No. _____

IN THE
Supreme Court of the United States

ARNEZ J. SALAZAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's opinion in *Arizona v. Gant*, 556 U.S. 332 (2009) created a two-part test that requires an arrestee to be unsecured and within reaching distance of a closed container for law enforcement officials to conduct a warrantless search incident to arrest.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED CASES

This case arises from the following proceedings:

United States of America v. Arnez J. Salazar, No. 22-2696, 69 F.4th 474 (7th Cir. June 2, 2023) (affirming denial of motion to suppress evidence); and

United States of America v. Arnez J. Salazar, Criminal No. 22-cr-10005-MMM-JEH (C.D. Ill. April 14, 2022) (denying motion to suppress evidence).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arnez Salazar respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The Seventh Circuit's decision is published at 69 F.4th 474 and is included as Appendix A. The district court denied Mr. Salazar's motion to suppress without a written order on April 14, 2022. The transcript of the district court's oral ruling has been included as Appendix B.

JURISDICTION

The Seventh Circuit entered judgment on June 2, 2023. Pet.App. 1a. No petition for rehearing was filed. This petition is filed within 90 days of the June 2, 2023, judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Am. IV states:

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

STATEMENT

This case is an ideal vehicle for resolving an important federal question involving the Seventh and Third Circuit Courts of Appeals deciding an issue in a

way that conflicts with this Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009). This Court in *Gant* set forth a two-part test for determining when a law enforcement official may conduct a warrantless search of a closed container incident to arrest. Under that test, the police are authorized to search a vehicle incident to a recent occupant's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343. That test has been extended to non-vehicle containers by multiple appellate courts. *See, e.g., United States v. Leo*, 792 F.3d 742, 750 (7th Cir. 2015).

Gant's plain language creates a conjunctive, two-part test that governs the search of a closed container incident to arrest – the police may only conduct a warrant search if the arrestee is unsecured *and* within reaching distance of the container. Meaning, being unsecured *or* within reaching distance of the container is simply not enough. Both conditions must be present to justify a warrantless intrusion.

Yet, the Seventh Circuit has decided that *Gant* does not mean what it says. According to the Seventh Circuit, *Gant* does not "demand separate analyses of whether an arrestee is secured and whether an area is within reaching distance." *United States v. Salazar*, 69 F.4th at 477. Instead, as Seventh Circuit sees it, a "more faithful reading" of *Gant* allows the police to conduct warrantless searches when the arrestee is unsecured *or* within reaching distance of the container. *Id.* at 478. In fact, according to the Seventh Circuit, *Gant*'s standard is not even mandatory. *See id.* (holding that *Gant* "may" require a district court to determine

whether an arrestee was unsecured and within reaching distance of the search area). Thus, in the Seventh Circuit, the police can fully secure arrestees and remove any potential danger, but still conduct a warrantless search of a closed container solely based on the proximity of the container to the arrestee. That result is inconsistent with *Gant*'s express language that permits the search "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 556 U.S. at 343.

The question presented calls out for this Court's immediate review. The Third Circuit has also endorsed the Seventh Circuit's non-textual reading of *Gant*. *See United States v. Shakir*, 616 F.3d 315 (3rd Cir. 2010). These opinions are not only contradictory to *Gant*'s plain language, but they are also dangerous. Allowing warrantless searches of closed containers solely based on the arrestee's proximity to the container is the type of unrestrained police authority that *Gant* was specifically designed to curb. The Seventh Circuit's conclusion that *Gant* does not require a separate analysis of the arrestee's secured status and their proximity to the container is a return to the era of authorized searches incident to *every* custodial arrest that existed following this Court's opinion in *New York v. Belton*, 453 U.S. 454 (1981). It gives the police an incentive not to remove the arrestee away from any potential danger, even when it is easy to do so. That is precisely the situation *Gant* was trying to rectify. *See* 556 U.S. at 343.

The Court should act now because the question is too important to ignore. Arrestees in the Seventh and Third Circuits are being subjected to warrantless

searches that ignore the standard set by this Court. This case presents an ideal opportunity to resolve an important federal question that has been decided, by two Circuits, in a way that conflicts with a relevant decision of this Court. Moreover, that conflict is only likely to continue to grow as other courts have recognized the existence of the "open question" that arguably exists after *Gant*. *See United States v. Davis*, 997 F.3d 191, 203, n.4 (4th Cir. 2021).

There are no threshold issues that would preclude this Court from reaching the question presented, which was the only basis for the Seventh Circuit's affirmance. Indeed, the Seventh Circuit expressly declined to reach the government's alternative basis for upholding this warrantless search. *See Salazar*, 69 F.4th at 479. Only this Court's intervention can ensure all arrestees, in every Circuit, are having their Fourth Amendment rights adequately protected based on the clear standards articulated by this Court.

I. Factual History

On January 14, 2022, Arnez Salazar was enjoying a drink with his grandfather at a local pub in Peoria, Illinois. The pub was quiet that evening, with only two other patrons at the bar, as well as two bar tenders on shift. Like many people do, Mr. Salazar posted a video of himself enjoying his evening to the social media site Facebook. Although that video was meant for his friends, the Peoria police saw it too. Knowing that Mr. Salazar had an active arrest warrant for traffic violations, they sent a squadron of five uniformed officers to apprehend him.

All five officers entered the pub at the same time, from different directions, and immediately descended upon and surrounded an unsuspecting Arnez Salazar

who was sitting on a barstool talking on his cell phone. Draped over the back of his chair was a black jacket with a cream-colored Sherpa liner ("the black jacket"). Also draped over the back of the vacant bar stool directly next to Mr. Salazar was another jacket with a Purple Heart insignia on the back ("the Purple Heart jacket").

The team of police officers wasted no time ordering Mr. Salazar to his feet and immediately cuffing his hands behind his back. Confused, Mr. Salazar repeatedly asked what he did and why nearly half a dozen police officers were accosting him. Multiple officers peppered the handcuffed Mr. Salazar with questions about which jacket belonged to him while, simultaneously, rooting through the pockets of both the Purple Heart and black jackets. Mr. Salazar initially replied that the Purple Heart jacket was his. As he made this statement, the police were already in the process of searching the outside pocket of the black jacket. There was nothing of interest found in the Purple Heart jacket or the outside pocket of the black jacket. After an officer had searched the outside pocket of the black jacket, he handed it off to another officer who continued the ongoing search.

With Mr. Salazar surrounded and handcuffed, the ongoing, warrantless search of the black jacket led to the discovery of a wallet with Mr. Salazar's ID card as well as a pistol inside the left inner pocket. Upon the discovery of the firearm, Mr. Salazar was secured in a patrol car and transported to the Peoria Police Department. Throughout the altercation, the two other patrons and the bar staff minded their own business, wholly uninterested the police activity. In total, the

ratio to police officers and uninvolved individuals in the bar was one-to-one while Mr. Salazar himself was outnumbered five-to-one by the Peoria Police.

II. Procedural History

Petitioner Arnez Salazar was sentenced to a 28-month term of imprisonment following a conditional guilty plea to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The conditional guilty plea came on the heels of the district court denying Mr. Salazar's motion to suppress evidence obtained as the result of the warrantless search of a jacket that was not connected to his person at the time of his arrest.

1. On January 27, 2022, a criminal complaint was filed in the United States District Court for the Central District of Illinois charging Mr. Salazar with possession of a firearm by a prohibited person in violation of 18 U.S.C. § 922(g). A grand jury returned an indictment on February 15, 2022. *See United States v. Salazar*, No. 22-cr-10005, R. 13 (C.D. Ill. Feb. 15, 2022).

2. On March 16, 2022, Mr. Salazar filed a motion to suppress, arguing that the police did not seize the firearm as a valid search incident to arrest. *Salazar*, No. 22-cr-10005, at R. 17. He argued that no reasonable officer would believe it conceivable that he could gain immediate access to the weapon, located on the inside pocket of his jacket, which was in the possession of the police, while he was surrounded by five uniformed police officers and handcuffed. *See id.* at 7-9. Put another way, Mr. Salazar argued that it was simply inconceivable that, under these circumstances, he would have been able to lunge for his jacket and somehow obtain

the firearm from the inside pocket with his hands cuffed behind him because he was fully secured at the time of the warrantless search.

The district court held a hearing on April 14, 2022. After hearing argument from both parties, the district court stated that it was "a very close question" and "a very close call," before denying the motion to suppress. Pet.App. at 11a. As to whether this was a valid search incident to arrest, the district court said the question was "really muddy." *Id.* at 12a. The court recognized that Mr. Salazar was, unquestionably, handcuffed behind his back at time of the search. *Id.* at 12a-13a. The court further recognized that the officers surrounded Mr. Salazar "in a semicircle" and that the police quickly had control of the jacket. *Id.* at 13a. Yet, the court determined that although "it would have been very difficult" for Mr. Salazar to maneuver his way to the inside pocket of his jacket while handcuffed behind his back, it would not be "impossible." *Id.* It therefore denied Mr. Salazar's motion to suppress. *Id.*

3. Mr. Salazar filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit. Oral argument was held on April 25, 2023, and, on June 2, 2023, the Seventh Circuit issued an opinion affirming the district court's denial of Mr. Salazar's motion to suppress. Pet.App. 1a-9a. The court recognized that the question of whether a lawful search incident to arrest occurred was governed by *Gant*, which requires the arrestee to be "unsecured and within reaching distance" of the car's interior at the time of the search. *Id.* at 5a (*citing Gant*, 395 U.S. at 343). The court noted that Mr. Salazar was "seizing" on the "conjunction" in

Gant to argue that *Gant* created a two-part test for the validity of a closed container search incident to arrest. *Id.* Meaning, Mr. Salazar suggested that, consistent with *Gant*, for a search to be lawful the arrestee must be both "'unsecured' *and* 'within reaching distance' of the area to be searched." *Id.* (emphasis in original). The court correctly recognized that Mr. Salazar's position was that although he was arguably within reaching distance of the jacket, the search was unreasonable because he was secured at the time the officers rifled through his jacket. *Id.* at 6a.

The Seventh Circuit rejected Mr. Salazar's textual reading of *Gant*, holding that *Gant* does not "demand separate analyses of whether an arrestee is secured and whether an area is within reaching distance." Pet.App. at 6a. Instead, the Court determined that this Court would reject its own plain language, as this would be a "divide-and-conquer" analysis rather than a "totality-of-the-circumstances test." *Id.* at 6a-7a.

Thus, despite the plain language of *Gant*, the Seventh Circuit opted for what it called a "more faithful reading" of this Court's opinion. Pet.App. at 7a. The court found that *Gant* did not create a conjunctive test, but instead stood "for the principle that a search incident to arrest is reasonable if it is possible that an arrestee can access a weapon or destroy evidence in the area to be searched." *Id.* at 7a. Citing to dicta in *Gant* rather than its holding, the Seventh Circuit found that the "access" question "may" require an analysis of whether the arrestee is unsecured and within reaching distance, but the issues "are not stand-alone elements of a two-part test." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Seventh Circuit's disjunctive application of the standard governing a search incident to arrest conflicts this with this Court's decision in *Arizona v. Gant*. In deciding that *Gant* does not create a conjunctive test that requires an arrestee be unsecured and within reaching distance of the container in order to justify a warrantless search, the Seventh Circuit is in direct conflict with this Court's express holding, which authorizes a search incident to arrest of a container "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343.

This case meets this Court's criteria for granting certiorari. First, the question presented concerns the Seventh Circuit deciding an important federal question in a way that conflicts with this Court's decision in *Arizona v. Gant*. Moreover, the Seventh Circuit is not the only circuit to misapply *Gant*. Second, the question presented is important and will profoundly affect many arrestees who face unreasonable searches prohibited by the Fourth Amendment that are currently allowed by the Seventh Circuit's justification of police overreach. If the Seventh Circuit's interpretation is permitted to stand, *Gant* will effectively be a nullity and the entire problem *Gant* sought to remedy – warrantless searches in nearly every case under *New York v. Belton*, 453 U.S. 454 (1981) – will again become the norm. Third, this case is an ideal vehicle.

I. The Questioned Presented Concerns the Seventh Circuit's Incorrect Application of This Court's Precedent in *Arizona v. Gant*, 556 U.S. 332 (2009).

This Court in *Gant* articulated a conjunctive, two-part standard that permits a container search incident to arrest "only when the arrestee is unsecured *and* within reaching distance of the passenger compartment at the time of the search." 556 U.S. at 343 (emphasis added). The Seventh Circuit, however, held that *Gant* did not create a two-part test and instead permits a search incident to arrest whenever an arrestee is within reaching distance of a container, regardless of their secured status. *Salazar*, 69 F.4th at 477-78. This holding is inconsistent with *Gant* and this Court should grant review to resolve this conflict.

A. *Gant* Creates a Conjunctive Standard that Requires the Arrestee to be Both Unsecured and Within Reaching Distance of the Container.

This Court's holding *Arizona v. Gant* was explicit and clear: "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343.[1] Yet, the Seventh Circuit omits half of that test in favor of what it calls "a more faithful reading of *Gant*" that allows a search incident to arrest solely based on proximity to the container regardless of the arrestee's secured status. *Salazar*, 69 F.4th at 477. That holding conflicts with *Gant*.

[1] The Seventh Circuit, along with several other sister circuits, have properly recognized that the language in *Gant* extends to non-vehicle containers. *See United States v. Leo*, 792 F.3d 742, 750 (7th Cir. 2015); *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010); *United States v. Davis*, 997 F.3d 191, 193 (4th Cir. 2021); *United States v. Wilson*, 716 Fed. Appx. 667, 667 (9th Cir. 2018).

In *Gant*, the arrestee was handcuffed and locked in the backseat of a police vehicle. 556 U.S. at 336. After fully securing the arrestee and removing him from reaching distance of his vehicle, two officers searched his car and found a gun and a bag of cocaine in the pocket of a jacket on the backseat. *Id.* The Arizona Supreme Court concluded that the search of the car was unreasonable. In doing so, the Arizona court's opinion noted that the "threshold question is whether the police may conduct a search incident to arrest at all once the scene is secure." *Gant*, 556 U.S. 337. The court found that once an arrestee is handcuffed and secured in the back of a patrol car, and under the supervision of an officer, "a warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene . . ." *Id.*

This Court affirmed the Supreme Court of Arizona's holding that the search was unreasonable under the Fourth Amendment. *Gant*, 556 U.S. at 337. In doing so, this Court rejected a broad reading of its prior precedent in *Belton* which would authorize a search incident to every recent occupant's arrest. *Id.* at 343. Instead, this Court held "that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured *and* within reaching distance of the passenger compartment at the time of the search." *Id.* at 343 (emphasis added). The conjunctive language demonstrates that a valid search incident to arrest can occur only when an arrestee is unsecured and within reaching distance of the container – not one or the other.

The Seventh Circuit, while recognizing that Mr. Salazar had his hands cuffed behind his back and was surrounded by five uniformed police officers, upheld the search as reasonable solely based on Mr. Salazar's proximity to the jacket. *See Salazar*, 69 F.4th at 478 (upholding the search because Mr. Salazar was "standing" and "adjacent to the jacket"). In doing so, the Seventh Circuit held that *Gant* does not "demand separate analyses of whether an arrestee is secured and whether an area is within reaching distance." 69 F.4th at 477. Instead, the court found that "*Gant* stands for the principle that a search incident to arrest is reasonable if it is possible than an arrestee can access a weapon or destroy evidence in the area to be searched." *Id.* at 478.

The holding relies on a later summation from *Gant* rather than the explicit language by this Court that states, "[W]e. . .hold. . . ." *Gant*, 556 U.S. at 343. The Seventh Circuit made the mistake of collapsing *Gant*'s actual holding to fit a later summation that does not state the holding. The Third Circuit has committed the same error. In *United States v. Shakir*, the Third Circuit found that *Gant* did not require a conjunctive test and that the same summation more accurately expresses this Court's holding. 616 F.3d 315, 320 (3rd Cir. 2010). However, a later summation cannot justify the invasion of constitutional rights when that summation does not completely state the holding. When this Court uses explicit language to state its holding, the circuit courts must honor that language.

Moreover, such reliance to ignore the Court's clear holding makes little sense. The later summation, noting that a search incident to arrest is permissible "only if

the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest" does not contradict or take away from the two-part test that was established in the Court's holding. *Gant*, 556 U.S. at 351. Rather, the summation simply assumes that the defendant is unsecured at the time of the search because the Court, in its holding, clearly established that as a condition precedent to determining whether the officer safety justification is present. Put another way, assuming that the arrestee is unsecured, as is required by the Court's holding, then a search incident to arrest is only permissible if the arrestee is within reaching distance of the passenger compartment at the time of the search. However, if the arrestee is secured at the time the of the search, the proximity to the container makes little difference – the warrantless search is impermissible. *Gant*, 556 U.S. at 343.

Salazar bends over backwards to justify its twisted reading of *Gant*. After pronouncing that *Gant* does not stand for the two-part test detailed in its holding, the court proceeded to examine *Gant*'s requirements as "factors." *Salazar*, 69 F.4th at 477-78. Yet, it is also clear that the Seventh Circuit relied only on Mr. Salazar's proximity to the jacket to justify this search. *See Salazar*, 69 F.4th at 478 (relying on Mr. Salazar's proximity to the jacket and the fact that no one stood between him and the jacket). Although officer safety and destruction of evidence are legitimate concerns for law enforcement under *Chimel* and affirmed by *Gant*, enabling police to search any container justified only by an arrestee's proximity to a container even

when they are fully secure will serve only to encourage police "entitlement" to search and chill Fourth Amendment rights. That result is clearly inconsistent with *Gant*, which states that this search was only permissible if Mr. Salazar was unsecured and within reaching distance of the jacket. By ignoring half of this Court's holding in *Gant*, the Seventh Circuit has reached a conclusion that is in conflict with a relevant decision of this Court.

Moreover, the Seventh Circuit's reasoning conflicts with plain English and the common understanding of the word "and." The word "and" conjoins "two words, phrases, or parts of a sentence." *See* Cambridge Dictionary https://dictionary.cambridge.org/us/dictionary/english/and, accessed 8-16-23. In terms of construing statutory language, words must be given their ordinary and common meaning. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). The result should be no different in interpreting the word "and" in an opinion from this Court. *Gant*'s holding requires a two-part inquiry into whether the arrestee was "unsecured" and "within reaching distance" of the container.

The Seventh Circuit, however, has changed this Court's use of the word "and" to "or." That is simply impermissible. When this Court says that the Fourth Amendment demands "X and Y," federal Courts of Appeals cannot decide that the Fourth Amendment instead gives law enforcement the choice between "X or Y." This Court used the word "and" to create a two-part standard. Far from the Seventh Circuit's reasoning being "more faithful" to *Gant*, it expressly runs afoul of test the Court created.

B. The Seventh Circuit's Disjunctive Reading is Inconsistent with *Gant* and Reverts Back to Unrestricted *Belton*-era Policing.

The Seventh Circuit's decision threatens to return to an era of unchecked police practices which is precisely what *Gant* sought to remedy. *Gant* went to great lengths to set out the history of the search-incident-to-arrest doctrine to explain why it was limiting searches incident to arrest to situations where the arrestee is unsecured and within reaching distance. The Court started at the beginning, recognizing that *Chimel v. California*, 395 U.S. 752 (1960) held that a search incident to arrest may only include "the arrestee's person and the area within his immediate control." *Gant*, 556 U.S. at 339 (*citing Chimel*, 395 U.S. at 763). This phrase was construed to mean the area from where the arrestee "might gain possession of a weapon or destructible evidence." *Gant* confirmed that *Chimel* "continues to define the boundaries" of the search incident to arrest doctrine. *Id.*

The Court then considered its opinion in *New York v. Belton*, which applied *Chimel* to the automobile context. *Belton* held that officers were permitted to search an automobile incident to arrest when the police had lawfully arrested the occupant of the vehicle. *Gant*, 556 U.S. at 340-41 (*citing Belton*, 453 U.S. at 460). In the wake of *Belton*, the search-incident-to-arrest doctrine was being treated as the rule instead of an exception. Courts of Appeals were allowing searches of vehicles incident to arrest even if it were impossible that the occupant could gain access to the vehicle. *Gant*, 556 U.S. at 341. Put another way, after *Belton* the police treated this ability to search a vehicle incident to arrest as an "entitlement rather than an

exception justified by the twin rationales of *Chimel*." *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring).

The entire point of *Gant*, then, was to reign in *Belton*-related searches and redraw the doctrine as a narrow exception rather than a wide-ranging rule that permitted container searches anytime the police arrested someone. See *United States v. Polanco*, 634 F.3d 39, 42 (1st Cir. 2011) ("*Gant* clarified that an automobile search may fall within the search-incident-to-arrest doctrine only in two very specific situations: 'when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search' (the officer-safety justification), or 'when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle' (the evidence-preservation justification)."); *United States v. Davis*, 997 F.3d 191, 198 (4th Cir. 2021) (to determine whether the defendant could have accessed the backpack at the time of the search "we consider whether Davis was 'unsecured and within reaching distance' of his backpack at time search.") (*citing Gant*, 556 U.S. at 343).

Indeed, *Gant* specifically noted that under the prevailing reading of *Belton*, "a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search." *Gant*, 556 U.S. at 343. But this reading would "untether the rule from the justifications underlying the *Chimel* exception--a result clearly incompatible with our statement in *Belton* that it 'in no way alters the fundamental principles established in the *Chimel* case regarding the

basic scope of searches incident to lawful custodial arrests.'" *Id.* (*citing Belton*, 453 U.S. at 460). It would serve "no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." 556 U.S. at 347.

This type of "entitlement to search" is precisely why the Court's holding created a two-part test that requires the arrestee to be "unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 556 U.S. at 343. The Court wished to reframe the search-incident-to-arrest doctrine as a narrowly drawn exception to the warrant requirement, rather than a rule that was applied every time a vehicle occupant was arrested.

Yet, in ignoring half of *Gant*'s holding, the Seventh Circuit has returned to the pre-*Gant*, *Belton*-era style of policing, where law enforcement can search closed containers incident to the arrest of virtually every citizen. According to the Seventh Circuit's rationale, an arrestee, with his hands shackled to his feet and multiple police officers kneeling on his back, is still subject to a warrantless search based solely on his proximity to the container because no separate analysis of security and proximity is required. *Salazar*, 69 F.4th at 477. Meaning, the police can secure an arrestee and have every opportunity to remove him from the proximity of the container as a way of ensuring officer safety but can choose to the leave the secured arrestee close to the container solely for the purposes of conducting a warrantless search. That is the exact result *Gant* was trying to avoid. *See Gant*, 556 U.S. at 345 (noting the "concern about giving police officers unbridled discretion to rummage at

will among a person's private effects."); *id.* at 351-352 (Scalia, J., concurring) (the police virtually always have less intrusive means of ensuring officer safety such as "ordering the arrestee away from the vehicle" and "placing him in a squad car"). There is no valid reason why law enforcement should be allowed to conduct warrantless searches of closed containers when the police have fully secured an arrestee solely based on proximity to the container, but that is exactly what is now permitted under the Seventh Circuit's interpretation of *Gant*.

Presumably, then, under the Seventh Circuit's holding, the police can also search containers that are not within reaching distance of an arrestee if the arrestee is unsecured at the time. Afterall, the Seventh Circuit expressly held that *Gant* does not create a conjunctive, two-part test to govern a valid search incident to arrest on the officer safety prong. *Salazar*, 69 F.4th at 477 ("We do not read *Gant* to demand separate analyses of whether an arrestee is secured and whether an area is within reaching distance."). Because no "separate analysis" is required, if the arrestee is unsecured, but not within reaching distance of the container, the container is subject to a warrantless search solely on the basis that the arrestee has not been secured. That, of course, is directly contradictory to *Gant*.

Unless this Court intervenes, countless arrestees will now be subject to the exact type of *Belton*-era container searches incident to every arrest solely at the whim of law enforcement regardless of their secured status. This Court should intervene to ensure that the exact problem *Gant* was trying to remedy does not again become the *de facto* rule associated with searches incident to arrest.

II. This Issue is Important and Will Not be Resolved Without this Court's Intervention.

The issue presented here is of grave importance. Without this Court's intervention, arrestees like Petitioner, who present no danger to law enforcement officials based on their fully secured status, will be subjected warrantless police searches. The Seventh Circuit's incorrect interpretation of the law does not stand alone. Arrestees in the Third Circuit are currently being subjected to the same *Belton*-era overbroad searches incident to arrest that expressly contradict *Gant*. *See Shakir*, 615 F.3d at 319-20. The Fourth Circuit has noted the existence of an open question on this very issue without deciding whether *Gant* creates a two-part test or something more akin to the holding adopted by the Seventh and Third Circuits. *See United States v. Davis*, 997 F.3d 191, 203, n.4 (4th Cir. 2021). Arrestees in these circuits will continue to be subject to the exact searches that *Gant* sought to prevent without this Court's intervention.

The Seventh Circuit's decision is not only inconsistent with *Gant*, but also incorrect. *Gant* expressly noted that situations where closed container searches incident to arrest are permissible on the grounds of officer safety should be "rare." 556 U.S. at 365, n.4. Yet, under the Seventh and Third Circuit's interpretation, these types of searches will again be commonplace any time the police choose to leave an arrestee close to the container they wish to search without a warrant. Finally, this case presents an ideal vehicle for this Court to resolve this important issue.

A. The Issue is Important and Will Not Resolve Without this Court's Intervention.

The Seventh Circuit has made clear its belief that *Gant* does not require separate analyses of whether an arrestee is secured and whether an area is within reaching distance. *Salazar*, 69 F.4th at 477. The Third Circuit has reached the same conclusion. *Shakir*, 615 F.3d at 319-20. The Fourth Circuit has acknowledged the existence of the open question but has so far declined to address the issue. *Davis*, 997 F.3d at 203, n.6. Without intervention from this Court, arrestees in these circuits will continue to be subject to a search-incident-to-arrest standard that does not comport with the explicit direction from this Court. Moreover, as the Fourth Circuit's opinion in *Davis* shows, this issue is going to arise in other Courts of Appeals as well. Unless and until this Court issues further clarification, further arrestees are at risk of searches that violate the Fourth Amendment under this Court's precedent.

Arrestees in the Seventh and Third Circuits are currently subject to searches solely based on their proximity to containers regardless of their secured status. Nothing short of intervention from this Court will resolve the incorrect application of *Gant* that has occurred in the Seventh and Third Circuits and is in danger of depriving more arrestees of the protections guaranteed by *Gant* and the Fourth Amendment.

B. The Decision Below is Incorrect.

The Seventh Circuit claims that *Gant*'s analysis "may" require a court to determine an arrestee's secured status and proximity to the search area. *Salazar*,

69 F.4th at 478. That is incorrect. *Gant*'s analysis demands that courts determine whether the arrestee was unsecured "and" within reaching distance of the container at the time of the search. *Gant*, 556 U.S. at 343.

As explained above, the Seventh and Third Circuit's holdings are not only inconsistent with *Gant* but make little sense in the way of reasonableness under the Fourth Amendment. The Seventh Circuit is correct in that a Fourth Amendment issue calls for a fact-intensive case-by-case analysis, requiring a court to determine whether a search was objectively reasonable given the totality of the circumstances. *Salazar*, 69 F.4th at 477. *Gant* did not upset that basic understanding of Fourth Amendment jurisprudence, nor does Mr. Salazar contest that reasonableness remains the hallmark of a Fourth Amendment analysis. *Gant*, did, however, define the test for reasonableness as it relates to a search of a closed container incident to arrest. Put another way, *Gant* articulated a test for reasonableness as it pertains to container searches, and that test requires an arrestee to be unsecured *and* within reaching distance of the container at the time of the search. 556 U.S. at 343

Ironically, it is the Seventh Circuit, not Mr. Salazar, that ignores the totality of the circumstances. According to the Seventh Circuit, there is no requirement that district courts separately analyze an arrestee's secured status and their proximity to the item to be searched. 69 F.4th at 477. Accordingly, in the Seventh Circuit half of the circumstances can be fully ignored in every search incident to arrest. If the arrestee is unsecured, their proximity to the container makes no difference – it can be searched because there is no separate inquiry. Likewise, if the arrestee is close to

the container, as Mr. Salazar was here, the inquiry ends, and the district court is free to ignore the facts that show an arrestee's hands were cuffed behind his back while he was outnumbered five-to-one by the police.

Mr. Salazar's interpretation, however, is faithful to *Gant*. If an arrestee is unsecured, then the police must determine whether they are within reaching distance of the container before undertaking a search. If, however, an arrestee has five officers holding them and has their hands cuffed behind their backs, it is wholly unreasonable to believe that the arrestee can gain access to the container despite its proximity. Put another way, even considering that the container may be close, looking at *all* the circumstances, the search is unreasonable because the arrestee is fully secured and thus presents no danger of obtaining access to a container. This is a totality of the circumstances analysis, which is why *Gant* properly articulated a two-part, conjunctive test. It is the Seventh Circuit who adopts a "divide-and-conquer" analysis that allows the district court to find a search to be reasonable based entirely on the arrestee's proximity to a container while ignoring how much police control is currently being exercised.

Perhaps more importantly, the Seventh Circuit never explains why it is "reasonable" for law enforcement officials to search closed containers after an arrestee is fully secured just because the container remains in close proximity. The Seventh Circuit fails to explain why, under any circumstances, it would be reasonable for law enforcement officials to conduct a warrantless search when the defendant was fully secured, instead of simply moving the secured defendant away

from the container and seeking a search warrant like the Fourth Amendment demands. That was the entire point of Justice Scalia's concurrence in *Gant*. *See Gant*, 556 U.S. at 351 (Scalia, J., concurring) (noting that police "virtually always have a less intrusive and more effective means of ensuring their safety" aside from warrantless searches).

Although the Seventh Circuit's opinion purports to be on all fours with a "reasonableness" analysis, it never grapples with why its outcome, that allows fully secured defendants to be subject to warrantless searches solely based on their proximity to the container, is reasonable under any circumstances. The Seventh Circuit's error is underscored by its reliance on its own pre-*Gant* precedent that clearly cannot be squared with *Gant*'s standard. *See Salazar*, 69 F.4th at 478 (*citing United States v. Tejada*, 524 F.3d 809 (7th Cir. 2008)). *Tejada*, a pre-*Gant* case, upheld the search of an entertainment center even though the arrestee was cuffed, face down on the floor, and surrounded by police. *Id.* (*citing Tejada*, 524 F.3rd at 811-12). That holding may have been permissible under the various interpretations of *Belton*, which permitted closed container searches in virtually every case where someone was arrested. *Gant*, 556 U.S. at 342. But the Seventh Circuit fails to explain how *Tejada*, or its opinion in this case that relies on *Tejada*, could possibly be reasonable after *Gant*, which specifically sought to curtail the exact type of "automatic" searches incident to arrest that *Tejada* approved. *Gant*'s two-part test, however, solves that problem and a "faithful reading" of *Gant* would be one that

follows its express holding and makes warrantless searches the exception, not the rule.

C. This Case Presents an Ideal Vehicle.

This case squarely and cleanly presents the issue that the Seventh Circuit has misapplied. It is therefore an ideal vehicle for resolving the question presented.

Petitioner raised the question presented throughout the proceedings below. He filed a motion to suppress the results of the search of his jacket and argued that no reasonable officer would believe it conceivable that he could gain immediate access to the weapon, located on the inside pocket of his jacket, which was in the possession of the police, while he was surrounded by five uniformed police officers and handcuffed. That motion argued that *Gant* controlled this search and that *Gant* created a two-part test that requires the arrestee to be unsecured and within reaching distance of the container at the time of the search. *See Salazar*, No. 22-cr-10005, R. 17 at 5 (C.D. Ill. Mar. 16, 2022).

The district court noted that it was "a very close question" but denied the motion to suppress. Pet.App. at 11a. Petitioner raised the issue again in the Seventh Circuit, squarely and clearly presenting the argument that *Gant* created a two-part test that requires the arrestee to be unsecured and within reaching distance. The Seventh Circuit decided the issue in the government's favor and expressly held that *Gant* does not require "separate analyses of whether an arrestee is secured and whether an area is within reaching distance." *Salazar*, 69 F.4th at 477. In direct conflict with this Court's holding in *Gant*, the Seventh Circuit held

that the district court "may," but need not, consider whether the arrestee was unsecured and within reaching distance of the search area as part of its analysis. *Id.* at 478

There are also no threshold issues that would limit this Court's review. The issue was clearly presented and preserved below, and the Seventh Circuit based its decision solely on the question presented, without reference to any other bases for relief raised by Petitioner in his initial motion. Although the government raised the issue of abandoned property in the district court and on appeal, the Seventh Circuit declined to reach the issue of abandonment after determining that this was a valid search incident to arrest. *See Salazar*, 69 F.4th at 479 ("we need not decide whether Salazar abandoned the jacket").

Timely resolution of the Seventh Circuit's misinterpretation of *Gant* is important. Police officers conduct searches daily, and now, those searches in the Seventh and Third Circuits will be justified by *Belton*-era reasoning. Abuse of the Fourth Amendment will continue if police are allowed to secure an arrestee and proceed to search any and every container that might be close. Without intervention from this Court, the protection against unreasonable searches provided for by the Fourth Amendment will be gutted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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