No. 21-1486

In the Supreme Court of the United States

NANCY CATHERINE POWERS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After a confidential informant bought methamphetamine from a man named Joshua Moyers at Moyers's house, police officers obtained a warrant to search the house for drugs. When they executed the warrant, they encountered Petitioner, Nancy Powers, asleep on the living room couch, where she had slept the night before. Her purse was on a nearby table. Though the officers did not know that Powers would be present, the informant had told them about her—that she occasionally stayed at Moyers's house and usually had methamphetamine on her. The officers searched Powers's purse and found methamphetamine.

Powers moved to suppress the evidence, contending that the search violated her rights under the Fourth Amendment. On appeal, she urged the Alabama Supreme Court to consider the totality of the circumstances. The court did so, and held that the search was reasonable. The question presented is:

Did the search of Powers's purse comply with the Fourth Amendment?

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STATEMENT

A. Police Find Methamphetamine in Powers's Purse While Executing a Search Warrant of the House Powers Was Staying At.

On the morning of November 26, 2018, police raided the home of Joshua Moyers, a known methamphetamine dealer. Pet. App. 3a. An informant had purchased methamphetamine from Moyers at his home just days before, leading police to obtain a warrant to search the premises. The warrant authorized the officers to search the house for:

> Illegal drugs, to wit: methamphetamine, phone bills, cell phone, documents, ledgers, currency, prerecorded U.S. currency, photographs, lock boxes and safes and contents thereof, paraphernalia, weapons that may be used to facilitate in illegal drug transactions, articles of property tending to establish the identity of persons in control of premises, vehicles, storage areas, and containers being searched to include utility receipts, addressed envelopes, and keys.

Id. at 2a-3a.

Police entered the home at around 8:50 in the morning. They immediately encountered Powers, asleep on the living room couch. Her purse was sitting on a nearby table. *Id.* at 1a-3a. Though police did not know ahead of time that Powers would be there, the informant had told them about her—"'that she usually has meth,' and that she does not 'stay [at Moyers's house] full time." *Id.* at 4a (alterations in original).

The officers swept the house and found Moyers and two other individuals, also asleep. *Id.* at 3a, 27a. Police discovered marijuana and methamphetamine in Moyers's wallet and in a box in his bedroom. R. 43.

The officers read Powers her *Miranda* rights, which she waived. Pet. App. 3a. She said that the purse was hers and that it did not have anything illegal in it. *Id.* at 3a-4a. When officers searched the purse they discovered 17 grams of methamphetamine, over $800 in cash, and a digital scale that Powers admitted she used to weigh methamphetamine. *Id.* at 3a, 5a.

Powers was taken into custody and indicted for unlawful possession of methamphetamine with the intent to distribute and possession of drug paraphernalia. *Id.* at 3a. She moved to suppress the evidence, claiming that the search of her purse violated her rights under the Fourth Amendment. Pet. App. 4a, 43a-44a. After the trial court denied the motion, Powers reserved her right to appeal the denial of the motion and pleaded guilty to possession with intent to distribute. *Id.* at 5a n.1. She was sentenced to three years in prison, which was suspended for two years of probation. *Id.* at 44a.

B. The Alabama Court of Criminal Appeals Adopts the "Relationship Test" and Affirms the Denial of Powers's Suppression Motion.

On appeal, the Alabama Court of Criminal Appeals noted that the question presented to it—whether a premises search warrant allows officers "to search the belongings of a person who is present at the house"—was one of first impression for the court. *Id.*

at 25a-26a. The court recounted two main tests that other courts use. *Id.* at 32a-38a.

First was the "proximity test," also known as the "physical-possession" test. *Id.* at 32a-33a. Under this test, the court wrote, "the reviewing court focuses on the physical location of the container and whether the individual wore the container at the time it was searched in order to determine whether the container was an extension of the person or part of the premises." *Id.* (citation omitted).

Second was the "relationship test." The court explained that this test focuses "on the officers' knowledge or understanding of the person's 'relationship' to the premises searched at the time the officers executed the search warrant." *Id.* at 35a (citation omitted).

The court of appeals adopted the "relationship test," reasoning that it "best balances citizens' reasonable expectations of privacy with law enforcement needs." *Id.* at 38a. Then the court upheld the search of Powers's purse under the test. The court noted that police encountered Powers "by herself in the first room inside the house asleep on the couch," and that the confidential informant had "indicat[ed] that Powers … 'stay[ed]' at Moyers's house on occasion" and "usually ha[d] meth." *Id.* at 40a. The court concluded that "at the time the law enforcement officers carried out the search warrant for Moyers's house, they would have perceived Powers as something more than a 'transient visitor' to Moyers's house." *Id.*

For this reason, "and because Powers's purse was a container that could conceivably conceal the 'illegal

drugs' that law-enforcement officers were looking for," the court unanimously concluded that "Powers's Fourth Amendment rights were not violated when the officers searched her purse." *Id.* at 41a.

C. The Supreme Court of Alabama Adopts Powers's Proposed Test—Totality of the Circumstances—and Affirms the Constitutionality of the Search.

Powers petitioned the Alabama Supreme Court for a writ of certiorari, which the court granted. Arguing that the Court of Criminal Appeals had erred "by evaluating the search under a single court-constructed test," Powers urged the Supreme Court to evaluate her claim "based on the totality of the circumstances." Petr's Ala. S. Ct. Op. Br. 14-15.

The court did so. After examining the various tests, the court "decline[d] to adopt any specific 'test'" and expressly agreed with Powers that "the 'touchstone' of the Fourth Amendment is 'reasonableness.'" Pet. App. 16a-17a (cleaned up and citation omitted). The court explained that "the determination of what is reasonable in a given situation is necessarily a fact-intensive inquiry best evaluated by considering all of the circumstances." *Id.* at 17a (cleaned up and citation omitted). "Each case must be evaluated based on the unique facts and circumstances relevant to a defendant's reasonable expectations of privacy and whether police reasonably can conclude that a particular personal effect comes within the scope of a premises warrant." *Id.* at 16a-17a.

In its opinion, the court discussed the reasoning of several Fourth Amendment decisions from various

courts. *Id.* at 5a-22a. Because Powers claims that the court's discussion of two of these cases demonstrates the court's error, Pet. 10, 19-21, 25-29, it is worth briefly surveying this part of the court's opinion.

The first discussion concerned the D.C. Circuit's decision in *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973), which Powers had held up to the Supreme Court as a case that "examined the totality of the circumstances—exactly the analysis [she] advocates." Petr's Ala. S. Ct. Rule 28B Resp. 2. In *Johnson*, police executing a search warrant of an apartment for drugs found the defendant—a visitor to the apartment—sitting on a couch with her purse "resting on a table in front of her." Pet. App. 17a. The officers searched the purse and found drugs; the Court of Appeals upheld the search as consistent with the Fourth Amendment. In so doing, the D.C. Circuit discussed how it weighed the various circumstances of the search, including: (1) that the defendant did not have her purse on her person; (2) that the "apartment was a place where narcotics were sold as well as stored"; (3) that there was a delay before the apartment door was opened; and (4) (and this is the Alabama Supreme Court's summary)"because the premises warrant had been issued based on allegations that narcotics were being sold in the apartment, police could have reasonably believed that the defendant was a customer of the owner of the apartment, that she had purchased narcotics, and that she had placed them in her purse." *Id.* at 18a-19a; *see Johnson*, 475 F.2d at 979 & n.3. Based on these circumstances, the Court of Appeals held that the purse fell within the warrant the officers were executing.

The second discussion Powers says is problematic was of *Wyoming v. Houghton*, 526 U.S. 295 (1999), a decision in which this Court considered the lawfulness of a search of a passenger's purse during a warrantless traffic stop. Though recognizing that the decision rested "in part on the diminished expectation of privacy that accompanies vehicle searches," Pet. App. 22a, the Alabama Supreme Court drew three lessons that it thought could apply beyond the vehicle context. One, it noted that this Court applied a general reasonableness, totality-of-the-circumstances test, not a bright-line rule. *Id.* Two, it recognized that this Court emphasized the distinction between a body search and the search of a passenger's purse. *Id.* And three, it found it informative that this Court observed that "a car passenger … will often be engaged in a common enterprise with the driver," making a search of a passenger's purse more likely to be reasonable than, say, the search of a patron who just happens to be present at a bar when it is searched. *Id.*; *see Houghton*, 526 U.S. at 304-05 (citing *Ybarra v. Illinois*, 444 U.S. 85 (1979)). Based on this last observation, the Alabama Supreme Court reasoned that "[a] similar conclusion might be reached with respect to Powers, who was discovered asleep on a couch in a place known to be involved in the buying and selling of methamphetamine." Pet. App. 22a.

After discussing these cases, the Supreme Court of Alabama summarized the totality of the circumstances of the search of Powers's purse and concluded that the search did not violate the Fourth Amendment. Because Powers claims that this conclusion was based solely on the court "applying the physical

possession test" and holding "that Powers enjoyed a reduced expectation of privacy merely because she 'chose to set her purse down on a table,'" Pet. 21 (citation omitted), the court's concluding paragraph is worth recounting in full:

> Powers, who was found sleeping on a couch at 8:50 a.m. with her purse set on a table, was more than a mere visitor who happened to be on the premises when the search warrant was executed. In addition, as a person known for possessing methamphetamine and given her multiple visits to a house known for its involvement in the selling of methamphetamine, Powers should have reasonably believed that her property could be subject to search and seizure. Furthermore, the search warrant at issue was specifically aimed at locating methamphetamine, which by its nature will fit in small containers such as purses. Thus, police reasonably believed that Powers's purse could contain the items listed in the premises warrant, and they acted reasonably in searching Powers's purse without a warrant that specifically identified her or her property. Considering all the circumstances, arguments, and above-discussed authorities, we agree with the State that police reasonably concluded that Powers's purse was a container that came within the scope of the premises warrant and that Powers's right to privacy was not violated.

Pet. App. 23a.

REASONS FOR DENYING THE WRIT

Powers asks this Court to grant certiorari to "clarify how to determine whether a search warrant for a premises includes the authority to search the personal property in the possession of a visitor present when the warrant is executed." Pet. 2. Her suggested answer? "Reasonableness should be assessed under the totality of the circumstances." *Id.* at 16.

That is the answer the Supreme Court of Alabama gave, too. Pet. App. 16a. That court explicitly rejected the bright-line tests Powers complains of and expressly adopted the path Powers proposed. The only thing the court didn't do was blind itself to *what* circumstances it should consider, thus ruling that Powers's challenge failed under the very test she advocated. Reviewing that fact-bound inquiry is no reason to grant certiorari.

Nor, in any event, is the split in approaches as meaningful as Powers suggests. To start, the split is academic in this case because the search of Powers's purse was reasonable under the totality of the circumstances (as the Supreme Court of Alabama held), the relationship test (as the Alabama Court of Criminal Appeals held), and the possession test. And Powers forfeited any reliance on the so-called "notice test," which—according to Powers's petition—has not been adopted by any federal court of appeals or state court of last resort. *See* Pet. App. 13a n.4; Pet. 14. As a result, this case does not present a good vehicle to examine the different approaches.

Powers also overstates the degree and practical significance of the difference in approaches. When all

the circumstances are considered, the decisions Powers relies on do not so much demonstrate a patchwork of "differing decisions in cases with identical fact patterns," Pet. 2, as a difference in salient facts. Many of the cases would not come out differently under a totality-of-the-circumstances test, making the Court's review unnecessary.

I. The Supreme Court Of Alabama Considered The Totality Of The Circumstances, Making Powers The Wrong Person To Present The Fourth Amendment Issue.

Powers contends that this Court's intervention is needed to clarify that the Fourth Amendment requires courts to shun "bright-line test[s]," Pet. 16, and instead "examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment," *id.* (cleaned up) (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)). But Powers already received the test she advocates because the Alabama Supreme Court expressly adopted it. So she is the wrong person to ask this Court to "clarify" its Fourth Amendment jurisprudence. Pet. 2. The law applied to her was perfectly clear.

1. As explained above, *supra* at 4, the Alabama Supreme Court expressly held that courts reviewing challenges under the Fourth Amendment must consider the totality of the circumstances. Pet. App. 16a. It "decline[d] to adopt any specific 'test' to the exclusion of others," *id.*, and emphasized that "[e]ach case must be evaluated based on the unique facts and circumstances relevant to a defendant's reasonable expectations of privacy and whether police reasonably

can conclude that a particular personal effect comes within the scope of a premises warrant," *id.* at 16a-17a. Its reasoning echoed this Court's: "We have long held that the touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Id.* at 17a (cleaned up) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)); *id.* at 17a ("There can be no ready test for determining reasonableness…." (cleaned up) (quoting *Camara v. Municipal Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 536 (1967))); *see also id.* ("No crisp formula can substitute for reasonable judgments." (cleaned up) (quoting *United States v. Micheli*, 487 F.2d 429, 432 (1st Cir. 1973))); *id.* ("The determination of what is reasonable in a given situation is necessarily a fact-intensive inquiry best evaluated by considering all of the circumstances." (cleaned up) (quoting *State v. Molnau*, 904 N.W.2d 449, 452 (Minn. 2017))).

The court did, in other words, precisely what Powers asked it to do. *See* Petr's Ala. S. Ct. Op. Br. 13-14 ("[T]o determine the reasonableness of such a search courts must 'examine the totality of the circumstances.'" (citation omitted)). That the court then *weighed* the totality of the circumstances differently than Powers would have liked does not change the fact that the *test* the court adopted is the one Powers proposed. She is thus the wrong person to bring her claim to this Court.

2. Powers tries to skirt this problem by claiming that the Alabama Supreme Court paid mere "lip service to the totality of the circumstances," when in fact it affirmed her conviction "under a framework that

was, for all intents and purposes, a physical possession analysis." Pet. at 19-20. She points to two pieces of evidence to support her claim: (1) the court's discussion of the D.C. Circuit's decision in *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973), and (2) the court's consideration of the totality of the circumstances in her case. Even putting aside her shaky premise—that what matters for certiorari purposes is a court's secret application of a test rather than its public pronouncement of what test governs—neither piece of evidence supports Powers's allegation.

a. While some courts have characterized *Johnson* as an "example of the physical possession test," Pet. 20 n.8, the Supreme Court of Alabama clearly did not. *See* Pet. App. 17a-19a. Neither did Powers until a few minutes ago. Twice she told the Alabama Supreme Court that *Johnson* was a totality-of-the-circumstances case. In her reply brief, she asserted that the *Johnson* "court did not apply the possession test; it applied a balancing test, e.g., it examined the totality of the circumstances." Petr's Ala. S. Ct. Reply Br. 24 (citing 475 F.2d at 979). She then repeated her reading after oral argument, responding to the State's letter of supplemental authority by stating: "the *Johnson* court examined the totality of the circumstances—exactly the analysis Ms. Powers advocates here—to determine that, 'on the limited nature of the circumstances presented,' the search of a purse was reasonable." Petr's Ala. S. Ct. Rule 28B Resp. 2 (quoting 475 F.2d at 979). Only when the Alabama court accepted her reading (and still ruled against her) did Powers change her tune: now she says the court erred by even

discussing *Johnson* because *Johnson* "is a canonical physical possession case." Pet. 20.

But put aside Powers's flip-flopping. Even without that history it is hard to read the Alabama Supreme Court's discussion of *Johnson* and come away with the impression that it viewed physical possession as the sole circumstance to consider. For one, in the part of the *Johnson* decision discussed by the Alabama court, the *Johnson* court itself considered a number of factors beyond possession, including that the "apartment was a place where narcotics were sold as well as stored," "the delay, the suspicious noises that preceded the executing officers' entry into the apartment," "the apparent effort of [the apartment's owner] to escape through the bedroom window," and the officers' reasonable belief that the visitor "might have been a customer who had purchased narcotics and placed them in her purse" since "[t]he warrant was issued on allegations that the apartment was a place where narcotics were being sold." 475 F.2d at 979 & n.3; *see* Pet. App. 18a-19a.

For another, after discussing the various factors the *Johnson* court considered, the Alabama Supreme Court included a string cite of cases that all emphasized factors *other than possession*. Here is how the court characterized those cases:

> *See also United States v. Simmermaker*, 998 F.3d 1008 (8th Cir. 2021) (holding that a "lock box" owned by a nonoccupant of a house frequented by drug users came within the scope of a premises warrant, noting that the nonoccupant was a suspected drug user and was found asleep on a couch in the house); *State v. Wenzel*,

> 162 Idaho 474, 476, 399 P.3d 145, 147 (Idaho Ct. App. 2017) (holding that the search of an overnight guest's purse at a premises where there was cause to believe controlled substances were located was valid under a premises warrant); *State v. Bulgin*, 120 Idaho 878, 880-81, 820 P.2d 1235, 1237-38 (Idaho Ct. App. 1991) (holding that the search of the defendant's purse was valid under a premises warrant because the defendant was an overnight guest at the premises and a suspected methamphetamine user); *United States v. Gray*, 814 F.2d [49, 51 (1st Cir. 1987)] (holding that police properly searched a jacket owned by the defendant, which had been draped over a chair, noting that the defendant was more than "a casual afternoon visitor" and instead "was discovered in a private residence, outside of which a drug deal had just 'gone down,' at the unusual hour of 3:45 a.m.").

Pet. App. 19a-20a.

At bottom, Powers's contention that the Alabama Supreme Court erred by discussing *Johnson* and other "possession test authorities" is a red herring. The court viewed *Johnson* just as Powers did—as a totality-of-the-circumstances case. Even if that was not the best reading of the case, Powers is not the person to complain about it. And more fundamentally (and as discussed next), that reading did not infect the court's holding.

b. Besides relying on the court's discussion of *Johnson*, Powers also asserts that the Alabama Supreme Court *really* applied the possession test

because it "held that Powers enjoyed a reduced expectation of privacy merely because she 'chose to set her purse down on a table' next to her, as opposed to wearing it on her shoulder." Pet. 21 (citing Pet. App. 12a n.3, 20a). Not so.

To be sure, the Alabama Supreme Court did note that, "[b]ased on the facts of this case, Powers cannot possibly be deemed to have been 'wearing' her purse when it was searched" because "she chose to set her purse down on a table before she went to sleep." Pet App. 12a n.3, 20a. But this statement is obviously true, and just as obviously not the court's entire analysis. The court also emphasized that: (1) "Powers was known to usually have methamphetamine," (2) she "was an overnight guest in a house known to be involved in the sale of methamphetamine," (3) she "was known to have stayed at the house on more than one occasion," (4) she "was found sleeping on a couch at 8:50 a.m.," (5) she "was certainly more than a mere 'patron' of a legitimate business or a 'passing visitor' of a residence," and (6) "the search warrant at issue was specifically aimed at locating methamphetamine, which by its nature will fit in small containers such as purses." *Id.* at 20a, 22a-23a. Those considerations go far beyond mere physical possession.

3. Powers next tries to taint the court's opinion by arguing that it was error for it to discuss and analogize to this Court's decision in *Wyoming v. Houghton*, 526 U.S. 295 (1999). Pet. 25-29. She claims that by doing so the Alabama Supreme Court "extend[ed] the automobile exception to premises searches" and "swallowed the warrant requirement." *Id.* at 26.

Again, not so. *Houghton* indeed concerned an automobile search. The question was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." 526 U.S. at 297. In holding that the search of a passenger's purse is constitutional when there is probable cause to search the car for contraband, this Court analogized the situation to premises searches. When considering the "constitutionality of a search warrant directed at premises belonging to one who is not suspected of any crime," the Court noted, "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime, but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.'" *Id.* at 302 (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)). So it was, the Court found, when it came to searches of vehicles.

The *Houghton* Court also relied on premises search cases to distinguish between a search of a person's *belongings* and a search of the *person*. So, for instance, the Court noted that in *Ybarra v. Illinois*, 444 U.S. 85 (1979), it had "held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons" due to the "unique, significantly heightened protection afforded against searches of one's person." *Id.* at 303. The *Houghton* Court emphasized that this "distinction between search of the person and search of property" was "not newly minted," but had long existed in the caselaw. *Id.* at 303 n.1 (cleaned up). And it gave as an example a search that

it considered obviously constitutional: "a house search" in which officers "inspect[ed] *property* belonging to persons found in the house—say a large standing safe or violin case belonging to the owner's visiting godfather." *Id.*

Last, the *Houghton* Court distinguished cases like *Ybarra* based on the relationship a passenger in a car might have to the car's owner. "A car passenger," the Court reasoned, "unlike the unwitting tavern patron in *Ybarra*[,] will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* at 304.

It was these aspects of *Houghton* that the Alabama Supreme Court recognized had something to say about Powers's situation. *See* Pet. App. 22a. Unlike the "unwitting tavern patron in *Ybarra*," the court noted, it was not likely that Powers just happened to have wandered into Moyers's private home at the wrong time. Rather, the court said, because she "was discovered asleep on a couch in a place known to be involved in the buying and selling of methamphetamine," it was reasonable to think that she might "be engaged in a common enterprise with" Moyers—particularly given that the confidential informant had mentioned that she was known to stay over at the house and usually had methamphetamine on her. *Id.* And unlike in *Ybarra*, the court recognized, the search of Powers's purse was *not* a search of Powers herself.

These considerations do not reflect error, or the "swallow[ing of] the warrant requirement," Pet. 26, by the Supreme Court of Alabama.

4. At root, Powers's problem with the decision below is not the test the court adopted. Her problem is that the court ruled against her under that test. But for the reasons the court explained (and as discussed next), that decision was correct. And even if it wasn't, correcting such a fact-bound application "of a properly stated rule of law" is no reason to grant certiorari. *See* S. Ct. R. 10.

II. The Split Is Academic To This Case Because The Search of Powers's Purse Would Be Upheld Under Any Test.

Although Powers is right that different courts have focused on different factors when determining whether a search of a visitor's belongings is reasonable, she is wrong to suggest that the difference matters to her case. *Cf.* Pet. 21-25. It doesn't. The search of her purse was lawful under any reasonable test, making this case a poor vehicle to resolve the split.

A. The Search Was Reasonable Under the Totality of the Circumstances.

To begin, it's important to recall what the Fourth Amendment protects: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Accordingly, the Amendment provides that "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." *Id.*

Reasonableness is the "touchstone of the Fourth Amendment." *Robinette*, 519 U.S. at 39. And when it comes to reasonable premises searches, "[t]he critical

element … is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher*, 436 U.S. at 556. Ownership is not part of the particularity requirement. *See id.* at 555 ("Search warrants are not directed at persons; they authorize the search of 'place[s] and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized." (quoting *United States v. Kahn*, 415 U.S. 143, 155 n.15 (1974))). Nor does the Fourth Amendment contain any additional requirement that the executing officer look behind the warrant to determine whether the issuing magistrate would have found probable cause to search unanticipated items on the premises (such as purses).

The Supreme Court of Alabama was correct to find that the search of Powers's purse was reasonable under the circumstances. Officers had probable cause to obtain a search warrant of Moyers's home because a confidential informant had recently bought methamphetamine from him there. Pet. App. 27. Based on that purchase, the officers also had reason to believe that anyone they encountered at the drug house was likely to be involved in some way and that any of their bags could also contain the contraband they were searching for. *Cf. United States v. Peep*, 490 F.2d 903, 906 (8th Cir. 1974) (noting that "it is plainly unreasonable to infer that anyone else other than a participant would be allowed on the premises" of a residence "obviously being used for the distribution of narcotics" (citation omitted)); *Houghton*, 526 U.S. at 304-05.

That suspicion was made all the more reasonable when officers encountered Powers, asleep on the couch, at 8:50 in the morning. The informant had told the officers about Powers, and so they knew that she occasionally stayed at Moyers's house and usually had methamphetamine with her. It was thus reasonable for them to conclude that her purse that was sitting on a table fell within the contours of the warrant because it could contain the drugs they were after. Pet. App. 22a-23a. Under the totality of the circumstances, the search was reasonable. *E.g.*, *Molnau*, 904 N.W.2d at 452 (upholding search of purse under similar facts after considering the totality of the circumstances).

B. The Search Was Reasonable Under the Relationship Test.

Courts applying the relationship test would also uphold the search, as the Alabama Court of Criminal Appeals did. Pet. App. 40a-41a. Under this test, courts "examine … the relationship between the person and the place" to determine whether the scope of a premises warrant extends to a person who does not own or manage the premises. *United States v. Giwa*, 831 F.2d 538, 545 (5th Cir. 1987).

Applying this test, the Alabama Court of Criminal Appeals noted that it was "clear that, at the time the law enforcement officers carried out the search warrant for Moyers's house, they would have perceived Powers as something more than a 'transient visitor' to Moyers's house." Pet. 40a. That is because, "[w]hen the officers entered Moyers's house on the morning of November 26, 2018, Powers was by herself in the first room inside the house asleep on the couch, and she had left her black purse sitting next to her on the side

table while she slept." *Id.* She was, "at least, an overnight guest." *Id.* And likely, the court noted, she was more than that: as one of the officers testified at the suppression hearing, the confidential information had told the officer "about Powers—namely, that Powers 'usually has meth' and that she does not 'stay [at Moyers's] house full time,' indicating that Powers does, at least, 'stay' at Moyers's house on occasion." *Id.* (citing R.5). Powers's relationship with the house was such that officers could "have reasonably believed" that her purse contained the drugs they were "searching for as detailed in the search warrant." *Id.*

Powers attempts to contest these factual findings in her petition, arguing that "any determination that [she] was more than a mere visitor is based on a flawed understanding of the record." Pet. 31. This is so, she says, because "there is nothing in the record itself indicating that [officers] knew Powers to be" the guest "that the confidential informant mentioned to Officer Wood." *Id.* But as the Alabama Supreme Court held, because Powers did not challenge the intermediate appellate court's statement of facts when she sought certiorari review from the state high court, she cannot claim now that the high court erred by relying on those facts. Pet. App. 21a n.6 ("Powers did not submit with her petition for a writ of certiorari a statement of facts or a verification that such a statement had been submitted to the Court of Criminal Appeals on rehearing in that court. Under Rule 39(k) [of the Alabama Rules of Appellate Procedure], the scope of certiorari review 'will ordinarily be limited to the facts stated in the opinion of the particular court of appeals, unless the petitioner has attempted to enlarge or

modify the statement of facts as provided by Rule 39(d)(5)." (citation omitted)).

Nor was there error in any event. Not only did both appellate courts below recognize the factual basis for concluding that the officers *did* know of Powers at the time, Pet. App. 21a & n.6, but officers also knew that Powers was no casual visitor because she had stayed over the night before the search. She was *sleeping* on the couch when officers entered the house that morning. *See Giwa*, 831 F.2d at 545 (holding that an "overnight visitor" who slept on premises was subject to search because he was "more than just a temporary presence"); *cf. Gray*, 814 F.2d at 51-52 (holding that search of defendant's jacket was lawful, whether or not "searchers believed that the jacket belonged to defendant," because defendant was "discovered in a private residence, outside of which a drug deal had just gone down, at the unusual hour of 3:45 a.m."); *Simmermaker*, 998 F.3d at 1009-10 (upholding a search of a lockbox where defendant was "asleep on the couch in the living room of the house" and "known drug users were in and out of the house often"). Powers's claim would thus fail under the relationship test, too.

C. The Search Was Reasonable Under The Possession Test.

Last, Powers would lose under the possession test. This test is based on the distinction between a search of one's person and a search of one's property, and so focuses "on the location of the searched item in relation to its owner." Pet. App. 11a. A search of a jacket a person is *wearing* may be considered a search of the person, *cf. Ybarra*, 444 U.S. at 88-89, while a search of a jacket left on a kitchen chair may be a search of

the premises, *e.g.*, *Commonwealth v. Reese*, 549 A.2d 909, 910-12 (Pa. 1988).

Powers did not have possession over her purse. It was sitting on a table, while she was sleeping on the couch. That her purse was "wearable," or that it "contain[ed] key possessions and materials," Pet. 31, does not change that analysis. "For the time being at least the purse was then no more a part of her person than would have been a dress which she had worn into [a] room and then removed for deposit in a clothes closet." *United States v. Teller*, 397 F.2d 494, 497 (7th Cir. 1968); *see also State v. Gilstrap*, 332 P.3d 43, 46 (Ariz. 2014).

* * *

In sum, whether courts consider Powers's claim under the totality of the circumstances (as the Supreme Court of Alabama did), the relationship test (as the Alabama Court of Criminal Appeals did), or the possession test, the search of Powers's purse would be considered lawful. As a result, this case is a poor vehicle to resolve the split in approach.[1]

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[1] Powers also mentions the "notice test," which turns on whether officers were on "notice" that a container they find during a premises search belongs to a non-resident. Pet. 14. Powers does not point to any "state court of last resort" or "a United States court of appeals" that has adopted the test. S. Ct. R. 10(b); *see* Pet. 14. (The quotation Powers includes (at 14) from the Arizona Supreme Court summarizing the test comes from a decision *rejecting* the test. *See State v. Gilstrap*, 332 P.3d 43, 46 (Ariz. 2014)).

III. The Split In Approaches Is Not As Important As Powers Claims.

Finally, the Court should deny the petition because the split in approaches is not nearly as meaningful as Powers suggests. Although different courts have labeled their approaches somewhat differently based on the primary factors they consider important, at base what tends to separate the decisions are not their analytical frameworks but the specific facts of each case.

True, Powers says otherwise. She asserts that the decision of the Alabama Supreme Court "widened a split between it and other appellate and state courts of last resort which have found nearly identical searches to be unreasonable." Pet. 16. According to Powers, "the appellate courts of multiple other states have held that the search of a visitor's purse when the owner is present during the execution of a premises warrant violates the Fourth Amendment even when the purse is not 'worn' by the defendant at the time of

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This Court's *Houghton* decision explains well why so few courts have adopted this test (and why none have done so this century): Once a visitor's property exception to premises searches "became widely known, one would expect [visitor]-confederates to claim everything as their own" and for "a bog of litigation" to ensue, "involving such questions as whether the officer should have believed a [visitor's] claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the [visitor] was a confederate, or to believe that the [owner] might have introduced the contraband into the package with or without the [visitor's] knowledge." *Houghton*, 526 U.S. at 305 (footnote omitted). To the extent a split exists based on the notice test, the split is stale and obviously insignificant.

the search." *Id.* at 22. Those decisions are (according to Powers and in the order she discusses them): *State v. Lambert*, 710 P.2d 693 (Kan. 1985); *State v. Nabarro*, 525 P.2d 573 (Haw. 1974); *People v. Gross*, 465 N.E.2d 119 (App. Ct. Ill. 1984); *State v. Brown*, 905 N.W.2d 846 (Iowa 2018); *Hayes v. State*, 234 S.E.2d 360 (Ga. App. 1977); *State v. Ingersoll*, 1994 WL 615127 (Minn. Ct. App. Nov. 8, 1994) (unreported); and *State v. Thomas*, 818 S.W.2d 350 (Tenn. Crim. App. 1991). Pet. 21-25.

None of these decisions are by a federal circuit court, and only three of them are by a state court of last resort: *Lambert*, *Nabarro*, and *Brown*. *Cf.* S. Ct. R. 10(b). *Brown* and *Nabarro* are easily distinguishable, while the *Lambert* decision is not indicative of an entrenched split warranting this Court's attention.

Brown "was decided as a matter of state constitutional law," as Powers dutifully notes. Pet. 23 n.9. Though Powers tries to paper over that fact by arguing that "the clause of the Iowa State Constitution interpreted in *Brown* substantially mirrors the Fourth Amendment to the United States Constitution," *id.*, Powers neglects to mention that the Iowa Supreme Court has "departed from Federal Fourth Amendment precedent in a number of cases interpreting the search and seizure provisions" of its state constitution, *Brown*, 905 N.W.2d at 849 (collecting cases). *Brown* is not good evidence of a deep split in federal Fourth Amendment law.

Neither is *Nabarro*. In that case, officers executed a search warrant of a hotel room for drugs. The warrant named two men as the occupants of the room. 525 P.2d at 575, 577. When the officers entered the room

in the mid-afternoon, they encountered three women. One of them, Nabarro, picked up her purse and began walking to the bathroom; "she was stopped at the door of the bathroom, however, and was told to surrender her purse to one of the officers," who found marijuana in it. *Id.* at 574-75. The Supreme Court of Hawaii suppressed the evidence, reasoning that the police knew that Nabarro was "a non-resident visitor to the premises," that she owned the purse, and that the purse was in her immediate, personal possession. *Id.* at 577.

Notably, *Nabarro* was decided five years before this Court's *Ybarra* decision, so its reasoning may indeed be off, focused as it is on the officers' notice of ownership. But its facts are not the "nearly identical" ones Powers promised, and its holding does not conflict with the court's below. Pet. 21. Unlike Nabarro, Powers was found asleep on a couch in the mid-morning, having slept there the night before. Unlike Nabarro, Powers was found in a private residence at which a confidential informant had recently bought methamphetamine. Unlike Nabarro, Powers was known to the officers as someone who occasionally stayed at the drug house and who usually had methamphetamine on her. And unlike Nabarro, Powers was not holding her purse when officers took it to search. *Nabarro* is no reason to grant certiorari review in this case.

That leaves the Kansas Supreme Court's 1985 decision in *Lambert*. There, law enforcement officers obtained a warrant to search "an apartment and its occupant, known as Randy, for a white powder that was believed to be cocaine." 710 P.2d at 694. When officers entered the apartment, they discovered two women

seated at a table in the kitchen. "Between the two women was a serving tray containing marijuana and a partially burned, hand-rolled cigarette, which the officer believed to be marijuana." *Id.* After placing the women under arrest, the officers searched a purse they found on the kitchen table beside the marijuana trey. The purse contained amphetamine and more marijuana. *Id.* The Kansas Supreme Court suppressed the evidence because "the officer executing the search warrant had no reason to believe that the purse lying on the kitchen table next to the defendant belonged to Randy" and thus "could not reasonably believe that the purse was part of the premises described in the search warrant." *Id.* at 698.

Lambert was plainly wrong because it focused almost entirely on ownership. The Kansas court should have upheld the search because the officers knew that the purse could contain the contraband they were after. The purse was sitting on a table of drugs out in the open. And the women were seated at that drug-laden table at the known drug house. The Kansas court thus erred by not following this Court's guidance in *Zurcher*: "The critical element … is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." 436 U.S. at 556.

Fortunately, since *Lambert* was decided nearly forty years ago it has not infected the caselaw of other States. Since 2000, the only out-of-state decisions to even discuss *Lambert* did so either to explicitly reject its test or (as the Iowa Supreme Court did in *Brown*)

as an aid to interpret state law. *See Brown*, 905 N.W. 2d at 849; *State v. Merritt*, 567 S.W.3d 778, 782-83 (Tex. Ct. App. 2018); *Gilstrap*, 332 P.3d at 45-46; *State v. Reid*, 77 P.3d 1134, 1139-40 (Or. Ct. App. 2003). This Court's intervention is not needed to correct a lone state-court decision from decades ago.

CONCLUSION

For these reasons, the Court should deny the petition.

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