law in the qualified immunity inquiry. The fact that an officer's conduct violated state law or regulations does not result in a finding that the prohibition on the officer's conduct was clearly established. See, *e.g.*, *Davis* v. *Scherer*, 468 U.S. 183, 193-196 (1984). The reasons for refusing to conflate the state law and federal law inquiries in that context also apply in the Fourth Amendment context.

[3] In the context of searches or seizures for which no individualized suspicion is required, such as inventory and administrative searches, the Court has looked to the existence of state policies governing police actions in determining that the actions are reasonable under the Fourth Amendment. See, *e.g.*, *Florida* v. *Wells*, 495 U.S. 1, 4 (1990); *New York* v. *Burger*, 482 U.S. 691, 703 (1987). Some lower courts have held that

B. Constitutionalizing State Restrictions Would Balkanize Fourth Amendment Protections And Unduly Complicate Constitutional Analysis

The rule adopted by the court below also conflicts with this Court's repeated admonitions that Fourth Amendment rules should be uniform and easily administrable.

1. This Court has often noted the "important need for uniformity in federal law." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983). The Court has placed particular importance on uniformity in the Fourth Amendment context. See *Devenpeck* v. *Alford*, 543 U.S. 146, 154 (2004) (rejecting proposed rule that would result in "arbitrarily variable protection"); *Whren*, 517 U.S. at 815 (rejecting rule that would make Fourth Amendment protections "vary from place to place and from time to time").

Because the rule adopted by the Virginia Supreme Court constitutionalizes state restrictions on arrest, it would result in the "arbitrarily variable protection" that this Court has rejected. The States place numerous limitations on the arrest powers of law enforcement officers. States limit authority to arrest based on who commits the crime, who the victim is, where the crime occurs, when the crime occurs, the value of what is taken, who the arresting officer is, what the officer is wearing,

---

the Fourth Amendment is violated when those state policies are not followed. See, *e.g.*, *United States* v. *Proctor*, 489 F.3d 1348, 1354 (D.C. Cir. 2007) (inventory search); *United States* v. *Knight*, 306 F.3d 534, 535-536 (8th Cir. 2002) (administrative search). In the context of suspicionless searches and seizures, the existence of standardized state policies provides protection against arbitariness. No corresponding need to inquire into state policies exists in the context of a search incident to an arrest that is based upon individualized probable cause.

when the arrest occurs, where the arrest occurs, and where the nearest judicial officer is located.[4] Different States apply different rules to the same situation. This case provides a good example: Like Virginia, some States generally prohibit warrantless arrests for driving on a suspended license. See, *e.g.*, Pet. App. 37-39; *State* v. *Bricker*, 134 P.3d 800, 803 (N.M. Ct. App. 2006); *Commonwealth* v. *Baez*, 678 N.E.2d 1335, 1338 (Mass. App. Ct. 1997). Other States generally permit warrantless

---

[4] See, *e.g.*, Ark. Rev. Stat. Ann. § 16-81-102(a)(1) (2005) (prohibiting arrest, within 15 days of a legislative session, of state legislators, their clerks, sergeants-at-arms, or doorkeepers); Md. Code Ann. Crim. Proc. §§ 2-202 to 2-204 (LexisNexis 2001) (generally limiting warrantless misdemeanor arrests to offenses committed in officer's presence but creating exception for, *inter alia*, battery of "the person's spouse or another person with whom the person resides"); Idaho Code Ann. § 19-603 (2004) (authorizing arrest for misdemeanors committed outside presence of officer if reasonable cause to believe crime committed "aboard an aircraft"); N.H. Rev. Stat. Ann. § 594:10 (LexisNexis 2003) (requiring that misdemeanor arrest be committed in presence of officer but creating exception for specified crimes of domestic violence committed "within the past 12 hours"); Minn. Stat. Ann. § 609.52(3), 629.34(1)(c)(1)-(5) (West 2007 Supp.) (prohibiting warrantless arrests for theft of less than $500 if committed outside officer's presence); Cal. Penal Code § 830.32 (West 2007 Supp.) (community college police may arrest only if there is "immediate danger to person or property" or escape is in progress); Ind. Code Ann. § 9-30-2-2 (LexisNexis 2004) (officer must be in uniform and marked vehicle to arrest for traffic offense); Nev. Rev. Stat. Ann. § 171.124 (LexisNexis 2006) (forbidding warrantless arrests at night except for felonies or gross misdemeanors); Ohio Rev. Code Ann. § 2935.03(A)(1) (LexisNexis 2007 Supp.) (restricting arrests to "within the limits of [an arresting officer's] political subdivision," subject to limited exceptions); Alaska Stat. §§ 12.25.030, 12.25.035 (2006) (waiving in-the-presence requirement for misdemeanors if "personal or property damage" is likely absent arrest and "there is no known judicial officer * * * within a radius of 25 miles").

arrests for that crime. See, *e.g.*, *State* v. *Valenzuela*, 898 P.2d 1010, 1012 (Ariz. Ct. App. 1995); *State* v. *Pulfrey*, 111 P.3d 1162 (Wash. 2005); *State* v. *Lopez*, 588 A.2d 318, 319 (Me. 1991). Consequently, under the rule adopted below, a search incident to an arrest based on probable cause to believe that a motorist was driving on a suspended license would violate the Fourth Amendment in Virginia, New Mexico, and Massachusetts, but not in Arizona, Washington, and Maine.

Indeed, Fourth Amendment protections could vary even within the same State. For example, Virginia's prohibition on warrantless arrests for driving on a suspended license does not apply in jurisdictions where "prior general approval has been granted by order of the general district court." Va. Code Ann. § 46.2-936 (2004). Thus, respondent's search would not have violated the Fourth Amendment in such a jurisdiction, even though it violated the Amendment in the rest of the State.

In addition, Fourth Amendment protections would change whenever a State changed its rules of arrest. For example, in 1969, North Dakota modified its law governing nighttime arrests to permit warrantless arrests for driving while intoxicated even when the offense is committed outside the officer's presence. See *City of Minot* v. *Knudson*, 184 N.W.2d 58, 63-64 (N.D. 1971). Under the rule adopted below, the meaning of the Fourth Amendment in North Dakota changed when that law was enacted. Before enactment, a nighttime arrest for driving while intoxicated violated the Fourth Amendment unless the arresting officer was present when the offense was committed. After enactment, the same arrest for the same crime no longer contravened the Fourth Amendment. This Court should not countenance

a rule under which "the search and seizure protections of the Fourth Amendment are so variable." *Whren*, 517 U.S. at 815.

2. The Court has also emphasized the value of "simplicity and clarity" in Fourth Amendment rules. *Dunaway*, 442 U.S. at 213. "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 213-214. The Virginia Supreme Court's decision cannot be reconciled with that "essential interest in readily administrable rules." *Atwater*, 532 U.S. at 347.

Many state restrictions on arrest turn on complex, fact-intensive inquiries that may be difficult for both arresting officers and reviewing courts to resolve. For example, Virginia law would have authorized respondent's arrest if the arresting officers reasonably believed he was likely to disregard a summons or to harm himself or others, or if he failed to discontinue the offense. Va. Code Ann. § 19-2.74 (2004). There can be considerable uncertainty whether those conditions are satisfied. Indeed, that question was litigated extensively below. Pet. App. 16-19, 45-48. Laws limiting territorial authority to arrest also illustrate the complexities presented by incorporating state restrictions into the Fourth Amendment. For example, Virginia provides that an officer's authority to arrest generally extends one mile beyond the boundary of his jurisdiction, but only 300 yards beyond "towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more." Va. Code Ann. § 19.2-250 (2004).

Although police officers must comply with such complex restrictions on their arrest authority to satisfy state law, constitutionalizing those restrictions would present problems of a different order. Violations of constitutional rules generally have significantly more severe consequences than violations of state laws. Constitutional violations usually trigger the exclusionary rule and may expose officers to liability under 42 U.S.C. 1983. Claims of constitutional violations also often arise in federal court actions. Federal courts are less familiar with state provisions governing arrest and may find them difficult to interpret and apply. Moreover, federal court Fourth Amendment decisions could be undermined by subsequent state Supreme Court decisions that construe state law restrictions on arrest differently than the federal court did. Thus, constitutionalizing the myriad state restrictions on arrest risks creating a "bog of litigation" that will burden courts, expose state officers to federal liability, and result in the suppression of reliable evidence. *Houghton*, 526 U.S. at 305.

C. Constitutionalizing State Restrictions Would Disrupt The Balance Of State And Federal Authority

Incorporating state restrictions on arrest into the Fourth Amendment would also seriously unsettle the traditional allocation of authority between the States the federal government.

1. This Court has repeatedly held that the States lack authority to expand or contract Fourth Amendment protections. Although "'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitu-*

tional law when this Court specifically refrains from imposing them.'" *Arkansas* v. *Sullivan*, 532 U.S. 769, 772 (2001) (quoting *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975)). But that is precisely what constitutionalizing state restrictions on searches and seizures would permit States to do. They could alter the scope of substantive Fourth Amendment protections merely by changing their own laws.[5]

This case provides a good illustration: In *Robinson*, the Court held that the Fourth Amendment permitted a search incident to an arrest based on probable cause to believe the defendant had committed essentially the same crime that respondent committed here. If this Court affirmed the decision below, *Robinson* would no longer accurately state the Fourth Amendment rule in Virginia. And Virginia, by enacting a state restriction on arrest, would have expanded the Fourth Amendment beyond what this Court held necessary in *Robinson*.

2. Constitutionalizing state restrictions on arrest would also upset the federal-state balance in other ways. Traditionally, each State has determined for itself the appropriate response to violations of state limitations on arrest. Some States apply the exclusionary rule as a remedy, see, *e.g.*, *State* v. *Brown*, 792 N.E.2d 175, 179 (Ohio 2003), while others provide less drastic penalties, such as money damages, see, *e.g.*, *Garrett* v. *City of Bossier City*, 792 So. 2d 24 (La. Ct. App. 2001). This Court has repeatedly held that the choice of remedy for a state law violation is the prerogative of the State, not a question of federal constitutional law. In *Greenwood*,

---

[5] However this Court resolves the question in *Danforth* v. *Minnesota*, No. 06-8273 (argued Oct. 31, 2007), there can be no question that States cannot alter the substantive scope of federal constitutional rights.

the Court rejected an argument that the Constitution required California to impose the exclusionary rule for violations of the State's prohibition on warrantless searches of trash. 486 U.S. at 44-45. And, in *Cooper*, the Court held that California was free "to apply its own state harmless-error rule to" determine the remedy for an automobile search that, although permissible under the Fourth Amendment, violated state law. 386 U.S. at 62. If state laws governing searches and seizures were incorporated into the Fourth Amendment, the States would lose control over the remedies for violations of their own laws.

Again, this case illustrates the problem. Although Virginia prohibits some arrests otherwise permitted by the Fourth Amendment, it generally provides a remedy other than the exclusionary rule for violations of those prohibitions. Under Virginia law, a person arrested without adequate justification may sue in tort for damages. See *Jordan* v. *Shands*, 500 S.E2d 215, 218 (Va. 1988). Virginia generally reserves the exclusionary rule for cases involving "an error of constitutional dimension." *Tharp* v. *Commonwealth*, 270 S.E.2d 752, 755 (Va. 1980). Thus, but for the transformation of the state law violation into a Fourth Amendment violation, Virginia would not apply the exclusionary rule for the violation here. Pet. App. 25-27. Nonetheless, the Virginia Supreme Court's incorporation of state law into the Fourth Amendment led that court to suppress probative evidence that respondent had committed a serious drug offense and to dismiss the indictment against him. *Id.* at 11.

Just as this Court weighs the benefits of the exclusionary rule against its costs when deciding whether to extend it to specific constitutional violations, *Hudson* v.

Michigan, 126 S. Ct. 2159, 2165 (2006), States should be free to decide that certain rights they have created are not sufficiently critical to merit the exclusion of valuable evidence. Indeed, if States were forced to choose between enacting a procedural protection the violation of which would necessarily result in exclusion of reliable evidence and forgoing the protection, they might well choose the latter. See *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (refusing to exclude evidence obtained in violation of federal agency regulations because mandating exclusion might deter promulgation of administrative privacy protections). But nothing in the federal Constitution forces that choice on the States. States may regulate constables *and* decide the appropriate remedy when the constable blunders.

3. The decision below would also disrupt the federal-state balance because state officials who violate the Fourth Amendment may face damages actions in federal court under Section 1983. Consequently, if violations of state restrictions on searches and seizures qualified as Fourth Amendment violations, federal courts would effectively become enforcers of those state laws.

This Court has never recognized "an action in federal court for arrests by state officers who simply exceed their authority." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 737 (2004). Indeed, the Court has rejected interpreting federal law to produce that "breathtaking" result. *Id*. at 736. That is unsurprising, because "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984). Yet the Virginia Supreme Court's rule would conscript the

Fourth Amendment to produce that result, which "conflicts directly with the principles of federalism." *Ibid.*

4. Respondent argues (Br. in Opp. 22) that, absent the Virginia Supreme Court's rule, state officers could violate arrest procedures in States that mandate exclusion as a remedy with the knowledge that the evidence could be provided to federal authorities for use in federal court. This case does not present that concern, because Virginia does not mandate exclusion for the violation here, and this prosecution was brought in state court. In any event, the concern is misplaced. Each year, approximately nine million people are charged with misdemeanors, but only 70,000 are indicted in federal court. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 782 & n.5 (2006); *Sourcebook of Criminal Justice Statistics Online* (2005) <http://www.albany.edu/sourcebook/pdf/t582005.pdf>. It is difficult to imagine that state officers would routinely arrest individuals in violation of state law in the hope of finding evidence that could be used only in the unlikely event an independent sovereign elected to press charges. That scenario is particularly implausible because unlawful arrests may expose officers to internal discipline and civil suits. See *Hudson*, 126 S. Ct. at 2168; pp. 18–19, *supra*. "[T]he country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Atwater*, 532 U.S. at 353. Affirming the long-standing rule that States may fashion their own remedies for violations of their own laws is unlikely to trigger one.

D. Constitutionalizing State Restrictions Threatens Inappropriate Expansion Of The Exclusionary Rule

Although Fourth Amendment violations do not always require suppression, see *Hudson*, 126 S. Ct. at 2165, courts generally apply the exclusionary rule when they conclude that a search was unreasonable under the Fourth Amendment. The Virginia Supreme Court did so here. Pet. App. 11. It is unclear whether this Court would agree that exclusion is warranted when the alleged Fourth Amendment violation depends on a failure to comply with state restrictions on searches and seizures. If it does agree, however, the result will be the routine use of the exclusionary rule to remedy violations of state law.

That would be a significant and inappropriate expansion of the suppression remedy. Because the social costs of the exclusionary rule are very high, the Court has stressed that it should be applied only when clearly justified. See *Hudson*, 126 S. Ct. at 2163; *United States* v. *Leon*, 468 U.S. 897, 906-908 (1984). The Court generally does not apply the suppression remedy for non-constitutional violations, including violations of federal statutes, treaties, and regulations. See *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2680 (2006); *Caceres*, 440 U.S. at 755-757; *United States* v. *Donovan*, 429 U.S. 413, 431-439 (1977). And the Court has likewise refused to apply the exclusionary rule in response to violations of state statutes, even when those statutes regulate searches and seizures. See *On Le* v. *United States*, 343 U.S. 747, 754-755 (1952); *Olmstead* v. *United States*, 277 U.S. 438, 466-469 (1928).

To be sure, even if this Court adopted the Virginia Supreme Court's rule, the Court could conclude that ap-

plying the exclusionary rule as a remedy for violations of state restrictions on arrest is unwarranted, at least in certain cases, because those restrictions are often enacted for reasons other than protecting privacy interests. For example, territorial limits on arrest powers are typically enacted "to 'protect the rights and autonomy of local governments' in the area of law enforcement." *State* v. *Hamilton*, 638 N.W.2d 92, 98 (Mich. 2002) (citation omitted). Prohibitions on traffic stops by non-uniformed officers are designed "to protect drivers from police impersonators and to protect officers from resistance should they not be recognized as officers." *Bovie* v. *State*, 760 N.E. 2d 1195, 1199 (Ind. Ct. App. 2002). Even statutes that permit or require citation instead of arrest are frequently aimed at saving the time and money involved in processing arrests rather than shielding citizens from unreasonable seizures. See Judge Warren Davis, *Should Georgia Change Its Misdemeanor Arrest Laws to Authorize Issuing More Field Citations?*, 22 Ga. St. U. L. Rev. 313, 317-336 (2005); Floyd F. Feeny, *Citation in Lieu of Arrest: The New California Law*, 25 Vand. L. Rev. 367, 367–371 (1972). This Court has admonished that the exclusionary rule is appropriate only to remedy violations that "implicate[] important Fourth and Fifth Amendment interests." *Sanchez-Llamas*, 126 S. Ct. at 2681. Applying the rule to remedy violations of state restrictions on arrest, which often serve purposes unrelated to those constitutional provisions, cannot be squared with that admonition.

But an exclusionary rule jurisprudence that conditions the appropriate remedy on a further inquiry into state law—particularly an inquiry into the underlying purpose of the state limitation—has little to recommend

it and is unnecessary in any event. The more fundamental reason to reject the Virginia Supreme Court's rule is that state law violations should never render an arrest unconstitutional in the first place.

E. Neither This Court's Decisions Nor Respondent's Attempt To Define An Arrestable Offense By Reference To State Law Justifies Departing From the Fourth Amendment Rule That An Arrest Is Reasonable If It Is Based On Probable Cause

1. The Virginia Supreme Court believed that its holding was compelled by *Knowles* v. *Iowa*, 525 U.S. 113 (1998). The court was mistaken.

Knowles involved a full search of an automobile conducted after the driver was issued a citation but not placed under arrest. 525 U.S. at 114. Because the officers did not make an arrest, the search could not be justified under the rule, recognized in *Robinson*, that the Fourth Amendment permits a search incident to a constitutionally valid arrest. The Court reasoned that the rationales for permitting searches incident to arrest are not sufficiently implicated where officers only issue a citation. When a defendant is released rather than handcuffed and transported to a distant location, the encounter is likely to be briefer and less confrontational, minimizing the danger to the officers. *Id.* at 117. Moreover, officers typically have little need to discover additional evidence. *Id.* at 118. At the same time that the Court in *Knowles* refused to adopt a rule permitting a "search incident to citation," it reaffirmed the vitality of *Robinson*'s "bright-line rule" permitting "a full field search as incident to an arrest." *Ibid.*

Knowles has no application here, because respondent was arrested and transported from the scene, not issued

a citation and released. Because respondent's arrest was constitutionally valid, the search of respondent incident to his arrest was constitutionally permissible under the bright-line rule in *Robinson*.

Respondent contends (Br. in Opp. 21) that a Fourth Amendment prohibition on arrest when state law authorizes only citation is necessary to prevent circumvention of *Knowles*, because otherwise officers will arrest suspects in violation of state law in order to search them for evidence of other crimes. Respondent, however, has not identified any evidence that misdemeanor arrests have increased in States that bar use of the exclusionary rule to remedy violations of state limits on arrest. Indeed, "it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason." *Atwater*, 532 U.S. at 352. Moreover, as discussed above, officers who arrest in violation of state law risk internal discipline and civil damages suits. Given those potentially high costs, it is unlikely that rogue officers will arrest and search people who have committed minor crimes on the off-chance of discovering evidence of some more serious offense. If an officer did so, this Court has traditionally "assume[d]" that such "unlawful police behavior would 'be dealt with appropriately' by the authorities." *Hudson*, 126 S. Ct. at 2168 (citation omitted).

2. Respondent also contends (Br. in Opp. 16-20) that this Court's decisions hold that a search incident to arrest violates the Fourth Amendment when the arrest contravenes state law. That is incorrect. The Court has never held a search unconstitutional because the underlying arrest violated a state law requirement.

Respondent principally relies (Br. in Opp. 18-20) on *United States* v. *Di Re*, 332 U.S. 581 (1948). That deci-

sion, however, was not grounded in the Fourth Amendment but "was 'based on nonconstitutional considerations.'" 1 Wayne R. LaFave, *Search and Seizure* § 1.5(b) at 168 (4th ed. 2004) (LaFave) (quoting *Street* v. *Surdyka*, 492 F.2d 368, 372 n.7 (4th Cir. 1974)). This Court reversed the defendant's federal court conviction for possessing counterfeit gasoline coupons, which were found on his person in a search incident to his arrest. The arrest, although "for a federal offense," was "made by a state officer accompanied by federal officers who had no power of arrest." *Di Re*, 332 U.S. at 591. Given those circumstances, the parties disputed whether state or federal law governed the officer's authority to make the arrest. *Id.* at 588-589. The Court resolved that dispute by concluding that, "in absence of an applicable federal statute[,] the law of the state where an arrest without warrant takes place determines its validity." *Id.* at 589. The Court further concluded that the arrest was not authorized by New York law, which permitted arrest for a felony only if "the officer had reasonable grounds to believe the suspect had committed" one. *Id.* at 591. In discussing the lawfulness of the arrest, the Court never mentioned the Fourth Amendment. See *id.* at 587-595. *Di Re* is thus best understood, not as a Fourth Amendment ruling, but as an effort by the Court to clarify the law federal courts should use to determine the lawfulness of arrests for federal offenses. "So interpreted, *Di Re* is simply an instance of the Court utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional federal arrest." LaFave § 1.5(b) at 169.

In any event, although the Court did not analyze the case this way, the requirement of New York law that the Court found unsatisfied in *Di Re* mirrored the constitu-

tional requirement for a valid arrest. See 332 U.S. at 594-595 (equating "reasonable grounds" requirement with"probable cause" standard). Thus, even if *Di Re* were treated as a constitutional decision, its result would be consistent with the Fourth Amendment rule that nothing more than an arrest supported by probable cause is required to support a valid search incident to that arrest.

This Court cited *Di Re* in *Miller* v. *United States*, 357 U.S. 301 (1958), and *Johnson* v. *United States*, 333 U.S. 10 (1948). But neither of those cases transformed *Di Re*'s supervisory-powers ruling into a Fourth Amendment holding.

In *Miller*, federal agents conducted a search incident to an arrest made after they entered a home without knocking and announcing their presence. Citing *Di Re*, the Court stated that the validity of the arrest should be determined based on local law, but the Court then observed that the government had conceded that the entry should also be judged by the standards in a federal statute, 18 U.S.C. 3109. *Miller*, 357 U.S. at 305-306. After concluding that the entry did not comply with Section 3109, the Court ordered the suppression of the evidence discovered in the search. *Id.* at 307-314. Because *Miller* turned on the meaning of Section 3109, this Court has viewed it as a non-constitutional decision involving the exercise of the Court's supervisory authority. See *Sanchez-Llamas*, 126 S. Ct. at 2681; *Wilson* v. *Arkansas*, 514 U.S. 927, 934 & n.3 (1995); *Ker* v. *California*, 374 U.S. 23, 39 (1963) (plurality opinion); *id.* at 53 (opinion of Brennan, J., joined by Warren, Douglas, and Goldberg, JJ.).

In *Johnson*, the Court suppressed evidence discovered in a search of the defendant's residence after police

officers entered without a warrant or exigent circumstances. The Court held that the search was not justified as incident to the defendant's arrest, but not because the arrest was unlawful. Rather, the Court held that the search began when the officers entered the residence, and, at that time, they did not yet have probable cause to arrest. The Court's footnoted citation to *Di Re* for the proposition that state law determines the validity of warrantless arrests was therefore dictum. 333 U.S. at 15 n.5. Moreover, the state arrest law in *Johnson* paralleled the constitutional "probable cause" standard, see *id.* at 15, so *Johnson* presents no conflict with the principle that the Fourth Amendment permits searches incident to arrests supported by probable cause.

Respondent's reliance (Br. in Opp. 17-18) on *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), is also misplaced. In *DeFillippo*, the Court upheld the validity of a search incident to an arrest based on probable cause to believe that the defendant had violated an ordinance that was later declared unconstitutional. In reaching its holding, the Court reaffirmed the established rule that "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *Id.* at 36. The Court concluded that the arrest and subsequent search were constitutionally valid because, when they were made, the arresting officer had "abundant probable cause" to believe that the defendant had violated a "presumptively valid ordinance." *Id.* at 37. The Court stated in passing that "[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* at 36. But that observation played no role in the Court's decision because, as

the Court explained, the defendant did not contest that his arrest complied with state law. *Ibid.*[6]

Respondent's suggestion (Br. in Opp. 8-9) that a search incident to an arrest that violates state law is unconstitutional, even though the arrest itself is constitutional, is also inconsistent with numerous cases, including *Robinson*, *Beck*, and *Adams*, which make clear that the constitutional validity of a search incident to arrest follows from the constitutional validity of the arrest. See p. 10, *supra*. Indeed, respondent's argument is difficult to square with *DeFillippo* itself, which upheld the validity of both the arrest and the search incident to the arrest and seemed to view the latter as flowing naturally from the validity of the former. See 443 U.S. at 40.

Respondent's proposed rule also makes no sense. Searches incident to arrest are justified because of the need to ensure the safety of the arresting officers and the interest in discovering additional evidence. Those justifications apply with equal force regardless of whether the arrest complies with state law. Moreover, it would be incongruous for the constitutional validity of a search incident to arrest to turn on state law when state law determines neither the constitutionality of the arrest itself nor the constitutionality of other types of searches, see *Elkins*, *supra*; *Greenwood*, *supra*.

---

[6] In *Ker*, a plurality of the Court also stated in passing that the lawfulness of state arrests is determined by state law. See 374 U.S. at 37. But the plurality concluded that the arrests complied with state law, *id.* at 37-38, and the Court upheld the arrests and the subsequent search as reasonable under the Fourth Amendment, *id.* at 44 (plurality opinion); *id.* at 46 (concurring opinion of Harlan, J.). *Ker* therefore does not hold that a search violates the Fourth Amendment if it is incident to an arrest that contravenes state law.

3. Respondent's "alternative" argument in defense of the judgment below— that an arrest complies with the Fourth Amendment only if there is probable cause to believe the suspect committed "an *arrestable* offense" under state law (Br. in Opp. 28)—also lacks merit. Respondent cites no decision of this Court that even hints at such a requirement. Moreover, an "arrestable" offense requirement would present all of the problems with constitutionalizing state restrictions on searches and seizures discussed above.

An attempt to limit those problems by constitutionalizing only certain state restrictions on arrest would raise additional difficulties. Most significant, no logical principle would cleanly divide those state restrictions that should be incorporated into the Fourth Amendment and those that should not. Respondent proposes to constitutionalize only state laws that declare that an offense is "categorically not subject to arrest by any officer." Br. in Opp. 27. But he offers no reason why that limitation should be treated differently under the Fourth Amendment from other state laws defining when searches and seizures are permissible. For example, why should a state prohibition on arrest, however categorical, be treated differently from the categorical state prohibition on garbage searches that this Court refused to incorporate into the Fourth Amendment in *Greenwood*? It is also far from clear that the Virginia law at issue here qualifies under respondent's test. Although that law generally prohibits arrests for driving on a suspended license, the prohibition has numerous exceptions, including one that authorizes arrests in all circumstances in any jurisdiction where the general district court has given prior approval. See p. 2, *supra*. This Court should avoid the quagmire presented by respon-

dent's proposal and reaffirm the simple, longstanding rule that a search incident to an arrest based on probable cause complies with the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

DAVID E. HOLLAR
Attorney

NOVEMBER 2007