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
Kentucky

BRIEF IN OPPOSITION OF THE COMMONWEALTH OF KENTUCKY

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QUESTION PRESENTED

Whether the Kentucky Supreme Court properly upheld the warrantless search of a backpack incident to the petitioner's arrest after officers observed the petitioner selling synthetic drugs out of the backpack in a public courtyard, and the backpack was on a table in front of the petitioner before the search began.

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INTRODUCTION

Petitioner William Bembury was sitting in the public courtyard of a bank building when he opened his backpack, took out illegal drugs, and sold them to another person. Police officers observed the transaction and arrested Bembury. He now asks this Court to review the Kentucky Supreme Court's decision that a warrant was not required for a search of his backpack conducted moments after his arrest.

The Court should deny review for three reasons. First, the Kentucky high court's decision comports with this Court's precedents. Second, the split of authority Bembury describes is not significant enough to merit this Court's attention; additionally, the Kentucky decision does not cleanly contribute to it. Third, this case is an exceptionally poor vehicle to address the purported split because of its unique facts. The Court should deny Bembury's petition for a writ of certiorari.

STATEMENT OF THE CASE

1.a. The facts of this case must be considered in light of this Court's relevant decisions over the past five decades. Modern search-incident-to-arrest jurisprudence began with *Chimel v. California*, 395 U.S. 752 (1969). In *Chimel*, officers searched a burglary suspect's entire home after arresting him there. *Id.* at 753–54. Holding that the search exceeded the scope of a valid warrantless search incident to arrest, this Court determined that "[w]hen 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 ef-

fect his escape" or to "prevent" the "concealment or destruction" of evidence. *Id.* at 762–63. The logic of such searches, the Court explained, also extended to searches of "the area 'within [the arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. However, "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs." *Id.*

The Court added meat to *Chimel*'s bones in *United States v. Robinson*, 414 U.S. 218 (1973). In that case, an officer, patting down the respondent incident to a lawful arrest, "felt an object in the left breast pocket of the heavy coat" the respondent was wearing, pulled it out, and found it was a cigarette pack. *Id.* at 223. "The officer then opened the cigarette pack and found 14 gelatin capsules" of heroin. *Id.* The Court held that "[t]he authority to search the person" of a suspect "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." *Id.* at 235. Given a "custodial arrest of a suspect based on probable cause," a warrantless "search incident to the arrest requires no additional justification." *Id.*

The Court also made clear that because "it is the fact of custodial arrest which gives rise to the authority to search," it does not matter if the officer "did not indicate any subjective fear of the respondent" or if "he did not himself suspect that [the] respondent was armed." *Id.* at 236 (footnotes omitted). The searching

officer's authority did not end when he separated the cigarette pack from its owner. Instead, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes," the arresting officer "was entitled to inspect it." *Id.* The *Robinson* Court noted that this result was consistent with *Chimel*. That decision gave "full recognition . . . to the authority to search the person of the arrestee." *Robinson*, 414 U.S. at 226.

With *Robinson* and *Chimel* occupying opposite ends of the search-incident-to-arrest spectrum, the Court began filling in the center with *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). There, railroad officials observed the respondents loading onto a train a footlocker that "was unusually heavy for its size" and "was leaking talcum powder, a substance often used to mask the odor of marihuana or hashish." *Id.* at 3. The officials informed federal agents, who followed and eventually intercepted the respondents after a drug-sniffing dog "signaled the presence of a controlled substance inside" the footlocker. *Id.* at 3–4. The officers arrested the respondents and seized the footlocker after the respondents had loaded it into the open trunk of a car. *Id.* at 4. But the officers did not search the footlocker until "an hour and a half after the arrests;" in the meantime, the footlocker sat in a federal building "under the exclusive control of law enforcement officers." *Id.* The footlocker was sealed with two locks. *Id.* at 4–5. But the officers did not get a warrant before opening and searching it. *Id.* at 4.

The Court held the search was unreasonable. *Id.* at 11. "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation

that the contents would remain free from public examination." *Id.* The Court also discussed "significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." *Id.* at 12. Although observing that "[o]ur treatment of automobiles has been based in part on their inherent mobility," the Court noted it had upheld some "warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." *Id.* (ellipsis in original) (citations omitted). "The answer" explaining those results "lies in the diminished expectation of privacy which surrounds the automobile." *Id.* The Court then described several "factors" that "reduce automobile privacy," including that a car's "function is transportation and it seldom serves as one's residence or as the repository of personal effects" but "travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* (citation omitted). The Court contrasted this reduced expectation of privacy with the respondents' privacy interest in their locked footlocker. *Id.* at 13.

Importantly, the Court reasoned that "[r]espondents' principal privacy interest in the footlocker was . . . not in the container itself, which was exposed to public view, but in its contents." *Id.* at 13 n.8. "[T]he seizure" of the footlocker "did not diminish respondents' legitimate expectation that [its] contents would remain private." *Id.* The respondents' subjective expectation of privacy—shown by their actions in locking the container—informed the Court's reasoning. *See id.* at 11.

The *Chadwick* Court also clarified the scope of searches under *Chimel* and *Robinson*. In particular, the Court noted that "[t]he potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." *Chadwick*, 433 U.S. at 14–15 (citation omitted). The Court then distinguished between such searches and those of "luggage or other property seized at the time of an arrest." *Id.* at 15. Such searches "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.* (citation omitted). In other words, "[o]nce 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.* The Court thus drew a dichotomy between searches of the arrestee's person and the area in his immediate control—which are valid searches incident to arrest regardless of the likelihood that the arrestee possesses weapons or "destructible evidence"—and searches of personal property "not immediately associated with the person of the arrestee" that officers have brought under "their exclusive control," which are not. *See id.* at 14–15.

Two additional decisions provide principles relevant to this case. In *Arizona v. Gant*, 556 U.S. 332, 335 (2009), the Court held the search of an arrestee's car was unreasonable after he was arrested, handcuffed, and confined in a patrol car. The Court addressed

searches incident to arrest under *Chimel* and *Robinson*. *Id.* at 338–39. In particular, the Court noted that limiting searches incident to arrest to "the arrestee's person and the area within his immediate control . . . ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Id.* at 339 (citation marks omitted) (quoting *Chimel*, 395 U.S. at 763). "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* Thus, the Court held that police may conduct a warrantless search of "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.

The Court "also conclude[d] that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)). Evidence-gathering searches of cars are justified by "'a reduced expectation of privacy' and 'heightened law enforcement needs.'" *Riley v. California*, 573 U.S. 373, 398 (2014) (quoting *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in judgment)). Such searches do not turn on whether the arrestee is within reach of the car. *See Gant*, 556 U.S. at 343. Because the respondent in *Gant* was not within reach of his car at the time of the search, and he was arrested for an

offense for which evidence was not likely to be found in the car, the search was unreasonable. *Id.* at 344.

Finally, in *Riley*, 573 U.S. at 386, the Court "decline[d] to extend *Robinson* to searches of data on cell phones" found on arrestees, and "h[e]ld instead that officers must generally secure a warrant before conducting such a search." En route to that conclusion, the Court discussed the "search incident to arrest trilogy" of *Chimel*, *Robinson*, and *Gant*. *Id.* at 384. The Court observed that *Robinson* "did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search." *Id.* The Court also noted that *Robinson* "quoted with approval then-Judge Cardozo's account of the historical basis for the search incident to arrest exception"—that a "[s]earch of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion." *Id.* at 391–92 (citation omitted). Thus, "a patdown of Robinson's clothing and an inspection of the cigarette pack found in his pocket constituted only minor additional intrusions compared to the substantial government authority exercised in taking Robinson into custody." *Id.* at 392.

Declining to extend *Robinson*'s logic to searches of cell phones, the Court observed that the risks to safety and evidence preservation "present in all custodial arrests" do not arise with respect to "digital data." *Id.* at 386. "In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself," while searches of cell phones implicate "vast quantities of personal information." *Id.* The Court thus asked

"whether application of the search incident to arrest doctrine to this particular category of effects would 'untether the rule from the justifications underlying the *Chimel* exception.'" *Id.* (citation omitted). It found that it would. *Id.* "A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items"—such as a "billfold and address book," a "wallet," or a "purse"—but does not make sense as to "digital data." *Id.* at 392–93. The latter "implicate privacy concerns far beyond those implicated by a search of" physical items. *Id.* at 393.

b. These cases spell out a few key principles. After a valid arrest, officers may search the person of an arrestee without a warrant. *Chimel*, 395 U.S. at 763; *Robinson*, 414 U.S. at 235. They may also search containers found in the arrestee's clothing. *See Robinson*, 414 U.S. at 236. Such searches are permissible regardless of the likelihood in a particular case that the arrestee has weapons or evidence on him. *Id.* at 235. That is because all custodial arrests carry inherent risks and because an arrest substantially reduces an individual's expectation of privacy in his person. *See Riley*, 573 U.S. at 392; *Chadwick*, 433 U.S. at 14–15. The reduced-privacy rationale does not extend to searches of digital data on an arrestee's cell phone. *Riley*, 573 U.S. at 393. However, it may extend to searches of "physical items" found on or with the arrestee, beyond those found in his clothing. *Id.*; *see Robinson*, 414 U.S. at 235.

Officers may also search the area within the arrestee's "immediate control" and items therein. *Chimel*, 395 U.S. at 763. Like searches of the person,

these searches do not require a calculation of "the probability that weapons or destructible evidence may be involved." *Chadwick*, 433 U.S. at 14–15. If the arrestee was apprehended while in a car, officers may search the interior of the car either if the arrestee is within reach of it or if the officers have reason to believe the car contains evidence of the crime of arrest. *Gant*, 556 U.S. at 343. These evidence-gathering searches are justified by "'a reduced expectation of privacy' and 'heightened law enforcement needs'" that attend vehicle searches. *Riley*, 573 U.S. at 398 (citation omitted).

2.a. On August 14, 2019, Lexington, Kentucky police officer Adam Ray and his colleague Officer Brandon Kennedy were on patrol in downtown Lexington's Phoenix Park. Pet. App. 2a. Both officers were patrolling on their bicycles. *Id.*; Video record: Suppression hearing (Feb. 11, 2020), at 2:46.

That evening, Officer Ray was observing petitioner William Bembury. The officer was familiar with Bembury both from a previous arrest and from frequently seeing him around Lexington. Pet. App. 2a; Video record: Suppression hearing (Feb. 11, 2020), at 2:57. Officer Ray had received several reports that Bembury was trafficking synthetic marijuana—reports from both local security personnel and individuals who, arrested for possession of synthetic marijuana, said they got it from Bembury. Pet. App. 2a.

Around 6:00 p.m., the officers saw another man, Joseph Napier, approach Bembury on the sidewalk. *Id.* Bembury and Napier talked briefly and then walked to a nearby open courtyard beside a Chase Bank building. *Id.* The officers found Bembury's and Napier's conduct suspicious, and they followed at a distance as

the two took seats at a picnic table in the courtyard. *Id.* at 2a–3a. Officer Ray took a position in a parking garage overlooking the courtyard, giving him an unobstructed view of Bembury and Napier. *Id.* at 3a.

As Officer Ray watched, Napier gave Bembury some money, which Bembury placed in his backpack on the table. *Id.* Bembury then "took a white rolling paper" and a substance from the backpack. *Id.* He sprinkled the substance onto the paper, "rolled it into a joint," and handed it to Napier. *Id.* Napier put the joint into his own backpack and left. *Id.* The officers followed him. *Id.*

When the officers intercepted Napier moments later, they told him they had seen his interactions with Bembury and "asked him to give them the joint." *Id.* Napier did so. *Id.* Based on Officer Ray's experience—including encountering synthetic marijuana almost every day during the summer—the appearance and odor of the joint indicated it contained synthetic marijuana. *Id.* Napier told the officers he had paid Bembury "about five dollars" for the joint. *Id.*

While Officer Kennedy remained with Napier, Officer Ray rode his bicycle back to the courtyard, where Bembury still sat at the picnic table. *Id.* Officer Ray arrested and handcuffed Bembury. *Id.* He then briefly "look[ed] through" Bembury's backpack—which was still on the table in front of Bembury—before pausing and waiting for Officer Kennedy. *Id.* at 3a–4a. After Officer Kennedy joined him, Officer Ray did paperwork while Officer Kennedy performed a more thorough search of the backpack. *Id.* at 4a. That search revealed a golf-ball-sized bag of synthetic marijuana, rolling papers, and $7 in one-dollar bills. *Id.* Bembury "did not consent to the search" of his backpack. *Id.*

b. Bembury was charged with trafficking in synthetic drugs and with being a first-degree persistent felony offender. *Id.* at 69a. He moved to suppress the evidence found in his backpack, and the trial court held an evidentiary hearing on the motion. *Id.* at 4a.

Officer Ray testified at the hearing. *Id.* He described the circumstances of Bembury's arrest and the backpack search. *Id.* When asked what happened to the backpack, Officer Ray testified that it was probably given back to Bembury at the jail. *Id.* at 69a. After the hearing, the parties submitted memoranda of law on the suppression issue. *Id.* at 79a.

The trial court denied Bembury's motion to suppress. *Id.* In its order, the court held that *Gant*'s rule authorizing warrantless searches of vehicles for evidence of the crime of arrest applied to the search of Bembury's backpack. *Id.* at 82a. The trial court reasoned that the officers had reason to believe the backpack contained evidence of trafficking in synthetic marijuana because the officers observed Bembury commit that crime using items from his backpack. *Id.*

After the trial court's ruling, Bembury pleaded guilty to the reduced charge of possession of synthetic drugs. *Id.* at 69a. He reserved the right to appeal the trial court's ruling on his suppression motion. *Id.* at 70a.

A divided panel of the Kentucky Court of Appeals reversed. *Id.* at 68a. Then-Chief Judge Clayton wrote that *Gant*'s rule regarding evidence of the crime of arrest was limited to vehicle searches. *Id.* at 72a. And she wrote that the backpack search could not "be upheld as a search of the area within [Bembury's] immediate control because at the time of the search, his

hands were cuffed behind his back and there was no possibility that he could access the contents of the backpack in order to endanger the safety of the police officers or destroy evidence."[1] *Id.*

Judge Taylor concurred only in the result, and Judge Thompson dissented without opinion. *Id.* at 77a.

3. The Commonwealth sought discretionary review of the Court of Appeals' ruling, arguing that the backpack search was valid incident to Bembury's arrest and, alternatively, that the evidence would have been inevitably discovered. *Id.* at 8a. In a lengthy opinion, the Kentucky Supreme Court reversed the Court of Appeals. *Id.* at 1a.

The Kentucky high court thoroughly examined this Court's precedents regarding searches incident to arrest as well as state and federal appellate decisions applying those precedents. *Id.* at 11a–46a. In view of those decisions, the court concluded that "a container capable of carrying items, such as a backpack, can be considered part of an arrestee's 'person' for the purposes of a search incident to lawful arrest." *Id.* at 44a. The Kentucky Supreme Court then defined its test for determining whether a container can "be considered part of an arrestee's person": it "must be in the arrestee's actual and exclusive possession, as opposed to constructive possession, at or immediately preceding the time of arrest such that the item must necessarily accompany the arrestee into custody." *Id.*

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[1] However, the trial court had not made a finding about the possibility or lack thereof that Bembury could access the backpack.

The court found that test satisfied on the facts of Bembury's case:

> Bembury's actions in putting items into and taking items out of the backpack established his actual and exclusive, rather than constructive, possession of it. There was no suggestion that the backpack belonged to anyone other than Bembury, and it was still with him when Officer Ray returned to the courtyard to arrest him. Furthermore, as the officers could not have simply left Bembury's backpack in the courtyard, it was an item that necessarily and inevitably would have accompanied him to jail.

Id. at 45a. Having concluded the search was valid incident to Bembury's arrest, the court "decline[d] to address the parties' arguments regarding the inevitable discovery doctrine." *Id.* at 46a.

Justice Nickell concurred and wrote a separate opinion arguing that "Bembury's use of his backpack as a public dispensary for synthetic marijuana obviated the requirement for a search warrant under the plain view exception." *Id.* at 48a. "After the officers observed Bembury complete the drug transaction in full public view such that the officers were justified in effecting his immediate arrest, it was a foregone conclusion that the backpack used to facilitate the transaction contained the fruits of the same illegal activity." *Id.* at 49a. Justice Nickell concluded that "Bembury waived any legitimate expectation of privacy by opening the illegal contents of his backpack to public view." *Id.* at 50a.

Justices Keller and Thompson each dissented. *Id.* at 47a. Justice Keller argued that *Riley* requires "balancing" a search's intrusion on an individual's privacy interest against the government's interest in the search and argued that such balancing compelled the conclusion that a warrant was required here. *Id.* at 53a–54a. Justice Thompson also wrote separately. *Id.* at 62a. His opinion asserted that the backpack search took place after Bembury was "placed in the back of a police car."[2] *Id.* Based on the facts as he saw them, Justice Thompson argued that *Chimel* and *Gant* required a warrant in this case. *Id.* at 62a–66a.

ARGUMENT

Bembury seeks this Court's review based on his argument that the Kentucky Supreme Court's ruling is not compatible with this Court's jurisprudence and his identification of a purported split of authority. He is wrong on both counts. The Kentucky Supreme Court's result is consistent with this Court's governing decisions. Moreover, the split of authority is more one-sided than Bembury suggests. Several decisions he relies on are consistent with the Kentucky Supreme Court's decision. And others create less of an entrenched distinction between "time-of-arrest" and "time-of-search" analysis than Bembury indicates. True, the time-of-arrest test (which generally is defined similarly to the Kentucky Supreme Court's formulation) "reflects the practical reality that a search of the arrestee's 'person' to remove weapons and secure evidence must include more than his literal person" because arresting officers "take possession of [the arrestee's] clothing and personal effects, any of which

[2] The sworn testimony from the evidentiary hearing refutes this assertion.

could contain weapons and evidence." *State v. Byrd*, 310 P.3d 793, 798 (Wash. 2013). By contrast, the time-of-search test generally asks whether it is reasonably likely that the arrestee could have reached the container at the time of the search. *See, e.g.*, *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019). The two tests, however, often produce consistent results.

This case is a very poor vehicle for resolving any tension between the time-of-arrest and time-of-search rules. The fact pattern here is highly unusual. And two potential alternative bases for upholding the search—the plain-view and inevitable-discovery doctrines—cloud the search-incident-to-arrest issue. Equally problematic, Bembury's framing of the question presented assumes a key finding the Kentucky Supreme Court did not make about his ability to access the backpack. The Court should deny the petition.

I. The Kentucky Supreme Court's decision is consistent with this Court's precedents.

The Court should deny review because the Kentucky Supreme Court's narrowly written decision does not depart from this Court's precedents.

1. At the outset, Bembury frames the state court's opinion too broadly. He argues that it "extended the search incident to arrest exception to allow warrantless searches of any external containers in the arrestee's possession, in all custodial arrests, even if at the time of the search there was no reasonable possibility the arrestee could access the container to gain a weapon or destroy evidence." Pet. 25. But the court did not declare open season on all containers. Instead, it held that "a container capable of carrying items, such as a backpack, *can* be considered part of an arrestee's

'person' for the purposes of a search incident to lawful arrest." Pet. App. 44a (emphasis added). It also limited its application of the time-of-arrest rule in six ways.

First, the court noted its opinion did not necessarily extend to locked containers, which are "not at issue in" this case. *Id.* at 43a–44a. Second, the court emphasized that "the search of Bembury's backpack occurred immediately after, and in the same location as, his arrest." *Id.* at 44a. The search was not "remote in time or place from the arrest," unlike the search invalidated in *Chadwick*. *Id.* Third, the court required that the container "be in the arrestee's actual and exclusive possession, as opposed to constructive possession." *Id.* Fourth, the container must be so closely associated with the arrestee's person that it "must necessarily accompany the arrestee into custody." *Id.* Fifth, the court gave "[a]dditional consideration . . . to the fact that . . . Bembury was pulling illegal items out of his backpack in a public place and in the plain view of the officers." *Id.*

Sixth, and critically, the court noted that "[u]ntil it was moved to perform the search, Bembury's backpack remained on the picnic table in front of him." Pet. App. 4a. Contrary to Bembury's argument, neither the Kentucky Supreme Court nor the trial court found Bembury had "no reasonable possibility" of accessing the backpack. *See* Pet. 25. Though Bembury asserts that the handcuffs made accessing it practically impossible—a contention that, as discussed below, has been rejected by multiple courts—that assertion is not a factual finding underlying the Kentucky Supreme Court's decision. The court simply did not authorize warrantless searches of containers that the arrestee has no possibility of accessing.

2. Bembury identifies no principle of this Court's jurisprudence that conflicts with the Kentucky Supreme Court's decision. That is because the court colored within the lines.

a. First, the Kentucky court's result is consistent with *Robinson*. In that case, the Court upheld a warrantless search of the cigarette pack found on the arrestee even though the officer had already taken the pack and limited the arrestee's ability to access it. 414 U.S. at 236. *Robinson* was partly predicated on the arrestee's reduced expectation of privacy. *See Riley*, 573 U.S. at 392. Thus, it did not matter that the package posed no obvious risk to the officer, or that the arrestee was in no position to destroy evidence. *See id.* at 387; *Robinson*, 414 U.S. at 236.

Bembury had a similarly reduced expectation of privacy under the unusual circumstances here. This Court has held that determining whether an individual has a protected Fourth Amendment interest involves analyzing both his or her "subjective expectation of privacy" and whether "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (cleaned up). Here, Bembury exhibited a very limited expectation of privacy when he conducted an illegal drug sale from his backpack in the public courtyard of a major bank. His actions also made his privacy interest less objectively reasonable: society does not recognize a legitimate privacy interest in illegal activities.

Of course, "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 573 U.S. at 392. But it matters for determining whether an incident-to-arrest search is reasonable.

See id. at 391–92. The search here was not a warrantless search of a sealed container whose owner exhibited a desire to hide its contents. *Cf. Chadwick*, 433 U.S. at 11 ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination."). It was instead a search of a container used as a "public dispensary for synthetic marijuana." Pet. App. 48a; *see Thornton*, 541 U.S. at 630 (Scalia, J., concurring in judgment) ("The fact of prior lawful arrest . . . distinguishes a search for evidence of [the arrestee's] crime from general rummaging.").

The Kentucky Supreme Court's formulation of the time-of-arrest rule is also consistent with *Robinson*. There, this Court held that "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes," the arresting officer "was entitled to inspect it." 414 U.S. at 236. In other words, the officer's authority to search an item carried on the arrestee's person did not end once the officer gained control of the item. *See United States v. Perez*, 89 F.4th 247, 257 n.4 (1st Cir. 2023) (concluding that "the application of *Robinson*'s categorical rule depends, as to at least some personal property, on the property's location at the time of the arrest and not at the time of the search"). As this Court noted in *Riley*, "[o]nce an officer gained control of the [cigarette] pack, it was unlikely that Robinson could have accessed the pack's contents." 573 U.S. at 387. But the search was nonetheless reasonable because "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Id.*

Robinson's rationale maps onto this case. Like the arrestee in *Robinson*, Bembury no longer had exclusive possession of his backpack at the time of the search. However, the officers knew Bembury was using his backpack to deal drugs, and it was reasonable for them to be concerned about additional illegal or dangerous items or substances the backpack might contain. Importantly, too, Bembury compromised his own privacy interest in the backpack. The search of the backpack thus looked much more like the "minor additional intrusions" occasioned by the ordinary search of an arrestee's person than the intrusion occasioned by the ordinary search of a container. *See Riley*, 573 U.S. at 392.

b. While *Robinson* is most directly on-point, this Court's other search-incident-to-arrest precedents are also consistent with the Kentucky Supreme Court's decision. *Chimel* held that "the area 'within [the arrestee's] immediate control'" would properly be subject to a warrantless search. 395 U.S. at 763. *Chadwick*, too, reaffirmed that "warrantless searches of items within the 'immediate control' area" are "reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." 433 U.S. at 15 (citation omitted). Notably, these cases did not hold that "immediate control" must be defined at the time of the search rather than the time of the arrest.

The Kentucky court's time-of-arrest rule is narrow enough to generally produce results consistent with *Chimel*, *Robinson*, and *Chadwick*. For example, requiring "actual and exclusive possession" of containers excludes searches in which the arrestee shares cus-

tody of the container or is arrested at a significant distance from the container. *See* Pet. App. 44a. Also, the Kentucky Supreme Court's rule does not support searches of containers "remote in time or place from the arrest" because the court anchored its holding to the fact that "the search of Bembury's backpack occurred immediately after, and in the same location as, his arrest." *Id.* (quoting *Chadwick*, 433 U.S. at 15). The requirement that the container "must necessarily accompany the arrestee into custody" is another strict limiter. *Id.* In short, the Kentucky Supreme Court's rule does not lend itself to expansive interpretation.

Although the Kentucky Supreme Court did not approach this case as an "immediate control" one, the same result follows under that framing. As discussed later, ample precedent supports viewing the backpack as within Bembury's reachable area after he was handcuffed. Although Bembury argues the rationale for warrantless searches "does not apply" if officers "secured the item out of the arrestee's reach," Pet. 27, the Kentucky Supreme Court did not find the officers did so in this case. The search would thus be permissible even if the backpack were not considered part of Bembury's person. Indeed, *Chadwick* drew a line between items in the "'immediate control' area" and "luggage or other property seized at the time of an arrest." 433 U.S. at 15. Bembury's backpack was not "seized" when he was arrested. Instead, it "remained on the picnic table in front of him" until Officer Kennedy's search. Pet. App. 4a. The backpack search thus fell in the former—permissible—search category described by *Chadwick*.

Nor does *Riley* support Bembury. Although he argues "[a]n arrestee has a significant expectation of privacy in the contents of a backpack, purse, or luggage," Pet. 29, the *Riley* Court suggested that purses and similar containers are more like "an arrestee's pockets" than digital data on a cell phone, 573 U.S. at 393. Bembury also argues *Riley* requires a "balanc[ing]" of his privacy interest against the government's safety and evidence-preservation interests that the Kentucky Supreme Court failed to conduct. Pet. 29. But Bembury overreads *Riley*. The opinion does not require a re-weighing of interests for searches of every type of item. *See* 573 U.S. at 386 (stating that "*Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects"). In any event, the government interests here outweighed Bembury's privacy interest, which he significantly compromised by using the backpack to commit a crime in public.

Bembury suggests the question: Why not wait until getting a warrant to search the backpack? *See* Pet. 27. In support, he cites Justice Scalia's concurrence in *Thornton*, which argued that "[i]f 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search." 541 U.S. at 627 (Scalia, J., concurring in judgment). In *Thornton*, however, Justice Scalia was explaining why the evidence-preservation and safety rationales put forward to justify automatic searches of the passenger compartments of arrestees' cars under *New York v. Belton*, 453 U.S. 454 (1981), did not hold water. Justice Scalia argued the Court "should at least be honest about why" it "continue[d] to allow *Belton* searches": they were "a return to the broader sort of search incident to arrest that [the Court] allowed before *Chimel*."

Thornton, 541 U.S. at 631 (Scalia, J., concurring in judgment). Thus, Justice Scalia urged the Court to "limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle" (a suggestion the Court adopted in *Gant*). *Id.* at 632. Justice Scalia was not suggesting a limitation on *Robinson*-style searches of an arrestee's person or items associated with it.

Moreover, consider how this case differs from *Thornton*, where the arrestee was secured in a squad car during the search. 541 U.S. at 618. Officers Ray and Kennedy did not have squad cars; they had bicycles. While waiting to transport Bembury to the jail, they had limited options for securing both him and his backpack. They knew the backpack contained contraband; they did not know what other illegal or dangerous substances or items it might contain. Under the circumstances, it was reasonable for the officers to conduct a warrantless search of the backpack. And the Kentucky Supreme Court's articulation of the time-of-arrest rule was carefully tailored to encompass those facts without sweeping in a much broader set of circumstances.

Bembury argues that the time-of-arrest rule is "analytically flawed because it artificially permits a warrantless search when the justification for not getting a warrant no longer applies." Pet. 28. But the time-of-search rule does not necessarily resolve that concern either. The time-of-search rule risks incentivizing officers to leave arrestees unsecured longer, in hopes of ensuring searches take place under exigent circumstances. *See United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996) ("[I]f the courts were to focus exclusively upon the moment of the search, we might

create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer.").

In sum, Bembury identifies no aspect of the Kentucky Supreme Court's decision that is irreconcilable with this Court's decisions. As the foregoing analysis shows, application of this Court's holdings produces a result consistent with the Kentucky high court's.

II. The Kentucky Supreme Court's decision does not cleanly contribute to a split of authority.

Bembury asserts that there is "a deep split among federal and state lower courts" over container searches incident to arrest. Pet. 13. However, the purported split quickly loses depth upon closer examination. Many of the decisions Bembury relies upon simply reflect fact-dependent differences in result among courts applying the same principles from this Court. And the decisions that do disagree with one another do so in ways that are peripheral to the question here.

1. Most fundamentally, none of the cases Bembury cites (with one exception) involved the unusual element of a container whose illicit contents were *already known*—not merely suspected—at the time of the search.[3] Here, the Kentucky Supreme Court explicitly stated that "[a]dditional consideration must . . . be given to the fact that . . . Bembury was pulling illegal items out of his backpack in a public place and in the plain view of the officers." Pet. App. 44a. Although the

[3] In *Knapp*, the arrestee told officers her purse contained a pistol (which she, as a felon, was prohibited from possessing) prior to the search. 917 F.3d at 1164. However, the court did not reference that information in analyzing the search's legality.

court's formulation of the time-of-arrest rule did not explicitly incorporate that fact, its reasoning and result cannot be viewed apart from it. The cases on both sides of Bembury's purported split lack this unique feature. For that reason, the Kentucky Supreme Court did not decide "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10(b).

2. In support of his split-of-authority argument, Bembury suggests that several courts of appeals and state courts rejected the time-of-arrest rule when they found *Gant*'s test for a vehicle search incident to arrest—whether there is a "possibility that an arrestee could reach into the area that law enforcement officers seek to search," 556 U.S. at 339—extends beyond the car context. Pet. 19–23. Bembury contrasts those decisions with others declining to extend *Gant* or adopting a time-of-arrest rule. Pet. 15–19. But a closer look at the cases shows the split is overstated.

First, several of the cases Bembury puts in the *Gant*-extension category *upheld* warrantless searches. They also applied *Gant*'s reachable-area test in a way consistent with the Kentucky Supreme Court's decision here. For example, in *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010), the Third Circuit held that *Gant* "refocus[ed] . . . attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted," even for non-vehicle searches. Applying *Gant*'s standard, however, the panel upheld a warrantless search of an arrestee's bag "[a]lthough he was handcuffed and guarded by two policemen." *Id.* at 321. The panel noted that the arrestee's bag was "at his

feet" at the time of the arrest and search; "[a]lthough it would have been more difficult for [him] to open the bag and retrieve a weapon while handcuffed," the Court did "not regard this possibility as remote enough to render unconstitutional the search incident to arrest." *Id.*; *see also United States v. Salazar*, 69 F.4th 474, 478 (7th Cir. 2023) (upholding warrantless search of handcuffed arrestee's jacket, which was hanging on his chair, because arrestee "remained standing, agitated, and adjacent to the jacket"); *United States v. Cook*, 808 F.3d 1195, 1199–1200 (9th Cir. 2015) (upholding warrantless search of backpack while arrestee was "face down on the ground with his hands cuffed behind his back" because search "occurred immediately;" the arrestee's "backpack was right next to him;" and the search took only "twenty to thirty seconds"). All three of these decisions comport with the Kentucky Supreme Court's analysis of the backpack search here.

Other cases Bembury relies on were crafted to highly specific factual scenarios and would not necessarily exclude all warrantless searches of containers after an arrestee is handcuffed. *United States v. Davis*, 997 F.3d 191, 198 (4th Cir. 2021), is particularly notable. It held that the warrantless search of an arrestee's backpack was unreasonable when the arrestee was "face down on the ground and handcuffed with his hands behind his back" after having been "ordered out of [a] swamp at gunpoint." *Id.* As part of its holding, the court held that "*Gant* applies beyond the automobile context to the search of a backpack." *Id.* at 193.

However, the *Davis* panel distinguished the Fourth Circuit's earlier decision in *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020). There, the court upheld

a warrantless search of a backpack when the arrestee "was handcuffed and physically near an officer." *Davis*, 997 F.3d at 199. "It was arguably reasonable for the officers in *Ferebee* to believe that the defendant could access his bag because, although handcuffed and out of reaching distance, the defendant was not secured and presumably could have reentered the home and retrieved his bag." *Id.* Thus, although taking a time-of-search approach and purporting to follow *Gant* in doing so, the Fourth Circuit acknowledged that some searches of handcuffed arrestees' possessions may be valid under that rule. That outcome is consistent with the Kentucky Supreme Court's holding in this case. *See also State v. Carrawell*, 481 S.W.3d 833, 845 (Mo. 2016) (en banc) (applying time-of-search rule and invalidating search while noting that arrestee "was handcuffed and locked in the back of a police car at the time" of the search).

The Court should not take this case to resolve whether *Gant* applies outside the vehicle context because the Kentucky Supreme Court did not take a side on that question. Although referencing *Gant* in its analysis, the court did not take an approach like that of the First Circuit in *Perez*. That decision held that *Gant* "has literally nothing to say about where the line should be drawn in searches incident to arrest when it comes to things an arrestee carries at the time of the arrest." 89 F.4th at 256–57. To be sure, *Perez*'s result—upholding the search of a backpack the arrestee was carrying when he was detained—is consistent with the Kentucky court's decision here. *See id.* at 249. But so are the Third, Seventh, and Ninth Circuits' decisions taking the opposite view of *Gant*.

Bembury argues that several more decisions contribute to the split over time-of-arrest versus time-of search analysis. Pet. 23. Not all the rulings he puts in the time-of-search column clearly belong there, however. Although *State v. Ortiz*, 539 P.3d 262 (N.M. 2023), purported to follow the Tenth Circuit's version of the time-of-search rule in holding the warrantless search of an arrestee's purse invalid, it couched its analysis partly in time-of-arrest terms. *See id.* at 268 (noting "limited evidence . . . as to the location of the purse at the time of arrest" and finding "nothing to indicate that at the time Defendant was arrested, [the officer] and the purse were within Defendant's immediate control").

Some other cases applying the time-of-search rule would likely come out the same way under the Kentucky Supreme Court's time-of-arrest rule. For example, in *Knapp*, the arrestee's purse did not "necessarily" have to "accompany [her] into custody" because the arrestee's boyfriend could have held onto it for her. *See* Pet. App. 44a; 917 F.3d at 1167. That warrantless search, therefore, might fail the Kentucky Supreme Court's test like it failed the Tenth Circuit's. *See* Pet. App. 38a (approvingly quoting a state-court decision that applied the time-of-arrest rule and invalidated a search of a backpack that did not "*necessarily*" have to "travel with [the arrestee] to jail").

3. To the extent there is a split of authority, it is a lopsided one. The weight of authority upholds searches like the one here. As Bembury acknowledges, four states have adopted versions of the time-of-arrest rule, and the First Circuit has adopted it in all but name. Pet. 15–19. Although Bembury also identifies five courts of appeals and two states that declined to

adopt a time-of-arrest rule, three of those court-of-appeals decisions *upheld* searches incident to arrest despite the arrestees' being handcuffed. *See Salazar*, 69 F.4th at 478; *Cook*, 808 F.3d at 1199–1200; *Shakir*, 616 F.3d at 318. And one of the two state courts considered where the container was at the time of arrest, despite not expressly adopting that as the relevant time for adjudging the legitimacy of a search. *See Ortiz*, 539 P.3d at 268.

What these decisions show is that, in many cases, the time-of-arrest rule and time-of-search rule produce the same result. Whether courts expressly say so or not, they often consider the possibility the arrestee could access the container at the time of the search. Indeed, the Kentucky Supreme Court's analysis referenced facts relevant to that possibility. *See* Pet. App. 4a (noting that, "[u]ntil it was moved to perform the search, Bembury's backpack remained on the picnic table in front of him"); *id.* at 44a (noting that "the search of Bembury's backpack occurred . . . in the same location as[] his arrest").

Meanwhile, several other decisions from courts of appeals and state high courts have upheld warrantless searches of containers that were in the arrestees' possession at the time of the arrests. *See, e.g.*, *Ferebee*, 957 F.3d at 419 (upholding search of backpack because, "despite the fact that [arrestee] was handcuffed, the police reasonably could have believed that [he] could have accessed the backpack"); *United States v. Perdoma*, 621 F.3d 745, 750–51 (8th Cir. 2010) (upholding search of bag that "occurred in close proximity to where [arrestee] was restrained"); *United States v. Johnson*, 846 F.2d 279, 283 (5th Cir. 1988) (pre-*Gant* case upholding search of briefcase because it was in

"immediate control" of arrestee "at the time of the arrest"); *People v. Marshall*, 289 P.3d 27, 31 (Colo. 2012) (en banc) (upholding search of backpack that was "at [arrestee's] feet at the time of his lawful arrest"). The deep divide Bembury purports to identify among the courts does not exist. Even if it did, this case would not be the right one for resolving it.

III. This case is a poor vehicle to address the purported split.

Because of its unique characteristics, this case makes a remarkably poor vehicle for resolving the question Bembury raises about the time-of-arrest rule. First, the undisputed fact that Bembury was seen by two officers dealing drugs in plain public view takes the case outside the realm of ordinary searches incident to arrest and even ordinary probable-cause searches. That fact influenced the Kentucky Supreme Court's reasoning. Pet. App. 44a. And it inspired a separate writing raising an alternative ground for upholding the search.

That brings up the second point. Justice Nickell, who concurred fully in the majority opinion, also identified the plain-view doctrine as a separate basis for finding the search valid. *Id.* at 48a. Under this Court's precedents, the Fourth Amendment does not apply to items that "a person knowingly exposes to the public." *Florida v. Riley*, 488 U.S. 445, 449 (1989) (citation omitted). Similarly, "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost." *Illinois v. Andreas*, 463 U.S. 765, 771–72 (1983). True, Bembury did not open the entire contents of his backpack

to plain view. However, everything the officers recovered from the search related to the illegal transaction they witnessed: synthetic marijuana, rolling papers, and cash. Pet. App. 4a. As far as can be determined from the record, the search did not uncover any items in which Bembury had a legitimate expectation of privacy.

As Justice Nickell observed, Bembury used "his backpack as a public dispensary for synthetic marijuana." *Id.* at 48a. The arresting officers knew the backpack contained contraband "based on [their] firsthand, contemporaneous observations as opposed to mere suspicion or subjective belief." *Id.* at 49a. That fact makes this case unlike "those where police merely happen upon a closed container during the course of a lawful arrest or search." *Id.* Even if the Court views the application of the plain-view doctrine to these facts as debatable, Justice Nickell's concurrence highlights the inappropriateness of using this case to resolve a question about searches incident to arrest.

Third, the officers' knowledge that the backpack contained contraband implicates the evidence-gathering rationale for searches incident to arrest. *See Riley*, 573 U.S. at 404–06 (Alito, J., concurring in part and in judgment) (citing sources indicating the historical "basis for" searches incident to arrest was "the need to obtain probative evidence"); *Thornton*, 541 U.S. at 629 (Scalia, J., concurring in judgment) (citing cases and "[n]umerous earlier authorities . . . referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction"); *id.* at 630 (noting that "[o]nly in the years leading up to *Chimel* did we start consistently referring to

the narrower interest in frustrating concealment or destruction of evidence"); *see also Birchfield v. North Dakota*, 579 U.S. 438, 458 (2016). The Court explicitly adopted the evidence-gathering rationale in *Gant*. *See* 556 U.S. at 343. There, the Court relied on two "circumstances unique to the vehicle context" that justify warrantless searches "solely for the purpose of gathering evidence": "'a reduced expectation of privacy' and 'heightened law enforcement needs.'" *Riley*, 573 U.S. at 398 (citation omitted).

If ever a case implicated those circumstances in the non-vehicle context, it is this one. Bembury had "a reduced expectation of privacy" in his backpack after he opened it in public view, in the courtyard of a branch of a major bank, and conducted an illegal transaction from it. Relatedly, the case presents "heightened law enforcement needs" because the officers knew Bembury had an illicit substance in the backpack. Indeed, the trial court here relied on *Gant* to uphold the search. Pet. App. 81a–82a. This case thus raises the question whether *Gant* should be extended to searches of containers if officers know—beyond probable cause—that those containers contain contraband. The presence of the *Gant* evidence-gathering question makes this case inappropriate for resolving the time-of-arrest issue.

Fourth, a key purported fact that Bembury relies on was not found by the Kentucky Supreme Court. He predicates his question presented on his having had "no reasonable possibility" of accessing the backpack at the time of the search. Pet. i. But the Kentucky Supreme Court did not make or rely on such a finding. Bembury's being handcuffed, although relevant, does

not automatically mean he could not reach the backpack. *See, e.g.*, *Knapp*, 917 F.3d at 1168 (treating "whether the arrestee is handcuffed" as only one factor in evaluating whether an item "is within an arrestee's grab area"); *Cook*, 808 F.3d at 1200 (holding that "[t]he fact that [arrestee] was already handcuffed is significant, but not dispositive"); *Shakir*, 616 F.3d at 320–21 (declining to hold that searches of containers may never take place after arrestee is handcuffed). Cases like *Knapp*, *Cook*, and *Shakir* refute Bembury's suggestion that handcuffing eliminates the reach area. *See* Pet. 30 n.5.

Fifth, in the Kentucky Supreme Court, the Commonwealth argued the inevitable-discovery doctrine provided an alternative basis for upholding the search. But the court did not reach that argument because it found the search was valid incident to Bembury's arrest. Pet. App. 46a. Thus, for yet another reason, addressing Bembury's argument about the time-of-arrest rule would not necessarily resolve the validity of the search.

Finally, this case does not implicate concerns about warrantless searches of containers that contain "all 'the privacies of life.'" Pet. 11 (citation omitted). Some individuals indeed carry legitimately private items in their backpacks. But Bembury does not identify any innocent items discovered during the search here. More to the point, he chose to open his backpack in a public place and sell an illicit substance out of it. That action, as well as his subsequent arrest, "distinguishes a search for evidence of *his* crime from general rummaging." *See Thornton*, 541 U.S. at 630 (Scalia, J., concurring in judgment). The officers knew they would

find contraband in Bembury's backpack. The Kentucky Supreme Court's inclusion of that fact in its analysis ensures that this case is not a precedent for indiscriminate searches of personal belongings.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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