No. 21-1486

IN THE

Supreme Court of the United States

NANCY CATHERINE POWERS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF FOR PETITIONER

MATTHEW T. MARTENS
Counsel of Record
MATTHEW E. VIGEANT
MATTHEW M. GIRGENTI
JULIAN M. BEACH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
matthew.martens@wilmerhale.com

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INTRODUCTION

Respondent provides no basis to deny certiorari. The opposition is largely predicated on misportrayals of the Alabama Supreme Court's opinion, misconstrues the Petition and relevant precedent, and relies on manufactured vehicle problems.

Ybarra v. *Illinois* established that premises warrants do not authorize searches of visitors who "happen to be" present when the warrants are executed. 444 U.S. 85, 91 (1979). Rather, a search "of a person must be supported by probable cause particularized with respect to that person." *Id.* *Ybarra* did not resolve how to distinguish between the reasonable search of a premises and the unreasonable search of a person. Pet.2. This left lower courts, including the Alabama Supreme Court here, to answer whether a purse is so closely associated with someone like Petitioner that its search constitutes a search of the person. *United States* v. *Robertson*, 833 F.2d 777, 784 (9th Cir. 1987). To answer that question, the Alabama Supreme Court should have examined the totality of the circumstances surrounding the search. *Samson* v. *California*, 547 U.S. 843, 848 (2006); Opp.9-11. However, this is neither what the court did, nor what Respondent urges now.

Instead, the court rested its determination on a single fact: because Petitioner's purse was on the table directly next to her, she was not "wearing" it at the time of the search, and consequently—according to the court—the search could not have been of her person, Pet.App.12a n.3. By so doing, the court short-circuited any totality of the circumstances analysis in favor of functionally adopting a "possession test." Pet.19-21; *see also* Pet.App.12a n.3

Perhaps recognizing the Alabama Supreme Court's error, Respondent minimizes the dispositive factor that court relied upon, and instead directs this Court's attention to other facts listed at the end of the Alabama court's opinion. Opp.14. But those facts were ones either deemed insufficient in *Ybarra* to justify the challenged search there or, if now deemed sufficient to justify a search, would upend established Fourth Amendment law by undermining the probable cause requirement.

More importantly, lower courts are coming to opposite conclusions on the question presented here: whether a search of a purse not being worn by a residential visitor at the moment a premises warrant is executed is permissible under the Fourth Amendment. Respondent's claim that state supreme court rulings contrary to that of the Alabama Supreme Court are "plainly wrong," Opp.26, or employ reasoning that "may indeed be off," Opp.25, cannot erase the split of authority. And courts approaching the question presented here apply at least four conflicting tests to address it. Pet.App.13a-15a. This Court's intervention is needed to stop the inconsistent application of Fourth Amendment protections.

ARGUMENT

I. THE ALABAMA SUPREME COURT EFFECTIVELY APPLIED THE PHYSICAL POSSESSION TEST

Under the Fourth Amendment, the search "of a person must be supported by probable cause particularized with respect to that person." *Ybarra*, 444 U.S. at 91. The particularity requirement cannot be "avoided by simply pointing to the fact that coincidentally there exists probable cause … to search the premises where

the person may happen to be." *Id.* To the contrary, a premises-only warrant "cannot logically meet [the particularity] requirement since by hypothesis there is no way to know, at the time the warrant is issued, whether the visitor ***or his possessions*** will even be present at the premises." *State* v. *Nabarro*, 525 P.2d 573, 576 (Haw. 1974) (emphasis added).

Here, whatever probable cause supported a warrant for Joshua Moyers's house was not probable cause to search Petitioner or her purse. The warrant did not name her, and the supporting affidavit contained no evidence concerning her. Petitioner thus maintained a reasonable expectation of privacy in her person and intimate belongings when police executed a premises warrant at Moyers's home. *See Ybarra*, 444 U.S. at 90-91.

While no party disputes that the warrant at issue did not authorize a search of Petitioner's person, the Alabama Supreme Court upheld the search of Petitioner's purse through what was, for all intents and purposes, a straightforward application of the physical possession test: because Petitioner was not holding the purse at the moment of the search, it was not an unreasonable search of her person. Pet.App.12a n.3; *see also* Pet.19-21; *United States* v. *Vogl*, 7 F. App'x 810, 815-817 (10th Cir. 2001) (The "physical possession" test "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.").

Not only did the Alabama Supreme Court's reasoning diverge from decisions of other courts to the effect that the search of an individual's purse within their

immediate vicinity constitutes a search of their person, Pet.App.21a-23a, it failed to follow this Court's instruction that the proper test to determine the reasonableness of a search requires examining the totality of the circumstances, necessarily including detail beyond whether Petitioner was holding or wearing the item, *see*, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness … is measured in objective terms by examining the totality of the circumstances.").

As the Petition acknowledged, the court did claim to consider the totality of the circumstances and even listed a handful of facts relating to Petitioner's relationship with the premises, Pet.19; Pet.App.16a-17a, but many of the facts the court cited were present in *Ybarra* and none of them could demonstrate that the officers reasonably believed that the purse was part of the premises and not Petitioner's personal belongings. Pet.18-19; Pet.App.19a, 22a-23a. Thus, the court did not grapple with whether the totality of the circumstances rendered the search of the purse in effect a search of Petitioner's person. *See* Pet.App.12a n.3 ("[I]t is not necessary to consider whether, or when, the search of a personal effect that might be considered 'wearable' is the equivalent of searching a 'person' for purposes of precedent like *Ybarra*."). This is not a matter of the "weight" assigned to any given factor, but instead a legal error in applying an important constitutional standard that merits review.[1]

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[1] *See*, *e.g.*, *United States* v. *Bras*, 483 F.3d 103, 106 (D.C. Cir. 2007) (noting a court can commit legal error by failing to consider Guidelines factors in totality of circumstances); *Alarcon-Chavez* v. *Gonzales*, 403 F.3d 343, 345 (5th Cir. 2005) (noting legal error may occur when a judge "considered the wrong factors in applying his discretion.").

As support for its approach, the Alabama Supreme Court relied (App.17a-20a) on the reasoning in *United States* v. *Johnson*, 475 F.2d 977 (D.C. Cir. 1973), which Respondent argued below,[2] and courts across the country have agreed[3] that *Johnson* applied a physical possession analysis. Now that the Alabama Supreme Court relied on *Johnson*, Respondent contends that the court applied *Johnson* as part of a totality of the circumstances analysis. Opp.11-13.

The Alabama Supreme Court also relied on *Wyoming* v. *Houghton*, 526 U.S. 295 (1999), which no matter how finely Respondent parses, rested "on the diminished expectation of privacy that accompanies vehicle searches." Pet.App.22a. While dicta contained in a footnote in *Houghton* did compare the search of the passenger to the search of a premises, it analogized to searching "a large standing safe or violin case,"—quite different containers than a purse and not included in the categories of personal belongings that other courts have equated with searches of the person. 526 U.S. at 303 n.1; *cf. Robertson*,

[2] Respondent stated: "[U]sing physical possession as the sole criterion is both over and under protective of Fourth Amendment rights. … In any event, Powers loses under this test as well because she did not possess her purse while the search warrant was being executed. … Such was the result, for instance, under nearly identical circumstances in *United States* v. *Johnson* … . [B]ecause the purse was 'resting separately from the person of its owner,' it 'was not being "worn" by [her] and thus did not constitute an extension of her person so as to make the search one of her person.'" Resp. Ala. S. Ct. Br. 32-34 (third brackets in original).

[3] *See State* v. *Gilstrap*, 332 P.3d 43, 45 (Ariz. 2014) ("Several jurisdictions have adopted the possession test," citing *Johnson*); *State* v. *Merritt*, 567 S.W.3d 778, 781 (Tex. Ct. App. 2018) ("'Under the possession test … the search of a personal item like a purse is not regarded as a search of the person when the item is not in the person's possession.'" (quoting *Gilstrap* and citing *Johnson*)).

833 F.2d at 784. Moreover, courts have held that *Houghton* is inapposite to cases like this involving premises warrants, a fact Respondent fails to address. Pet.App.25a-29a.

Finally, while Respondent notes (Opp.12-13), that the Alabama Supreme Court cited other cases as support for its conclusion, not only did the court not analyze those cases at any length, but cases such as *United States* v. *Simmermaker*, 998 F.3d 1008 (8th Cir. 2021) and *United States* v. *Gray*, 814 F.2d 49 (1st Cir. 1987), rested on a "particularized suspicion" or other aggravating circumstance that provided independent probable cause to search the defendants and their personal effects. *See* Opp.12-13. But it is undisputed in this case that the officers had not established independent probable cause and that no exceptions to the warrant requirement applied, and thus, the reasonableness of the search must stand or fall on the scope of the premises warrant.

II. RESPONDENT'S NOVEL ARGUMENT CONTRADICTS *YBARRA*

Respondent attempts to escape this Court's review by downplaying the dispositive factor in the Alabama Supreme Court's analysis, instead emphasizing several factors recited in the closing paragraph of that court's opinion. *See* Opp.7, 14. However, reliance on the facts recounted in that paragraph to justify the search here would gut *Ybarra's* protections.

In *Ybarra*, this Court laid down a bright line: a visitor cannot be searched merely because they "happen to be" at a premises subject to a warrant. 444 U.S. at 91. The Alabama Court of Criminal Appeals accepted this, Pet.App.31a, as did the Alabama Supreme Court,

Pet.App.10a. Thus, the police could not search Petitioner based on the warrant, and this is true no matter what the officers knew about a "Nancy" and regardless of whether Petitioner had slept that night on Moyers's sofa.

The question before the Alabama Supreme Court was thus whether the search of the purse was a search of Petitioner's person or of the premises, a question which the court addressed in a conclusory footnote that relied on the single fact that she was not wearing her purse at the moment of the search. Pet.App.12a n.3. Respondent nonetheless points to the conclusion of the court's opinion, attempting to prove that the Alabama Supreme Court examined the totality of the circumstances. That paragraph, however, only heightens the need for this Court's review given that the court made sweeping statements in that paragraph that, if accepted, would dramatically re-write Fourth Amendment law.

First, the court stated that Petitioner "should have reasonably believed" her purse could be searched "as a person known for possessing methamphetamine and given her multiple visits to a house known for its involvement in the selling of methamphetamine." Pet.App.23a. This is a remarkable assertion by the court—one that appears to contract *Ybarra*'s requirement of a warrant for the person. *Ybarra* specifically considered and rejected the notion that a person is subject to search because she is at a place "known for its involvement in the selling of [drugs]." *Id.* As with *Ybarra*, police "knew nothing in particular about [Petitioner] except that [s]he was present, along with several other[s] … at a time when the police had reason to believe that [Moyers] would have [drugs] for sale." 444 U.S. at 91.

Second, the Alabama Supreme Court relied on the fact that Petitioner's purse was a "small container" in which methamphetamine could fit. Pet.App.23a. But the same is true of the pants pocket searched in *Ybarra*. 444 U.S. at 89. While the warrant in *Ybarra* permitted the search of the premises for heroin, this Court ruled that it did not permit the search of a pocket where heroin could be located when that pocket was part of a person who "happened to be" at the premises searched. *Id.* at 91. Though pants, like a purse, are not literally part of a person, they are worn by and closely associated with a person's body, and thus like the body itself require a warrant for the person for police to search. *United States* v. *Graham*, 638 F.2d 1111, 1114 (7th Cir. 1981) ("[H]uman anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried. To remedy this anatomical deficiency clothing contains pockets. In addition, many individuals carry purses or shoulder bags to hold objects they wish to have with them. Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person."); *State* v. *Gilstrap*, 332 P.3d 43, 46 (Ariz. 2014) (noting that "the search of certain personal items, such as a purse, can in some circumstances amount to a search of a person").

Finally, the Alabama Supreme Court noted that Petitioner "was more than a mere visitor who happened to be on the premises [searched]" because she "was found sleeping on a couch." Pet.App.22a. This is, in effect, an (erroneous) application of the relationship test. Pet.13-14. Thus, while attempting to portray the Alabama Supreme Court's analysis as something else, Respondent ends up advocating for yet another court-

made test. In any event, whether or not Petitioner spent the night, she is not subject to a search of her person (or extensions of such) by means of a premises warrant.

In short, while the Alabama Supreme Court professed to consider "all the circumstances" in its opinion, it in fact rested its conclusion on one fact dispositive only under a possession test, and otherwise cited circumstances that either do not address whether the search was of Petitioner's person or that this Court deemed insufficient in *Ybarra*.

III. THE ALABAMA SUPREME COURT'S DECISION AND REASONING CONFLICTS WITH DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS

Most importantly for purposes of this petition, the outcome below conflicts with decisions in multiple state and federal courts. Pet.App.21a-23a. Respondent's attempts to minimize that conflict are unavailing.

Respondent claims that no decisions comprising the split of authority are by a federal circuit court. Opp.24. This is incorrect. In *Johnson*, while executing a premises warrant, police searched a purse sitting on a coffee table and belonging to a non-resident woman sitting on the couch. The D.C. Circuit deemed this search consistent with the Fourth Amendment, noting that the woman was not wearing her purse at the time. 475 F.2d at 979. In *United States* v. *Micheli*, 487 F.2d 249 (1st Cir. 1973), the First Circuit rejected this reasoning, explaining that the reasonableness of the search did ***not*** depend on whether the "appellant was physically holding the briefcase;" rather, as *Micheli* explained, the search would be unreasonable if, as in Petitioner's case, "agents [had] reason to know that the briefcase be-

longed to" the visitor. *Id.* at 430-431. The Eleventh Circuit likewise agreed with *Micheli* in upholding the search of a purse, concluding that a contrary ruling "would facilitate the insulation of incriminating evidence from lawful searches through the simple act of stuffing it in one's purse or pockets." *United States* v. *Young*, 909 F.2d 442, 445 (11th Cir. 1990).

Other state supreme courts have reached decisions consistent with these federal appellate decisions. *State* v. *Gilstrap*, 332 P.3d 43 (Ariz. 2014); *People* v. *Coleman*, 461 N.W.2d 615 (Mich. 1990).

But several state supreme courts have reached different conclusions. In *State* v. *Lambert*, 710 P.2d 693 (Kan. 1985), the court ruled that a search of a purse on a table in front of a female visitor at a house subject to a search warrant was impermissible under the Fourth Amendment. *Id.* at 698. Respondent contends that this decision was "plainly wrong." Opp.26. Whether or not that is so—and that is the question Petitioner asks this Court to resolve—the decision in *Lambert* is factually irreconcilable with the decision by the Alabama Supreme Court here.

So too is the decision by the Hawaii Supreme Court in *State* v. *Nabarro*, 525 P.2d 573 (Haw. 1974). In that case, police entered a residence for which they had a warrant and encountered a woman and a purse sitting on the floor immediately next to her. *Id.* at 584. The woman picked up the purse after police entered and headed for the restroom. *Id.* The police stopped her and demanded to search the purse. The Hawaii Supreme Court concluded that this search "was beyond the allowable scope of the warrant to search the room." *Id.* at 588. Respondent seeks to distinguish this case on the ground that "Powers was not holding her purse

when officers took it to search." Opp.25. If physical possession of the purse was the dividing line in *Nabarro*, then it conflicts with the First Circuit's decision in *Micheli*, which rejected this as the decisive factor. 487 F.2d at 430.

In short, the outcomes in *Johnson*, *Micheli*, *Gilstrap*, *Coleman*, *Lambert*, and *Nabarro* cannot be reconciled. Only adding to this confusion are the decisions of at least four states' intermediate appellate courts that reach conclusions contrary to that of the Alabama Supreme Court on nearly identical facts. Pet.23-25.

Ultimately, as Respondent concedes, courts across the country currently employ four different tests to determine the reasonableness of searches of personal possessions of visitors to a premises subject to a warrant: the relationship, physical possession, notice, and totality of the circumstances test. *See* Pet.13-15. And on facts like those here, courts have reached conflicting decisions regarding the permissibility of a search of a purse pursuant to a premises warrant. Lower courts need this Court's guidance to determine how to evaluate a common search and seizure issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MATTHEW T. MARTENS
Counsel of Record
MATTHEW E. VIGEANT
MATTHEW M. GIRGENTI
JULIAN M. BEACH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
matthew.martens@wilmerhale.com

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