No. 19-494

In the

Supreme Court of the United States

DAVID ZACHERY MORGAN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

Motion for Leave to File Brief and Brief of Amici Curiae Washington Association of Criminal Defense Lawyers and Colorado Criminal Defense Bar in Support of Petitioner

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Motion for Leave to File Brief of Amici Curiae in Support of Petitioner

Per Supreme Court Rule 37.2(b), the Washington Association of Criminal Defense Lawyers and Colorado Criminal Defense Bar respectfully move for leave to file the attached brief as amici curiae in support of the Petition for Writ of Certiorari. All parties were timely notified of proposed amici's intent to file this amicus brief. Petitioner has consented to the filing of the brief. Respondent State of Washington declined to consent unless provided with a draft of the brief before filing. Because that is not a required—or even accepted—practice, proposed amici declined and instead seek the Court's leave to file the amicus brief.

Proposed amici are criminal defense bar associations in Washington and Colorado working on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. This case presents an issue of great importance to proposed amici and their clients because Washington and Colorado have further relaxed the plain view exception to the Fourth Amendment's warrant requirement so that seizing officers do not need to perceive the incriminating nature of the object seized. Proposed amici are well-suited to provide insight into the implications of the decision below for criminal defendants, investigating officers, and the erosion of the Fourth Amendment's strong preference for a warrant.

For the foregoing reasons, the motion for leave to file the brief of amici curiae should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTE

RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Interest of Amici Curiae[1]

Amici, the Washington Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar, have a particular interest in this case because Washington's and Colorado's state supreme courts have eliminated the requirement that the seizing officer directly perceive an object's incriminating nature to qualify for the plain view exception to the warrant requirement. *See State v. Morgan*, 440 P.3d 136 (Wash. 2019); *People v. Swietlicki*, 361 P.3d 411 (Colo. 2015). Those holdings conflict with this Court's precedent and the rule in several other jurisdictions.

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit professional bar association with approximately 800 attorneys practicing criminal defense law in Washington State. WACDL seeks to promote the fair and just administration of criminal justice and to ensure due

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of proposed amici's intent to file this amicus brief. Petitioner consented to the filing of the brief. Respondent declined to consent unless provided an opportunity to review the brief first. Amici thus have filed a motion seeking leave to file the amicus brief.

process and defend the rights secured by law for all persons accused of crime.

The Colorado Criminal Defense Bar ("CCDB"), with nearly 850 members, is the largest criminal defense bar association in the State of Colorado. Its members are dedicated to the representation of criminal defendants, including the indigent. CCDB works to ensure that Colorado's criminal justice system embodies the principles of liberty, justice, and equality.

WACDL's and CCDB's members regularly litigate Fourth Amendment suppression issues and many of the organizations' members represent individuals—like the Petitioner—who have had their personal property seized without a warrant. WACDL and CCDB have filed amicus briefs in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Summary of Argument

Washington's (and Colorado's) interpretations of the plain view doctrine are untethered from the "theoretical and practical moorings" of the plain view doctrine—that is "the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband." *Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987). In most cases, the doctrine applies to items that any reasonable officer would know are evidence of a crime—usually drugs, weapons, or items the officer knows are stolen. In this respect, the plain view doctrine is similar to the rule that an officer need not obtain a warrant to arrest a person committing a crime in the officer's presence. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). No warrant is necessary when the criminality is in plain view to the officer on the scene.

This is not a normal plain view case. Here, the seizing officer's supervisor did not get a warrant and instead directed the officer to go to the hospital to take Petitioner's clothes. The officer later seized opaque plastic bags that contained the clothes. But, at the point of seizure, the officer was not seizing any item that his "plain view" or personal knowledge told him was evidence of a crime; he did not see blood or smell gasoline on the clothing. That takes the conduct outside the plain view exception and the traditional authority of police to make warrantless seizures when criminality is in plain view. The decision in *State v. Morgan*, 440 P.3d 136 (Wash. 2019),

dispenses with the traditional plain view requirement that the evidence be obviously incriminating.

This Court should grant certiorari and reverse the decision below for the following reasons:

First, none of the specifically established and well-delineated exceptions to the warrant requirement constitutionally excuse the warrantless seizure in this case. In addition, none of the policy goals underlying the exceptions to the warrant requirement, such as the preservation of evidence and officer safety, support the Washington Supreme Court's decision. *Morgan* instead creates a new exception, where officers have no incentive to obtain a warrant despite having every opportunity to do so.

Second, the Washington decision deviates from this Court's plain view cases and improperly extends the fellow officer rule from arrests to seizures of evidence. *See* Sup. Ct. R. 10(c). This Court's plain view cases examine whether the incriminating nature of the searched or seized object was immediately apparent to the searching or seizing officer. The Court does not impute other officers' knowledge—known as the fellow officer rule—to determine whether probable cause to seize the object existed and should overrule Washington's exceptional decision to do so.

Third, Washington's plain view exception would erode the Fourth Amendment's safeguards and admit evidence excluded in most other jurisdictions. Police could obtain the type of evidence this Court

has suppressed or excluded in other cases, such as hotel registries kept on paper visible at the front desk, *see City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015), or serial numbers on the bottom of turntables, *see Hicks*, 480 U.S. 321. *See generally* Sup. Ct. R. 10(c). In addition, the Washington's expansion of the plain view exception would admit evidence excluded in several other jurisdictions that require the seized evidence to be obviously incriminating. *See* Sup. Ct. R. 10(b).

Fourth and finally, as this Court has readily acknowledged, technological advancements have made obtaining a warrant faster and more efficient. The federal government and almost all States, including Washington and Colorado, permit officers to obtain warrants remotely. And police can still rely on the exigent circumstances exception as a backstop to the warrant requirement. Requiring the criminal nature of evidence to be immediately apparent to the seizing officer does not hinder police from recovering evidence.

Argument

I. The Washington Supreme Court's decision does not fit a recognized exception to the warrant requirement.

State v. Morgan, 440 P.3d 136 (Wash. 2019), applied the plain view doctrine to dispense with the warrant requirement and sanction the seizure of Petitioner's clothing. But officers had every

opportunity to obtain a warrant prior to the clothing's seizure. As discussed below, this decision conflicts with principles girding the plain view exception to the warrant requirement, as well as the other "jealously and carefully drawn exception[s]." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citations and quotation marks omitted). The decision creates a new set of situations where police officers have no incentive to obtain a warrant but every opportunity to do so.

1. Plain view. The "theoretical and practical moorings" of the plain view doctrine are "the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband." *Hicks*, 480 U.S. at 326–27. The exception spares an officer, who is lawfully in a location and who has probable cause to believe that the item observed is evidence of a crime or contraband, from "the inconvenience and the risk—to themselves or to preservation of the evidence—of going to obtain a warrant." *Id.* at 327. Thus, officers seeing guns, drugs, and other obvious evidence of a crime in plain view do not need to seek a warrant or otherwise risk the disappearance of that evidence. At its core, the authority of officers to seize obvious evidence of a crime in their plain view is akin to their authority to arrest a person committing a crime in their presence. *See Atwater*, 532 U.S. at 354 ("If 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.").

When evidence of criminality is not directly in front of an officer but rather "the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it," as was the case here, "[t]he requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 470–71 (1971) (plurality opinion).

In this case, there was nothing obviously or even probably criminal in plain view to the seizing officer. He did not see blood or smell gasoline on the clothing, and the incriminating nature of these clothes could not have been immediately apparent to him. The seizing officer did not know anything about Petitioner's clothing and did not learn that Petitioner's clothing had any evidentiary value. *See Hicks*, 480 U.S. at 327; *see also Atwater*, 532 U.S. at 354. *Morgan*'s expansion of the plan view exception, however, excuses the need for the evidence to be obviously incriminating.

Nor do the reasons underlying the plain view doctrine justify this warrantless seizure. Nothing in the record suggests any "inconvenience and [ ] risk—to [the officer] or to preservation of the evidence—of going to obtain a warrant." *Hicks*, 480 U.S. at 327. Petitioner's clothing was not a weapon that could have been used against the officers. The bagged clothes sat "undisturbed on" the "back counter" for "hours"

in Petitioner's hospital room "while [Petitioner] was almost constantly in the presence of police officers" and "not going anywhere." *See* Pet. App. 5a, 37a, 41a. One officer even had time to call the on-duty homicide deputy prosecutor during a break in questioning. *See* Pet. App. 41a–42a. Officers could have obtained a warrant during that time. *See* Pet. App. 39a–40a (state court of appeals finding there was no evidence to show that it was impractical to get a telephonic warrant once police noticed the bagged clothing in Petitioner's hospital room). Indeed, the supervising officer "kn[e]w in advance the location of the evidence and intend[ed] to seize it," so "[t]he requirement of a warrant to seize impose[d] no inconvenience." *See Coolidge*, 403 U.S. at 470–71.

2. Exigency. Another exception to the warrant requirement is an exigent circumstance: "when there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). This exception enables swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or halt the destruction of evidence in control of the accused when officers do not have time to obtain a warrant. *See, e.g.*, *Michigan v. Fisher*, 558 U.S. 45, 47–48 (2009) (per curiam) (law enforcement's need to provide emergency assistance to an occupant of a home); *United States v. Santana*, 427 U.S. 38, 42–43 (1976) (hot pursuit of a fleeing suspect); *Tyler*, 436 U.S. at 509–10 (enter a burning building to put out a fire and investigate its cause); *Cupp v. Murphy*, 412 U.S.

291, 296 (1973) (prevent the imminent destruction of evidence).

No exigent circumstances existed here. Petitioner's clothing sat undisturbed on the back counter in the hospital room for hours before it was seized, and there was no sign that it or Petitioner would be moved. *See* Pet. App. 5a, 37a, 41a. Officers had ample time to secure a warrant before seizing Petitioner's clothing. On this point, both the state supreme court and court of appeals agreed that no exigency would have impeded an officer from getting a warrant. *See* Pet. App. 4a–5a, 39a.

3. Consent and administrative search. "[V]oluntary consent of an individual possessing authority" also excuses a warrantless search or seizure. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citation omitted). This is because an individual can waive a claim to privacy. *See Zap v. United States*, 328 U.S. 624, 628 (1946), *judgment vacated on other grounds*, 330 U.S. 800 (1947). With respect to administrative searches, "certain industries have such a history of government oversight that no reasonable expectation of privacy" could exist. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

No one sought Petitioner's consent to take the bags with his clothing, although the seizing officer spoke with Petitioner for hours. *See* Pet. App. 2a–3a, 37a, 45a.

4. Search incident to arrest, stop and frisk, or automobile exception. These exceptions serve interests in officer safety and evidence preservation. A search incident to arrest protects officers and prevents the destruction of evidence. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009). The *Terry* stop allows an officer "to take necessary measures to determine whether the [seized] person is in fact carrying a weapon and to neutralize the threat of physical harm." *Terry v. Ohio*, 392 U.S. 1, 24 (1968). And the vehicle exception minimizes the increased risk of loss of evidence because cars are "readily mobile." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.").

The seizure of Petitioner's clothing did not serve any interest in officer safety. Nor was there a heightened risk of destruction of evidence.

* * *

Morgan does not fit any of the jealously and carefully drawn exceptions to the warrant requirement. The State asserted the plain view and exigent circumstances exceptions, but the state court of appeals and state supreme court unanimously rejected the exigency justification as unfounded. This case thus presents an opportunity to correct *Morgan*'s expansion of the plain view doctrine. The decision left standing creates incentives for officers to not obtain

a warrant although they had every opportunity to do so before seizure.

II. This Court has always and should require the seizing officer to observe the criminality first-hand.

The Washington Supreme Court's new rule imputes the supervising officer's knowledge—that civilian witnesses saw blood and smelled gasoline on Petitioner's clothes—to the seizing officer. *See* Pet. App. 10a (Madsen, J., dissenting). This Court has never done that; all of its plain view cases rely on the seizing officer's immediate perception of an object's obvious criminality. Immediate perception of criminality is and ought to be required. There is no reason to extend the fellow officer rule from arrests and investigatory stops to the seizure of evidence.

A. This Court's plain view cases rely exclusively on the seizing officer's first-hand perception.

This Court has always examined only the seizing officer or officers' immediate perception of the seized object's criminality when evaluating whether the plain view doctrine justified the search or seizure. "[R]equiring police to obtain a warrant once they have obtained a *first-hand* perception of contraband, stolen property or incriminating evidence generally would be a needless inconvenience." *Texas v. Brown*, 460 U.S. 730, 739 (1983) (emphasis added; quotation marks omitted). "The rationale of the plain view

doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

This Court's cases focus on what the seizing (or searching) officer knew. The Court examined in *Hicks* whether the searching officer "had probable cause to believe that [a turntable] was stolen." 480 U.S. at 326. Because he had "only a 'reasonable suspicion'" and did not "follow[ ] up his suspicions, if possible, by means other than a search," the search of the turntable violated the Fourth Amendment. *Id.* at 329. It was "immediately apparent" to the seizing officer in *Horton v. California* that "an Uzi machine gun, a .38-caliber revolver, two stun guns, a handcuff key, a San Jose Coin Club advertising brochure, and a few items of clothing identified by the victim" constituted "incriminating evidence" of an armed robbery of the treasurer of the San Jose Coin Club. 496 U.S. 128, 130-31, 142 (1990). In *Brown*, "Officer Maples possessed probable cause to believe that" the "opaque, green party balloon, knotted about one half inch from the tip" in the individual's hand was contraband based on "his previous experience in arrests for drug offenses" and his viewing of "several small plastic vials, quantities of loose white powder, and an open bag of party balloons" in the open glove compartment. 460 U.S. at 733–34.

The officer's authority to act on obvious criminality also underlies this Court's discussion of warrantless arrests. *See Atwater*, 532 U.S. at 340. "If 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." *Id.* at 354. The Court's discussion of "warrantless misdemeanor arrest authority" has long "focused on the circumstance that an offense was committed in an officer's presence." *Id.* at 340. "[S]ince the officer observes both the crime and the culprit with his own eyes," there is "no danger that an innocent person might be ensnared" and "thus . . . no reason to require a warrant in that particular situation." *United States v. Watson*, 423 U.S. 411, 426 n.1 (1976) (Powell, J., concurring).

The decision below excuses the need for the evidence to be obviously incriminating. Allowing officers to seize objects without obvious incriminating character just because other officers might have known about the object's incriminating character, as here, eliminates a first-hand knowledge requirement. *See* Pet. App. 10a (Madsen, J., dissenting). Here, the clothes' "incriminating character" was not "immediately apparent" to the seizing officer. He did not "observe[ ] . . . with his own eyes" any evidence of criminality. *Watson*, 423 U.S. at 426 n.1; *see Atwater*, 532 U.S. at 340. And only a further search of Petitioner's clothes would have revealed the blood or smell of gasoline. *See Hicks*, 480 U.S. at 326. The plain view exception should not cover the seizure.

B. This Court has never applied the fellow officer rule to seizures of evidence and should overrule Washington's decision to do so.

This Court has applied the fellow officer rule (or collective knowledge doctrine) in only limited situations: arrests and investigatory stops.

The Court first discussed the fellow officer rule in an arrest case. This Court suggested that arresting police officers could "reasonably assume[ ]" that "whoever authorized the [sheriff's radio] bulletin" describing the suspects "had probable cause to direct [their] arrest." *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971). The arresting officers did not "themselves [need to be] aware of the specific facts which led their colleagues to seek their assistance." *United States v. Hensley*, 469 U.S. 221, 231 (1985). Preventing arresting officers from "acting on the assumption that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime would . . . unduly hamper law enforcement." *Whiteley*, 401 U.S. at 568. But the fellow officer rule could not save the defendant's arrest in *Whiteley*. Because the issuing sheriff lacked probable cause to arrest, the arrest violated the defendant's Fourth Amendment rights. *Id.* at 568.

The Court applied the fellow officer rule to justify an investigatory stop in *Hensley*. Police could rely on a "wanted flyer" issued by law enforcement in

another jurisdiction to make "an investigatory stop" even if the detaining officers did not know the "articulable facts supporting a reasonable suspicion that the wanted person has committed an offense." 469 U.S. at 223, 232. "In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense." *Id.* at 231.

The Court has never extended the fellow officer rule to seizures of evidence,[2] and it should overrule Washington's and Colorado's decision to do so. Evidence, unlike "criminal suspects," is generally "[im]mobile" and not "likely to flee across jurisdictional boundaries." *Hensley*, 469 U.S. at 223, 232. A suspect's location is unpredictable, so one cannot identify with certainty which of several officers will be in the best position to make the arrest or stop. In contrast, police typically seize evidence, as they did here, in a particular, known location. (The automobile exception, discussed *supra*, covers the rare case where evidence is likely to be mobile.) As a result, it

[2] This Court cited *Whiteley* in a footnote in a plain view case but did not apply the fellow officer rule. *See Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983) (citing *Whiteley*, 401 U.S. at 568). The Court did not impute to the searching officer knowledge of the facts underlying probable cause from another officer. The searching officer had firsthand knowledge that marijuana was in the searched container. He was present when U.S. Customs previously opened the container and he tested the substance inside. *Id.* at 767–68. The Court held that U.S. Customs' resealing of the container did not disturb the searching officer's direct knowledge that the container held marijuana. *Id.*

would not "unduly hamper law enforcement" to require police to get a warrant before seizing stationary evidence. *See Whiteley*, 401 U.S. at 568.

III. Outliers Washington and Colorado have expanded the plain view doctrine into a catch-all exception, eroding the Fourth Amendment's safeguards.

Application of Washington and Colorado's rule could admit the type of evidence that this Court has previously held that law enforcement could not obtain without a warrant. In addition, their version of the plain view exception differs from the doctrine adhered to in several other jurisdictions.

For example, the Washington rule might allow law enforcement to obtain the hotel registry information in *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015). The Supreme Court held that an ordinance requiring hotels to provide their registries to police on demand was unconstitutional because "the subject of the search" was not afforded an "opportunity to obtain precompliance review before a neutral decisionmaker." *Id.* at 2452. Under Washington's rule, police could obtain the same information without a warrant if the hotel happened to keep a list of its guests on paper visible from the front desk.

In addition, the Washington rule could permit the officer to manipulate the turntable at issue in *Hicks*, 480 U.S. 321. This Court held that a police

officer could not move a turntable, in plain view, to discover the serial number at the bottom, which confirmed that the turntable "had been taken in an armed robbery." *Id.* at 323, 325. The manipulation of the turntable was a search, and the searching officer lacked "probable cause to believe that the equipment was stolen" absent the serial number. *Id.* at 326. Under the Washington rule, however, the officer in *Hicks* could have seized the turntable without probable cause or following up his suspicions, at the instruction of a supervising officer, as Officer Christopher Breault did with Petitioner's clothes, just because it was in plain view.

The Washington rule would also admit evidence suppressed in many other jurisdictions. Here, Officer Breault seized intrinsically innocent items, absent apparent probable cause of criminality, just because they were in plain view. *See* Pet. App. 16a ((Madsen, J., dissenting). In the Sixth Circuit, however, the police could not seize a notepad and calendar, "intrinsically innocent" items, in plain view because "probable cause of criminality was neither immediate nor apparent to the agents from their plain view of the items." *United States v. McLernon*, 746 F.2d 1098, 1125 (6th Cir. 1984); *see United States v. Garcia*, 496 F.3d 495, 510 (6th Cir. 2007) (map and documents); *People v. Sanders*, 26 N.Y.3d 773, 777 (2016) (clothing in plastic bag on floor of hospital); *see also United States v. Rutkowski*, 877 F.2d 139 (1st Cir. 1989); *United States v. Garces*, 133 F.3d 70, 75 (D.C. Cir. 1998); *State v. Dobbs*, 323 S.W.3d 184 (Tex. Ct. Crim. App. 2010).

IV. Technological advances make rare the excusable failure to obtain a warrant.

This Court has "historically recognized that the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency.'" *Riley v. California*, 573 U.S. 373, 401 (2014) (quoting *Coolidge,* 403 U.S. at 481). Thus, if police officers "can reasonably obtain a warrant" for a search or seizure "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, 569 U.S. 141, 152 (2013).

The warrant requirement "does not place an unduly oppressive weight on law enforcement officers." *United States v. Jeffers*, 342 U.S. 48, 51 (1951). And advances in technology have significantly reduced the time and effort needed to obtain a warrant, reducing the burden further still. These advancements should reduce the circumstances where lack of obtaining a warrant can be constitutionally excused.[3] As this Court has stressed, the federal government and "[w]ell over a majority of States" allow police

[3] Though, of course, there are certain circumstances that will make obtaining a warrant impractical that would support an exigency justifying a warrantless search. *See Kentucky v. King*, 563 U.S. 452, 460 (2011) ("One well-recognized exception [to the warrant requirement] applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.") (internal quotation marks omitted).

officers to obtain warrants remotely, by means of a telephone, radio, fax, or email.[4] *McNeely*, 569 U.S. at 154–55. "And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process…." *Id.* Warrants can therefore be obtained expeditiously, often in 15 minutes or less. *See id.* at 172 (Roberts, C.J., concurring in part and dissenting in part) (describing jurisdiction where "[j]udges have been known to issue warrants in as little as five minutes" and another where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes"); *Riley*, 573 U.S. at 401.

Under Washington state law and regulations, for example, law enforcement officers can apply for a search warrant with a magistrate by "any reliable means." Wash. Super. Ct. Crim. Rule 2.3(c); *see* Wash. Rev. Code § 10.79.035 ("The application may

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[4] *See McNeely*, 569 U.S. at 154 n.4 (citing laws and rules of 35 states); Elaine Borakove & Rey Banks, Justice Management Institute, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants* 8–9, 68–76, https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide (accessed Nov. 17, 2019) (finding 45 states have legislation allowing the issuance of warrants based on telephonic, video, or electronic affidavits); *see also* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.3(c) (5th ed. 2012) (describing oral search warrants and collecting state laws).

be provided or transmitted to the magistrate by telephone, email, or any other reliable method.").

The Washington Court of Appeals noted that police could easily have sought a telephonic warrant here. There was no threat to the officers' safety. In addition, there was little risk that evidence would be lost. Police spoke with Petitioner for hours and even had time to call the on-duty homicide prosecutor during a break in questioning. And there were multiple officers in Petitioner's hospital room, *see* Pet. App. 20a, so it would not have unduly burdened the investigation to have one obtain a warrant. Even the supervising officer could have obtained a warrant before sending Officer Breault to the hospital. Thus, securing a warrant would not have "be[en] a needless inconvenience" or "dangerous." *Coolidge*, 403 U.S. at 468.

As a general matter, law enforcement should first obtain a warrant before telling other officers to seize an individual's property. Police officers will usually be able to obtain a warrant quickly. And the exigent circumstances exception still provides an effective backstop to ensure that the need to obtain a warrant will not hinder the government's interest in obtaining contraband and evidence of crimes.

Conclusion

Amici curiae respectfully urge the Court to grant certiorari in this case.

Dated: November 18, 2019

Respectfully submitted,

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