No. 23-802

In the
Supreme Court of the United States

WILLIAM BEMBURY,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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February 23, 2024

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense (NAPD) is an organization of more than 25,000 practitioners dedicated to the effective legal representation of accused persons who cannot afford to retain private counsel. NAPD's membership includes all categories of professionals necessary to providing a robust public defense: lawyers, social workers, case managers, investigators, sentencing advocates, academics, and legislative advocates. These professionals represent the interests of the most marginalized communities in the country.

One of the guiding principles of NAPD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAPD is appearing in this case because an overbroad extension of the search incident to arrest exception would open the door to undue infringements on the privacy interests and constitutional rights of the people NAPD serves. NAPD respectfully asks the Court to resolve the circuit split on the question presented, which threatens the Fourth Amendment rights of America's most vulnerable populations and creates confusion for public servants across the criminal justice system.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for both parties received notice of *amicus*'s intention to file this brief at least ten days prior to the due date.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for certiorari and resolve entrenched divisions between federal courts of appeals and state high courts regarding whether the search incident to arrest exception extends to an arrestee's bags that are inaccessible to the arrestee at the time of the search. NAPD echoes the points made in Petitioner's brief and highlights three further considerations that favor granting certiorari:

First, the significant uncertainty in this corner of Fourth Amendment jurisprudence has troubling consequences for defendants and public servants at every level of the criminal justice system. Defendants' constitutional rights should not vary based on what jurisdiction they are arrested in. And police, prosecutors, public defenders, and judges alike should not be required to dedicate their limited time and resources litigating this unresolved, recurrent issue in countless cases every year.

Second, the Kentucky Supreme Court's decision below is at odds with the rationales this Court has long relied on to justify the narrow search incident to arrest exception: the need for officer safety and the preservation of destructible evidence. The Kentucky Supreme Court endorsed the "time of arrest" rule, which permits the search of any container in an arrestee's possession at the time of arrest, regardless of whether the arrestee could have accessed the bag at the time of the (later-occurring) search. But allowing law enforcement to search backpacks and similar containers that are outside the arrestee's reach is unnecessary to serve either the safety or evidence-

preservation rationale. The "time of arrest" rule instead unduly curtails the Fourth Amendment rights of millions of Americans living in numerous jurisdictions.

Third, the Kentucky Supreme Court's decision below gives short shrift to arrestees' privacy interests in their personal effects. This Court has already recognized the heightened privacy interests that people have in their luggage. *See United States v. Chadwick*, 433 U.S. 1, 11-16 (1977) (holding that the warrantless search of the arrestees' footlocker violated the Fourth Amendment), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). And for good reason: people carry their most intimate possessions in their bags, including journals, medications, and religious items. This is especially true for the unhoused, who must carry all of their personal belongings in bags and other similar containers. The court below was thus mistaken in its assertion that a search of an arrestee's bags would constitute only a "minor additional intrusion in relation to the arrest itself." *Commonwealth v. Bembury*, 677 S.W.3d 385, 404 (Ky. 2023).

NAPD respectfully asks that the Court grant certiorari.

ARGUMENT

I. The split among the lower courts regarding the search incident to arrest exception has troubling consequences for defendants and public servants.

This case presents an opportunity to resolve a deep and persistent split in the lower courts about the correct interpretation of this Court's precedent on the

search incident to arrest exception to the Fourth Amendment's warrant requirement. Following this Court's decisions in *United States v. Robinson*, 414 U.S. 218 (1973), *Chadwick*, 433 U.S. 1, and *Arizona v. Gant*, 556 U.S. 332 (2009), the courts of appeals and state high courts have divided on whether police may, without a warrant, search an arrestee's backpack or other external bag or container in the arrestee's possession even when there is no reasonable possibility that the arrestee could access the container at the time of the search.

The First Circuit and the state supreme courts of Kentucky, North Dakota, Illinois, and Washington have all held that an external bag in an arrestee's possession at the time of arrest is subject to a warrantless search, regardless of whether the arrestee could have reached the container to retrieve a weapon or destroy evidence at the time the search is conducted. *See United States v. Perez*, 89 F.4th 247 (1st Cir. 2023); *Bembury*, 677 S.W.3d 385; *State v. Mercier*, 883 N.W.2d 478 (N.D. 2016); *People v. Cregan*, 10 N.E.3d 1196 (Ill. 2014); *State v. Byrd*, 310 P.3d 793 (Wash. 2013). But under the precedent of the Third, Fourth, Seventh, and Tenth Circuits, and the state supreme courts of New Mexico and Missouri, the police cannot search an arrestee's bag without a warrant if there is no reasonable possibility that the arrestee could have accessed the container at the time of the search. *See United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010); *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021); *United States v. Salazar*, 69 F.4th 474 (7th Cir.), *cert. denied*, 144 S. Ct. 308 (2023); *United States v. Knapp*, 917 F.3d 1161 (10th Cir.

2019); *State v. Ortiz*, 539 P.3d 262 (N.M. 2023); *State v. Carrawell*, 481 S.W.3d 833 (Mo. 2016) (en banc).

The lack of uniformity in this area of Fourth Amendment jurisprudence has troubling consequences. Most importantly, a person's protections under the Fourth Amendment vary depending on the jurisdiction in which the defendant is arrested. Nearly identical searches violate the Fourth Amendment under the law in some jurisdictions but not others. For example, the First Circuit recently upheld a warrantless search of an arrestee's backpack under the search incident to arrest exception even where the arrestee was on the ground, handcuffed, and "not in reaching distance of the backpack when the search of the backpack took place." *Perez*, 89 F.4th at 249. But two years earlier, under a similar set of facts, the Fourth Circuit held that the warrantless search of an arrestee's backpack violated the Fourth Amendment because the arrestee was on the ground, handcuffed, and "not within reaching distance of his backpack when [the police] unzipped and searched it." *Davis*, 997 F.3d at 198. These decisions are irreconcilable. NAPD has an interest in ensuring that the indigent defendants it serves have equal rights regardless of where they live.

The lower courts' confusion on this score also seriously burdens public servants at every level of the criminal justice system. As this Court has said: "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60

(1981). First, the uncertainty about what items the police may search incident to arrest has the potential to create needless conflict between the arresting officer and arrestee. Then, after an arrest involving the search of a backpack or other bag takes place—an exceedingly common occurrence—prosecutors and public defense lawyers must dedicate their limited time and resources to litigating the legality of the search at suppression hearings. And finally, judges at every level of the judiciary must spend time adjudicating the inevitable appeals generated from such hearings. As Second Circuit Judge Roger Miner contended, "allowing circuit conflicts to continue generates litigation, because the law remains unsettled," and consequently, "the lower courts become clogged with cases that would not be brought if the law was clearly stated."[2] This concern is particularly acute in criminal cases, where court systems at large are already "systematically overworked and underfunded."[3] Leaving this issue unresolved would place undue stress on the underserved populations that public defenders represent.

A clarifying decision from this Court is the only antidote to the current fragmentation in the law. Indeed, many decisions on both sides of the split have explicitly acknowledged the lack of guidance from this

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[2] Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 Judicature 104, 106-07 (1993).

[3] Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 Mich. L. Rev. 75, 91-92 (2017).

Court on the issue. The decision below is only the latest to recognize the need for this Court's guidance:

> As the U.S. Supreme Court has not yet directly opined on this issue, lower federal and state courts have been left to our own devices in determining how to draw the line between what constitutes a "*Robinson* search" of an arrestee's person and a "*Chimel* search" of the area within an arrestee's immediate control when a portable container capable of carrying items—purses, backpacks, suitcases, briefcases, gym bags, computer bags, fanny packs, etc.—are concerned. Unsurprisingly, there is little uniformity to speak of in the manner in which our nation's courts have addressed this issue.

Bembury, 677 S.W.3d at 397; *see also Knapp*, 917 F.3d at 1166 ("[T]he Supreme Court has not clearly demarcated where the person ends and the 'grab area' begins."); *Perez*, 89 F.4th at 261 ("[T]he relevant intervening Supreme Court precedents are *Chadwick* and *Gant*—neither of which even addresses a search of personal property carried by an arrestee at the time of the arrest, let alone whether and how to distinguish between types of such personal property, at least as between briefcases and cigarette packages.").

This case is an ideal vehicle for this Court to resolve this important and recurrent issue. The undisputed facts establish that Bembury could not have accessed his backpack at the time the police conducted the warrantless search, and the Commonwealth did not argue below that the search of Bembury's backpack was necessary to protect officer

safety or preserve evidence. The Court should grant certiorari—this Court's guidance is necessary to reduce burdens on indigent defendants and the criminal justice system more generally by resolving confusion among the lower courts.

II. The Kentucky Supreme Court's decision is at odds with the rationales behind the search incident to arrest exception.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches are presumptively unconstitutional: "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382 (2014) (citing *Kentucky v. King*, 563 U.S. 452, 459-60 (2011)). This Court has long recognized that the warrant requirement is "an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous, executive officers' who are a part of any system of law enforcement." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (quoting *Gouled v. United State*s, 255 U.S. 298, 304 (1921)). "[A] warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley*, 573 U.S. at 382 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

The Fourth Amendment's warrant requirement permits few exceptions, one of which is the search

incident to a lawful arrest exception. *Chimel v. California*, 395 U.S. 752 (1969), "laid the groundwork for most of the existing search incident to arrest doctrine." *Riley*, 573 U.S. at 382-83 (discussing the origins of and rationales behind the exception). In *Chimel*, the Court fashioned the following rule for assessing the reasonableness of a search incident to arrest:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

395 U.S. at 762-63. Applying this standard, the Court held that the "extensive warrantless search of Chimel's home did not fit within this exception, *because* it was not needed to protect officer safety or to preserve evidence." *Riley*, 573 U.S. at 383 (emphasis added) (citing *Chimel*, 395 U.S. at 763, 768). The Court's foundational precedent on the search incident to arrest exception thus makes plain that the basis for

the search incident to arrest is the need to protect officer safety and preserve evidence.

The Court's subsequent cases have carefully cabined the exception and kept the two justifications of officer safety and preserving evidence front of mind. *See, e.g.*, *Robinson*, 414 U.S. at 235 (applying *Chimel* in the context of a search of an arrestee's person and holding that "[t]he authority to search the person incident to a lawful custodial arrest [is] based upon the need to disarm and to discover evidence"); *Gant*, 556 U.S. at 338, 343 (observing that "[t]he exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations" before holding that "*Chimel* . . . authorizes police to search a vehicle . . . only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"); *Thornton v. United States*, 541 U.S. 615, 625 (2004) (Scalia, J., concurring) ("In *Chimel v. California*, we held that a search incident to arrest was justified *only* as a means to find weapons the arrestee might use or evidence he might conceal or destroy. We accordingly limited such searches to the area within the suspect's "'immediate control'"—*i.e.*, 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" (emphasis added) (citations omitted)).

Chadwick, 433 U.S. 1, is particularly instructive and analogous to the case at bar. There, the Court considered whether federal agents violated the Fourth Amendment by conducting a warrantless search of a footlocker that they had lawfully seized at the time of the arrest of its owners. *Id.* at 3. After arresting the

owners, the agents had taken possession of the footlocker and safely transferred it to the Boston Federal Building before conducting the warrantless search. *Id.* at 4. The search thus violated the Fourth Amendment: by the time the search took place, "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates," nor was there "reason to believe that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once." *Id.* The Court reasoned that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' or no exigency exists." *Id.* at 15 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). The Court concluded:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

Id.

Once again, central to the Court's analysis of whether the search was lawful was the question of whether the need for officer safety and evidence preservation was implicated. They were not—and thus the search was unconstitutional. *Id.*

The exact same principles should have governed the decision below and should require rejecting the "time of arrest" rule adopted by the Kentucky Supreme Court and numerous other courts. That rule is untethered from the key rationales on which the Supreme Court has based the search incident to arrest exception. Under the "time of arrest" rule, any container in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest is considered part of the arrestee's person and is thus subject to a warrantless search. *Bembury*, 677 S.W.3d at 406. The rule thus does not factor in whether the arrestee could have accessed the container or whether there is any conceivable risk to officer safety. *See id.* at 400. Instead, and as most of the federal circuits that have considered the issue have concluded, such a rule is at odds with this Court's precedent, which "stand[s] for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it." *Shakir*, 616 F.3d at 320; *see also Davis*, 997 F.3d at 197 ("[P]olice officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search.'" (second alteration in original) (quoting *Gant*, 556 U.S. at 343)); *Salazar*, 69 F.4th at 478 ("*Gant* stands 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.").

The Kentucky Supreme Court relied in part on the Court's opinion in *Robinson*, but that case lends no support to a broad "time of arrest" rule. In *Robinson*,

the Court held that a search of an arrestee's person incident to arrest need not be justified by case-by-case adjudication of whether there was a particular need to discover evidence or disarm the arrestee. 414 U.S. at 235-36 ("The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."). Accordingly, the Court upheld the warrantless search of a cigarette box the police found in the arrestee's jacket pocket. *Id.*

But as the Tenth Circuit has persuasively explained, the search in *Robinson* did not stretch beyond the arrestee's immediate person, worn clothing, or containers concealed within worn clothing. *See Knapp*, 917 F.3d at 1166-67. Because an arrestee's potential ability to access weapons concealed in his or her clothing or pockets poses a risk to officer safety, "an officer must necessarily search those areas because it would be impractical (not to mention demeaning) to separate the arrestee from her clothing." *Id.* at 1166. By contrast, once a backpack or other container is separated from the arrestee's person, "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Chadwick*, 433 U.S. at 15. Thus, "the animating reasons supporting arresting officers' 'unqualified authority' to search an arrestee's person are less salient in the context of visible, handheld containers such as purses" or backpacks. *Knapp*, 917 F.3d at 1166 (quoting *Robinson*, 414 U.S. at 225). And in *Robinson*, this

Court itself recognized that searches of the arrestee's person and searches of the areas within the arrestee's immediate control are "two distinct propositions" that "have been treated quite differently." *Robinson*, 414 U.S. at 224.

The rule adopted by the Kentucky Supreme Court collapses that distinction and "risks expanding *Robinson*'s limited exception." *Knapp*, 917 F.3d at 1167. As Justice Scalia counseled, "conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring). But the rule announced in the Kentucky Supreme Court's opinion is *not* justified by necessity. The "time of arrest" rule improperly stretches the reach of the search incident to arrest exception to spaces altogether untethered from the rationales that originally justified it: officer safety and the preservation of evidence. This Court should reverse.

III. The Kentucky Supreme Court's decision disproportionately impinges on indigent persons' privacy interests in their personal effects.

The Supreme Court of Kentucky's decision to adopt the "time of arrest" rule rests, in part, on the court's estimation that this Court would not "find an arrestee's privacy interests in such containers [like Bembury's backpack] to be significant enough that a search would constitute more than a minor additional intrusion in relation to the arrest itself." *Bembury*, 677 S.W.3d at 404. But this assertion fails to appreciate the real-world privacy interests of the

many vulnerable populations that NAPD serves, especially indigent persons without homes, who often must carry all of their personal and private belongings in bags.

As this Court has recognized, "the central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. People carry some of the most intimate of their "private effects" in their bags. As Justice Keller wrote in dissent in the decision below:

> People carry all kinds of personal items in their backpacks of which they do not intend the public to have knowledge and to which they do not intend the public to have access. These items could include things as personal as journals containing a person's innermost convictions, medications indicating one's physical health history or even mental health diagnoses, hygiene products, or checkbooks and other financial records evincing one's political, religious, and other personal affiliations.

677 S.W.3d at 411-12 (Keller, J., dissenting).

Indigent people who do not have homes or access to other safe storage spaces have even greater privacy interests in their bags. And yet even as their privacy interests in these containers are greater, these same persons are also more likely to be exposed to the warrantless searches the decision below would permit. They often face arrest for low-level offenses like loitering or sleeping in parks, triggering the exception at issue. As Justice Thompson recognized in his

dissent below, hundreds of thousands of unhoused Americans are "dependent upon suitcases, backpacks, grocery carts and even garbage bags" to carry all of "'the privacies of life' which for another citizen might be stored in a house." *Id.* at 414-15 (Thompson, J., dissenting) (quoting *Riley*, 573 U.S. at 403). It cannot reasonably be said that that a search of all of a person's worldly belongings constitutes a mere "minor additional intrusion." *Bembury*, 677 S.W.3d at 404.

This Court's precedent further undermines the Kentucky Supreme Court's claim that the search of an arrestee's backpack or similar external container does not represent a significant privacy intrusion. In *Chadwick*, this Court held that the search of the arrestees' footlocker was unreasonable, in part, because of the arrestees' heightened privacy interests in their luggage. 433 U.S. at 11. The Court specifically said:

> Unlike searches of the *person*, *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edwards*, 415 U.S. 800 (1974), searches of *possessions* within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.

Id. at 16 n.10 (emphasis added). The Court explained in detail why the arrestees had significant, heightened privacy interests in their luggage:

> Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject

> to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects.

Id. at 13. The Court concluded that the arrestees "were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded." *Id.* at 15-16. So too here. The Court's reasoning in *Chadwick* applies with equal force to the case at bar and would apply with even greater force to a case involving the search of all of an unhoused person's belongings.

Contrary to the Kentucky Supreme Court's analysis, this Court's decision in *Robinson* cannot justify the additional intrusion on an arrestee's privacy interests in their backpacks and similar items. As the Tenth Circuit reasoned:

> [T]he holding in *Robinson* relied on an arrestee's diminished privacy interest in her person by way of her arrest such that a pat-down and inspection of containers found within her clothing "constitute[] only minor additional intrusions." Containers held in an arrestee's hand and not concealed on her body or within her clothing do not implicate such concerns to the same degree.

Knapp, 917 F.3d at 1167 (alteration in original) (quoting *Riley*, 573 U.S. at 392).

This Court has long recognized "the right of privacy as one of the unique values of our civilization." *McDonald v. United States*, 335 U.S. 451, 453 (1948).

NAPD urges the Court to reject the rule adopted below, which not only deepens divisions burdening the criminal justice system, but also disproportionately infringes on indigent persons' privacy interests.

CONCLUSION

The Court should grant certiorari and reject the "time of arrest" rule adopted by the Kentucky Supreme Court below.

Respectfully submitted,

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February 23, 2024