No. 21-

IN THE

Supreme Court of the United States

NANCY CATHERINE POWERS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the search of a purse in the possession of a visitor present at a residence during the execution of a premises warrant violates the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Nancy Catherine Powers, who was the defendant in the Circuit Court of Mobile County, Alabama, and appellant in the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

Respondent is the State of Alabama, which was the plaintiff in the Circuit Court of Mobile County, Alabama, and appellee in the Alabama Court of Criminal Appeals and the Supreme Court of Alabama.

RELATED PROCEEDINGS

Circuit Court of Mobile County:

State v. *Powers*, No. CC-19-2058 (Aug. 30, 2019)

Court of Criminal Appeals of Alabama:

Powers v. *State*, No. CR-18-1196 (Ala. Crim. App. Feb. 5, 2021), *aff'd sub nom. Ex parte Powers*, No. 1200764 (Ala. Jan. 21, 2022).

Supreme Court of Alabama:

Ex parte Powers, No. 1200764 (Ala. Jan. 21, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nancy Catherine Powers respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

INTRODUCTION

Forty-three years ago, in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), this Court addressed whether visitors at a premises subject to a warrant may be searched simply because they are present on the premises when the warrant is executed. Noting that "a search or seizure of a person must be supported by probable cause particularized with respect to that person", this Court held that the requirement for a warrant to search a person cannot be "avoided by simply pointing to the fact that coincidentally there exists probable cause … to search

the premises where the person may happen to be." *Id.* at 91. Thus, mere visitors maintained a reasonable expectation of privacy in their person even when found within a premises subject to a valid warrant. But *Ybarra* left open the question of *how* to distinguish between a reasonable search of a premises and an unreasonable search of a person.

Petitioner Nancy Powers was visiting another individual's house when that house was searched pursuant to a premises warrant. Officers from the Mobile Police Department had no independent probable cause to search Powers, and the Alabama Criminal Court of Appeals was clear that, under *Ybarra*, the warrant to search the house did not include the authority to search Powers. Despite this, officers searched Powers' purse, which was located on a table immediately next to her and over which she verbally asserted possession before the search. After Powers sought to suppress the search, the Supreme Court of Alabama upheld the search as reasonable under the Fourth Amendment.

This Court's guidance is needed to clarify how to determine whether a search warrant for a premises includes the authority to search the personal property in the possession of a visitor present when the warrant is executed. Courts currently use *four different tests* to answer this question. Three of the tests are bright-line judge-made tests, while another one looks at the totality of the circumstances. This patchwork of law leads to differing decisions in cases with identical fact patterns, based solely on the jurisdiction in which the search happened to be conducted.

Moreover, the Supreme Court of Alabama's decision widens a split with multiple state courts of last resort and other appellate courts, which have found

searches nearly identical to the one of Powers' purse to be unreasonable.

This case presents an ideal vehicle for the Court to resolve the split of authority over the scope of a visitor's reasonable expectation of privacy. The issues present in Powers' case will recur absent an intervention, and such cases are not likely to be eligible for appellate review, much less review by this Court, since the outcome of a suppression hearing often results in the resolution of the case by means of a plea agreement that includes an appellate waiver or dropped charges. But here, the Court has the chance to provide guidance that the lower courts have needed for over four decades. To prevent the continued disparate treatment of searches throughout the United States, this Court should grant review and reverse.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App. 1a-23a) is unpublished but is available at 2022 WL 188289. The opinion of the Alabama Court of Criminal Appeals (App. 25a-41a) is unpublished but is available at 2021 WL 411074. The Circuit Court of Mobile County's order denying defendant's motion to suppress and entering a plea of guilty to the charge of Possession with Intent to Distribute (App. 43a-44a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on January 21, 2022. By order dated April 12, 2022, this Court extended the date for the filing of a petition through May 23, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated".

STATEMENT

A. Mobile Police Seek A Warrant For The Premises Of Another Individual And Encounter And Arrest Petitioner

On November 16, 2018, Officer Shaun Wood of the Mobile Police Department applied for a premises warrant to search the home of Joshua Moyers at 2724 McGrew Court in Mobile to seize illegal drugs. App. 2a-3a; C.19-20.[1] In support of the premises warrant, Officer Wood submitted an affidavit describing Moyers' appearance, Moyers' residence, the street number of his residence, the travel directions to the residence, and a list of specific items to be searched and seized at the residence:

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

[1] Pursuant to Supreme Court Rules 12.7 and 14.1, citations to C. 1-C. 66 and R. 1-R. 29 refer to the Record on Appeal before the Supreme Court of Alabama.

> areas, and containers being searched to include utility receipts, addressed envelopes, and keys.

Id. The probable cause cited in the affidavit was the purchase of methamphetamine from Moyers by a confidential informant at Moyers' home 72 hours earlier. App. 3a; C.19-20. Specifically, the confidential informant stated that, after entering Moyers' house and giving him payment for the drugs, Moyers retrieved the drugs from a "bedroom." C.21. Moyers was the only person named in the affidavit. C.19-22. Based on this evidence, a Mobile County District Court issued a warrant authorizing a search of the residence. C.23-24.

On November 26, 2018, almost two weeks after the confidential informant had purchased methamphetamine from Moyers, Officer Wood and other law enforcement officers executed the search warrant for Moyers' home. App. 3a; C.43. Upon entry, the officers found Petitioner Nancy Powers asleep on a couch in the first room inside the front door, then found Moyers asleep on the floor in his bedroom, Marisa Moyers (Moyers' sister) asleep in her bed in her bedroom, and Lisa Johnston asleep in her bed in another room next to the living room. *Id.*

After entry, Officer Wood spotted a black purse on a side table next to the couch where Powers had been sleeping. App. 3a; C.43; R.4-5 (Tr. 8/13/2019). After reading Powers and the other persons present *Miranda* warnings, Officer Wood asked Powers whether the purse belonged to her. *Id.* Powers replied that it did. *Id.* Moyers admitted to having marijuana in the house but said there was nothing else illegal. C.43. Powers stated that she had nothing illegal either with her or on her person. App. 3a. Officer Wood and the other law enforcement officers then began their search of the

residence and found what was believed to be marijuana and methamphetamine in Moyers' bedroom. C.43.

At some point during the search of the house, another officer returned to the living room where Powers had been lying on the couch and performed a search of the purse previously identified as belonging to Powers. C.43; R.4-5. Purses were not among the specific items listed in the warrant to be searched and were not noted in the affidavit as a receptacle which may contain illegal narcotics. App. 2a-3a; C.19-20. While searching Powers' purse, the officer discovered a digital scale, over $800, and a clear plastic bag containing what he believed to be methamphetamine. App. 3a; C.43. Officers then transported Powers and Moyers to a police station to be interviewed. C.44.

After being confronted with these items, Powers admitted at the police station that the substance in her purse was methamphetamine and stated that she had the digital scale to weigh the methamphetamine. App. 3a; C.43-44. Powers was arrested for unlawful possession of methamphetamine with the intent to distribute and with possession of drug paraphernalia, and was later indicted for these offenses pursuant to Alabama Code § 13A-12-211(c)(6). App. 3a; C.5. Powers appeared for arraignment on June 11, 2019 and pled not guilty. C.10.

B. Proceedings Below

1. Trial Court Proceedings

On July 23, 2019, Powers filed a pretrial motion to suppress the evidence obtained from her purse and her subsequent statements as unlawfully obtained in violation of the Fourth Amendment. App. 4a; C.15-18. Powers argued that the search warrant for Moyers'

residence did not permit a search of her or her purse since she was not reasonably associated with the premises and no probable cause existed to search her or her belongings. App. 4a.

The trial court held a hearing on Powers' motion to suppress on August 13, 2019, during which Officer Wood was called as the sole witness. App. 4a; R.2. Officer Wood stated during direct examination that probable cause for the warrant was based on a controlled buy from Moyers, that the warrant was a premises warrant, that the only residence identified in the search warrant was Moyers', and that Moyers was the only name mentioned in the affidavit filed in support of the warrant. R.3-4.

When asked if he knew of Powers prior to entering Moyers' house, Officer Wood testified that he knew the name of a person called "Nancy" from a confidential informant but did not know this person's full name as Nancy Powers, though he had been told that "Nancy" did not stay at Moyers' residence "full time." R.5. The affidavit in support of the premises warrant and the warrant itself do not mention a "Nancy" or any details related to her. C.19-24. Officer Wood also stated that law enforcement officers had never made a controlled buy from Powers and that he did not know or expect that Powers would be in the house when they executed the search warrant. App. 4a; R.5, 7. When asked what led him to believe that Powers had illegal items in her possession during the search, Officer Wood responded that it was because: (1) she was nervous; (2) she said that she did not have anything illegal on her; and (3) she said that the purse was hers. App. 4a; R.6.

After the hearing, the trial court denied Powers' motion to suppress. App. 4a. Powers then pled guilty

to unlawful possession of a controlled substance with intent to distribute and reserved the right to appeal the trial court's decision to deny her motion to suppress. App. 44a. Powers was subsequently sentenced to three years imprisonment, suspended for two years of probation, and ordered to pay court costs and fines. C.26-27. Powers gave oral notice of appeal at her guilty plea hearing. App. 44a.

2. Proceedings On Appeal

a. Court of Criminal Appeals Proceedings and Opinion

The Court of Criminal Appeals affirmed Powers' conviction on February 5, 2021. App. 41a. Citing *Ybarra*, the court acknowledged that Powers herself was not subject to search pursuant to the premises warrant. App. 31a. The court noted that Powers' case presented an issue "of first impression" for Alabama appellate courts—namely, whether a law enforcement officer executing a premises warrant may search the personal belongings (i.e., a purse) of a person not mentioned in the warrant but who is visiting when the warrant is executed—and that courts in other jurisdictions are divided on this question. App. 26a.

To answer that question, the court applied the so-called "relationship test" to determine the reasonableness of the search, which "focuses on the officers' knowledge or understanding of the person's 'relationship' to the premises searched at the time the officers executed the search warrant," and, based on that relationship, determines whether an individual is either a "usual occupant or owner" who "loses her privacy interests in the belongings located there," or is a "mere visitor" who "retains her legitimate expectation of

privacy regardless of whether the visitor is currently holding or has temporarily put down her belongings." App. 35a (internal citation omitted). The court chose to rely on the "relationship test" instead of the "proximity test/physical-possession test" used by other courts, but at no point examined the totality of the circumstances surrounding the search. App. 38a-40a.

The court concluded that the officers executing the warrant were entitled to search Powers' purse because they "would have perceived Powers as something more than a 'transient visitor' to Moyers's house." App. 40a. That is, according to the court, even though Powers was not named in the warrant or affidavit supporting it, she was "at least, an overnight guest in Moyers' house and was certainly more than a 'transient visitor,'" because she was asleep on a couch in the front room (notably, not a bedroom like Moyers who was the owner of the premises) when the officers entered the residence. *Id.*

Further, the court took Officer Wood's later post-seizure testimony at the suppression hearing that a confidential informant had mentioned that someone named Nancy "usually has meth" and that she did not stay at Moyers' house full-time—details which were not included in the affidavit supporting the warrant—to imply that Powers did "at least, 'stay' at Moyers's house on occasion." App. 40. This led the court to conclude that the purse was a container that could conceivably conceal the "illegal drugs" which officers were looking for in Moyers' house. *Id.* The court did not identify any other basis for probable cause to search Powers or her purse. Accordingly, the court affirmed the trial court's judgment, holding that Powers' Fourth Amendment rights were not violated when officers searched her purse.

An application for rehearing was filed with the Alabama Court of Criminal Appeals on February 19, 2021 and overruled on July 30, 2021 (No. CR-18-1196). Powers then sought certiorari review from the Supreme Court of Alabama on August 5, 2021, which was granted on September 9, 2021. App. 2a.

b. Proceedings before the Supreme Court of Alabama and Opinion

The Supreme Court of Alabama, reviewing the rulings below *de novo*, App. 5a, affirmed Powers' conviction, though based on a different reasoning than the Court of Criminal Appeals, App. 2a.

Examining the multitude of different tests employed by courts to determine the reasonableness of a search of nonoccupants' personal possessions, the court stated that it "decline[d] to adopt any specific 'test' to the exclusion of others," but instead would examine the "unique facts and circumstances relevant to a defendant's reasonable expectations of privacy and whether police reasonably can conclude that a particular personal effect comes within the scope of a premises warrant." App. 16a-17a. Despite this disavowal of any particular test, the court conducted a possession analysis in all but name only. Specifically, the court relied on two inapposite cases which (1) applied the physical possession test, which focuses on the physical location of an object in relation to the individual, App. 17a-20a, and (2) involved the warrantless search of a vehicle after a traffic stop, App. 15a-22a, to find that Powers' purse was a container within the scope of the premises warrant, App. 23a.

The court addressed the primary factor for its finding that the search was reasonable in a conclusory statement in footnote 3, asserting that because Powers

had placed her purse down on the table directly next to her and was not "wearing" it at the time of the search, the search was not a search of her person. App. 12a n.3. Having thus decided that a purse was not part of Powers' person—ignoring precedent from courts around the country which urge that it can be—the court concluded that Powers was not entitled to the privacy interest recognized by this Court in *Ybarra*. From there, the court held that the search of the purse was valid because Officer Wood testified that he was aware of a "Nancy" who was known for possessing methamphetamine, and a purse is the type of small container that could contain methamphetamine. App. 22a-23a; R.5.

REASONS FOR GRANTING THE PETITION

In *Ybarra* v. *Illinois*, this Court held that "[the] search or seizure of a person must be supported by probable cause particularized with respect to that person," and the requirement cannot be "avoided by simply pointing to the fact that coincidentally there exists probable cause … to search the premises where the person may happen to be." 444 U.S. 85, 91 (1979). Despite this guidance, the Supreme Court of Alabama held that the search of Powers' purse was reasonable based solely on its determination—which lacked any analysis or discussion—that the purse was not part of her person. Not only is this error, but the Supreme Court of Alabama's decision also deviates from the basic reasoning of this Court's decisions on the scope of Fourth Amendment protections.

The landscape of Fourth Amendment law determining the reasonableness of searches of visitors' persons and possessions in the course of executing a premises warrant is a hodge-podge of different judge-made rules, creating differing results on nearly identical facts

between jurisdictions. To start, different courts apply *four different tests* to determine the reasonableness of a search of a visitor's personal effects pursuant to a premises warrant. Three of the tests are bright-line judge-made tests—the "relationship," "physical proximity," and "notice tests"—while under the fourth, courts examine the totality of the circumstances. Lower courts across the country are divided on what test to use despite this Court having said in other contexts that the touchstone of the reasonableness inquiry is to examine the totality of the circumstances. *See*, *e.g.*, *Samson* v. *California*, 547 U.S. 843, 848 (2006).

Further, the Supreme Court of Alabama's decision conflicts with the decisions of other state courts of last resort and federal appellate courts on nearly identical facts. *First*, multiple state courts of last resort have reached different conclusions regarding the reasonableness of the search of a visitor's purse in nearly identical situations as Powers'. *Second*, the Supreme Court of Alabama relied on warrantless vehicle search case law to reach its conclusion, which also conflicts with other state and federal courts that have held that such case law should not be applied to searches of visitors during the execution of a premises warrant.

While it is egregious enough that the Supreme Court of Alabama's decision conflicts with those of other courts on multiple levels and sets improper precedent within its own state, this issue arises frequently in courts across the country and the confusion in the law will be repeated. Searches of visitors' persons and possessions during a premises search are a routine occurrence, and because an individual subject to an unreasonable search may accept a plea deal after arrest to avoid or limit prosecution, many cases are resolved without review of the Fourth Amendment issue at the

trial court, much less appellate, level. This limits this Court's ability to review and provide guidance on such situations. But here, the Court has that chance. This Court's review is necessary to ensure that unreasonable searches of visitors' person and possessions do not continue to take place.

I. DIFFERENT STATE COURTS OF LAST RESORT APPLY MULTIPLE DIFFERENT TESTS TO EVALUATE THE REASONABLENESS OF THE SEARCH OF A VISITOR'S PERSON AND POSSESSIONS

State courts of last resort have developed a variety of conflicting tests to determine whether the search of a nonresident's person and possessions under a premises warrant is reasonable. This patchwork of conflicting judge-made tests has resulted in courts in different jurisdictions reaching divergent outcomes on the reasonableness of searches under identical circumstances.

To start, certain jurisdictions rely on the so-called "relationship test," which examines the connection between the person who is being searched and the place subject to the warrant, as perceived by the law enforcement officers executing that warrant. *United States* v. *Giwa*, 831 F.2d 538, 545 (5th Cir. 1987); *see also United States* v. *Young*, 909 F.2d 442, 445 (11th Cir. 1990); *People* v. *Reyes*, 273 Cal. Rptr. 61, 65 (Cal. Ct. App. 1990). That is, in relationship test jurisdictions, to determine whether a "personal effect not currently worn, but apparently temporarily put down," such as a purse, "falls outside the scope of a warrant to search the premises," the court "examine[s] the relationship between the person and the place." *United States* v. *Micheli*, 487 F.2d 429, 431-432 (1st Cir. 1973). If the court finds a sufficient "relation to the place" such "that it could reasonably be expected that" a subject's

"personal belongings would be there," the search is reasonable. *Id.* The Alabama Court of Criminal Appeals relied on the relationship test in its analysis of the search of Powers' purse. App. 40a.

Other courts apply a "notice" test, which asks whether the law enforcement officer conducting the search had actual notice that the personal property belonged to the visitor. *See*, *e.g.*, *Waters* v. *State*, 924 P.2d 437, 439 (Alaska Ct. App. 1996); *State* v. *Thomas*, 818 S.W.2d 350, 360 (Tenn. Crim. App. 1991); *People* v. *McCabe*, 192 Cal. Rptr. 635, 637 (Cal. Ct. App. 1983); *Childers* v. *State*, 281 S.E.2d 349, 351 (Ga. Ct. App. 1981). If the officer has such notice, then the search would be unreasonable. *State* v. *Gilstrap*, 332 P.3d 43, 45 (Ariz. 2014) ("This test allows police to search an item that may contain the object of a premises warrant unless they are put on notice that the item belongs to a non-resident.").

A minority of courts apply a "physical possession" or *proximity* test, which "focuses on the physical location of the container and whether the individual wore the container at the time it was searched in order to determine whether the container was an extension of the person or part of the premises." *United States* v. *Vogl*, 7 F. App'x 810, 815-817 (10th Cir. 2001); *see also United States* v. *Johnson*, 475 F.2d 977, 979 (D.C. Cir. 1973); *United States* v. *Teller*, 397 F.2d 494, 497-498 (7th Cir. 1968); *State* v. *Reid*, 77 P.3d 1134, 1143 (Or. Ct. App. 2003); *State* v. *Lepier*, 761 A.2d 458, 461 (N.H. 2000). If the container is "within [a visitor's] physical possession [it] is considered an appendage of the body and, therefore, a search of the person," and a search would be unreasonable. *Vogl*, 7 F. App'x at 815.

Finally, still other courts examine the totality of the circumstances surrounding the search of a visitor's possessions to determine whether the police reasonably believed that the visitor's purse was a part of the premises described in the search warrant. *See*, *e.g.*, *State* v. *Brown*, 905 N.W.2d 846, 853 (Iowa 2018); *State* v. *Molnau*, 904 N.W.2d 449, 452-453 (Minn. 2017). That is, instead of relying on any single bright-line rule, these courts examine all of facts and circumstances surrounding the search to determine whether an individual has a legitimate expectation of privacy in their person and possessions, including, for example: whether the officers expected the defendant to be on the premises during the execution of the warrant; whether the nature of the item searched indicated that it belonged to the resident or a visitor; whether the officers identified "suspicious" circumstances attending the execution of the warrant; whether the defendant asserted ownership or control of the purse; and whether the purse was in the immediate vicinity of the defendant.

A right as sacred as freedom from unreasonable searches and seizures should not hang in the balance depending on which jurisdiction's caselaw applies to a defendant visitor who happens to be present on a premises during the execution of a warrant. This Court should grant certiorari to ensure consistency in the proper application of bedrock Fourth Amendment principles.

II. THE SUPREME COURT OF ALABAMA'S DECISION IS WRONG ON THE MERITS AND CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

While the Supreme Court of Alabama did not acknowledge as much, in effect it relied primarily on a

single bright-line test—physical possession—to uphold the reasonableness of the search of Powers' purse. Not only does the physical possession test flout common sense and Fourth Amendment guarantees, but the use of *any* bright-line test is constitutionally improper. As this Court has urged in other contexts, "'[u]nder our general Fourth Amendment approach[,]' we 'examine the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson*, 547 U.S. at 848. The Supreme Court of Alabama's failure to follow the guidance widened a split between it and other appellate and state courts of last resort which have found nearly identical searches to be unreasonable.

A. The Supreme Court of Alabama Erred in Relying on Possession Test Authorities

1. Reasonableness Should Be Assessed Under The Totality Of The Circumstances, Not A Binary Possession Test

Under the Fourth Amendment, "a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra*, 444 U.S. at 91. This particularity requirement cannot be "avoided by simply pointing to the fact that coincidentally there exists probable cause … to search the premises where the person may happen to be." *Id.*; *see also City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."). The particularity requirement provides an essential constitutional limit on the scope of search warrants by requiring law enforcement demonstrate probable cause as to any persons or property subject to

search. *Micheli*, 487 F.2d at 432 ("It should not be assumed that whatever is found on the premises described in [a] warrant necessarily falls within the proper scope of the search."); *cf. State* v. *Nabarro*, 525 P.2d 573, 576 (Haw. 1974) ("To overcome [the Fourth Amendment] interest, the federal and state constitutions require a warrant supported by probable cause. And a warrant to search premises only cannot logically meet this requirement since by hypothesis there is no way to know, at the time the warrant is issued, whether the visitor or his possessions will even be present at the premises….").

Accordingly, since *Ybarra*, "[t]he Supreme Court and other courts have repeatedly recognized that containers such as backpacks are so closely associated with one's person that a search of them must be supported by a warrant which satisfies the particularity requirement, or by one of the exceptions to the warrant requirement." *United States* v. *Robertson*, 833 F.2d 777, 784 (9th Cir. 1987); *see also Brown*, 905 N.W.2d at 853 ("[A] search of the possessions of a third party at a residence is unconstitutional when the warrant does not support probable cause to search that particular person.").

The constitutional review of a search begins with determining whether "the police reasonably believed that [the visitor's] purse was a part of the premises described in the search warrant rather than the defendant's personal property." *People* v. *Gross*, 465 N.E.2d 119, 122 (Ill. App. Ct. 1984); *see generally* 2 LaFave, *Search and Seizure* § 4.10(b) (6th ed. 2021) (recognizing limit on "police authority to execute the warrant by searching into personal effects" where the police "knew or should have known" that the effects belonged to a visitor). As this Court has repeatedly instructed, to

determine the reasonableness of such a search, courts must "examine the totality of the circumstances." *Samson*, 547 U.S. at 848; *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (citation omitted)); *United States* v. *Drayton*, 536 U.S. 194, 201 (2002) (noting that the reasonableness "inquiry necessitates a consideration of 'all the circumstances surrounding the encounter'").

Thus, in assessing the reasonableness of a search of a purse belonging to a visitor during the execution of a premises warrant, courts must consider a variety of factors including: whether the warrant named or described the item searched;[2] whether the officers expected the defendant to be on the premises;[3] whether the nature of the item searched indicated that it belonged to the resident or a visitor;[4] whether the

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[2] *E.g.*, *United States* v. *Simmermaker*, 998 F.3d 1008, 1010 (8th Cir. 2021) (search of lock box upheld where warrant described lock boxes among the items to be searched); *State* v. *Lambert*, 710 P.2d 693, 697-698 (Kan. 1985) (officers lacked probable cause to search person "who was neither named nor described in the warrant").

[3] *E.g.*, *State* v. *Peters*, 611 P.2d 178, 178-179 (Kan. Ct. App. 1980) (warrant to search a premises did not authorize search of person who coincidentally appeared at the premises during execution).

[4] *E.g.*, *Brown*, 905 N.W.2d at 847 (officers could not have reasonably believed under the circumstances that a feminine purse was part of the residence of a man); *Gross*, 465 N.E.2d at 122 (police could not have reasonably believed the purse was part of the premises described in the warrant after having opened it and found a picture of the defendant).

defendant attempted to escape the police or other "suspicious" circumstances attended the execution of the warrant;[5] whether the defendant claimed ownership of the purse[6] or relinquished control by walking away from it; and whether the purse was in the "immediate vicinity" of the defendant (such as next to her on the sofa or floor).[7] The totality of these circumstances informs whether "the officer could [have] reasonably believe[d] that the purse was part of the premises described in the search warrant." *State* v. *Lambert*, 710 P.2d 693, 697-698 (Kan. 1985).

2. The Supreme Court Of Alabama Applied The Physical Possession Test

The Supreme Court of Alabama acknowledged this Court's instruction that "the 'touchstone' of the Fourth Amendment is 'reasonableness' … 'measured in objective terms by examining the totality of the circumstances.'" App. 17a (citing *Robinette*, 519 U.S. at 39). Yet after paying lip service to the totality of the circumstances, the court abruptly changed course and affirmed Powers' conviction under a framework that was,

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[5] *Johnson*, 475 F.2d at 979 (noting "the delay, the suspicious noises that preceded the executing officers' entry into the apartment, and the apparent effort … to escape through the bedroom window"); *United States* v. *Gray*, 814 F.2d 49, 51 (1st Cir. 1987) (officers had reasonable suspicion because the defendant "was discovered in a private residence, outside of which a drug deal had just 'gone down,' at the unusual hour of 3:45 a.m.").

[6] *Gross*, 465 N.E.2d at 122 (assessing whether the defendant gave up a reasonable expectation of privacy regarding her purse by failing to claim it as her property); *Nabarro*, 525 P.2d at 576-578 (assertion of ownership over purse weighed against reasonableness of search).

[7] *Nabarr*o, 525 P.2d at 577.

for all intents and purposes, a physical possession analysis. Indeed, while it purported to eschew any judge-made test, the court ultimately located the reasoning for its conclusion in *Johnson*, 475 F.2d at 979, a canonical physical possession case.[8] *See* App. 17a-20a.

In *Johnson*, the D.C. Circuit drew a distinction between objects "worn" by a visitor—*i.e.*, objects in the owner's immediate physical possession—and objects "resting separately from the person of its owner." 475 F.2d at 979. Under the physical possession test, the former object "constitute[s] an extension of her person so as to make the search one of her *person*," while the latter does not. *Id.* The physical possession test can thus turn on whether a visitor happened to be holding or have placed her personal effects down on a table or sofa next to her at the moment officers arrive on the premises—an artificial distinction that other courts have rejected as inconsistent with traditional Fourth Amendment principles. *See*, *e.g.*, *Nabarro*, 525 P.2d at 576 ("An analysis which focuses entirely on whether a belonging is in the physical possession of a non-resident visitor to premises searchable under a warrant, while it

[8] Subsequent courts have consistently cited *Johnson* as a paradigmatic example of the physical possession test. *See*, *e.g.*, *Gilstrap*, 332 P.3d at 45 ("Several jurisdictions have adopted the possession test" and citing *United States* v. *Johnson* for proposition that "a search of a purse resting separately from its owner, was not 'worn' and therefore the search was proper"); *State* v. *Merritt*, 567 S.W.3d 778, 781 (Tex. App. 2018) ("Under the possession test … 'the search of a personal item like a purse is not regarded as a search of the person when the item is not in the person's possession'" (quoting *Gilstrap* and citing *Johnson*)); *State* v. *Wills*, 524 N.W.2d 507, 510 (Minn. Ct. App. 1994) (citing *Johnson* for the "focus on the physical possession of the item to be searched"); *State* v. *Light*, 306 P.3d 534, 540-541 (N.M. Ct. App. 2013) (citing *Johnson* as the representative case for the "physical possession test").

serves to protect the zone of privacy around the visitor's person, ignores the substantial interest the visitor has in the privacy of all his possessions, wherever located."); *Brown*, 905 N.W.2d at 854-855 ("A visitor who placed her purse on a sofa would be shocked to learn that her host, let alone government agents, was free to rummage around the purse looking for interesting or entertaining items while the visitor was in the other room."); *Micheli*, 487 F.2d at 431 (rejecting possession test and observing that "[t]he rudest of governmental intrusions into someone's private domain may occur by way of a search of a personal belonging which had been entrusted to a nearby hook or shelf"); *People* v. *Duffie*, 2021 WL 4762638, at *7 (Ill. App. Ct. Sept. 24, 2011) (suppressing search of items found in defendant visitor's pants on the floor).

By in effect applying the physical possession test, the Supreme Court of Alabama held that Powers enjoyed a reduced expectation of privacy merely because she "chose to set her purse down on a table" next to her, as opposed to wearing it on her shoulder. *See* App. 12a n.3, 20a. This artificial distinction widened a split with other state courts of last resort and appellate courts that have found searches in nearly identical situations to be unreasonable.

3. The Supreme Court Of Alabama's Application Of The Possession Test Is At Odds With The Holdings Of Other State Courts Of Last Resort In Cases With Nearly Identical Facts

The Supreme Court of Alabama's application of the possession test further accentuates a split of authority among state courts of last resort and federal circuits on the proper standard for examining the reasonableness

of a search of a visitor's personal effects. Applying a variety of approaches, the appellate courts of multiple other states have held that the search of a visitor's purse when the owner is present during the execution of a premises warrant violates the Fourth Amendment even when the purse is not "worn" by the defendant at the time of the search.

In *Lambert*, police officers executed a search warrant on a residence occupied by "Randy," during which the officers searched a purse located on the kitchen table where two women were seated. 710 P.2d at 694-695. The search of the purse resulted in the discovery of methamphetamine. *Id.* at 695. The trial court concluded that the evidence from the search of the purse should have been suppressed under the Fourth Amendment, and the Kansas Supreme Court agreed. *Id.* As the Kansas Supreme Court explained, "[s]ince the officer executing the search warrant had no reason to believe that the purse lying on the kitchen table next to the defendant belonged to Randy, the officer could not reasonably believe that the purse was part of the premises described in the search warrant." *Id.* at 697-698.

In *Nabarro*, police officers obtained a warrant to search a hotel room for marijuana based on information that two residents had marijuana products and paraphernalia in their possession. 525 P.2d at 577. When the officers executing the warrant entered the room, they encountered a third person who had placed her purse on the floor next to her. After that individual claimed ownership of the purse, the officers instructed her to empty its contents on the counter and found marijuana products. *Id.* Noting that the defendant's "mere presence in a hotel room which allegedly contained marijuana was not an abdication of her right to

privacy in her person and effects," the Hawaii Supreme Court held that the search "warrant itself cannot alone provide the basis for" a search of a purse placed on the floor, and suppressed the evidence found in the defendant's purse. *Id.* at 576-577.

Similarly, in *Gross*, police officers executing a warrant searched a purse lying on a table on the premises and discovered cocaine. 465 N.E.2d at 120. On appeal, the State argued that "the search of the defendant's purse was within the scope of the search warrant because the defendant did not assert ownership over the purse and the police reasonably believed that it may have belonged to someone who lived at the premises." *Id.* at 122. However, reviewing the record at the suppression hearing, the Illinois appellate court observed that the circumstances of the search made it clear that the officer would have known the purse belonged to a non-resident. *Id.* Following *Ybarra*, the appellate court rejected the State's argument, noting that the "State cannot now argue that the police reasonably believed that the purse was a part of the premises described in the search warrant rather than the defendant's personal property." *Id.*

Finally, in *Brown*, police executing a warrant on the residence of a man unexpectedly found a woman at the residence. 905 N.W.2d at 847. The officers searched the woman's purse, which was sitting next to her, and found marijuana.[9] *Id.* The Iowa Supreme Court held that the state could not sustain the search of

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[9] Although *Brown* was decided as a matter of state constitutional law, the clause of the Iowa State Constitution interpreted in *Brown* substantially mirrors the Fourth Amendment to the United States Constitution. *See* 905 N.W.2d at 853 (quoting Iowa Const. art. I, § 8).

the purse under any of the three "tests" (i.e., proximity/possession, relationship, notice) because the officers could not have reasonably believed under the circumstances that the purse (with its feminine qualities) belonged to the man named in the warrant, and not the woman sitting next to it. *Id.* at 854-856.

Here, the State placed much reliance on the fact that the officers executing the warrant found Powers napping on the sofa next to her purse. Under a totality of the circumstances analysis, however, this lone fact would not control. In *Hayes* v. *State*, 234 S.E.2d 360 (Ga. App. 1977), police officers also entered an apartment to find the defendant alone and "asleep on the couch in the living room." *Id.* at 361. Assessing all the circumstances, the Georgia court of appeals concluded that the police had violated the defendant's Fourth Amendment rights by searching his suitcase located on the floor next to the couch:

> [In] the present case, we believe the officers had enough notice that they were searching the personal effects of a person they had no authority to search so that the search was an unreasonable intrusion into the appellant's privacy. The circumstances they encountered when they began the search, for example, one man asleep on the living room couch with a suitcase next to him are inconsistent with the notice that the man was the resident "Mark."

Id. at 362. Similarly, in *State* v. *Ingersoll*, the police searched the respondent's jacket after he had spent the night in a house where a search warrant was issued and found controlled substances. 1994 WL 615127, at *1 (Minn. Ct. App. Nov. 8, 1994). In suppressing the evidence from the search, the Minnesota Court of Appeals

affirmed that "[i]n determining whether the conduct of the officers executing the search pursuant to the search warrant was reasonable, this court must look at the totality of the circumstances." *Id.* Although the defendant was an "overnight visitor," the Court noted that the "warrant did not authorize the search of any individual other than the owner of the premises" and that the respondent had clearly indicated that the jacket belonged to him. *Id.*; s*ee also Thomas*, 818 S.W.2d at 354 (suppressing evidence from a purse belonging to an overnight visitor).

4. The Supreme Court of Alabama Compounded Its Error By Relying On Inapposite Warrantless Automobile Search Case Law To Justify The Search Of Powers' Purse, In Further Conflict With Other Courts.

In concluding that the premises warrant justified the search of Powers' purse, the Supreme Court of Alabama also relied on *Wyoming* v. *Houghton*, 526 U.S. 295 (1999). *See* App. 21a (holding that *Houghton* is "helpful in resolving this case"). In *Houghton*, the Supreme Court examined the "permissible scope of a warrantless car search" when "it is uncontested … that the police officers had probable cause to believe there were illegal drugs in the car." 526 U.S. at 297, 300, 302. Although Powers' appeal concerned the scope of a premises warrant, an inquiry far afield from the automobile exception to the warrant requirement, the Supreme Court of Alabama analogized the search of a vehicle passengers' possessions to the search of Powers' purse in Moyers' home on the ground that neither constituted "a body search involving a higher degree of intrusiveness." App. 22a. While acknowledging that *Houghton*

rested "on the diminished expectation of privacy that accompanies vehicle searches," the court nonetheless held that "there is some indication that *Houghton* could be extended to premises searches." *Id.*

In extending the automobile exception to premises searches, the Supreme Court of Alabama not only swallowed the warrant requirement but opened a split with myriad courts that have rejected any comparison between *Houghton* and the circumstances of the search here. As the Tenth Circuit observed in *Vogl*, *Houghton* "expressly limited its holding to 'passengers' belongings found in [a] car that are capable of concealing the object of the search" and "makes no mention of … property found on a premises." 7 F. App'x at 814. The limitations inherent in *Houghton*'s reasoning follow from the particularities of a warrantless vehicular stop: "The *Houghton* holding is uniquely 'grounded on a balancing of interests including a passenger's reduced expectation of privacy in containers placed in vehicles which trave[l] public thoroughfares.'" *Id.* (internal quotations omitted). Thus, as the Tenth Circuit concluded, "we hold *Houghton* does not apply in this instance because its holding, footnote one, and facts are rooted in and inseparable from the context of the automobile exception, do not extend to a premises search, and are factually distinguishable from this case." *Id.*

Applying similar reasoning, the Supreme Court of Minnesota found *Houghton* inapplicable to the search of a visitor's purse in *Molnau*. Noting that "*Houghton* examined the scope of a warrantless automobile search," that court explained how "[i]n a car, both drivers and passengers have a reduced expectation of privacy … [t]his case does not involve the automobile exception, and we therefore conclude that *Houghton* does

not require us to abandon the totality-of-the-circumstances approach." 904 N.W.2d at 453.

The New Mexico Court of Appeals made the same observation in *State* v. *Light*, 306 P.3d 534 (N.M. Ct. App. 2013). In that case, police had searched a theater guest's purse during the execution of a warrant on the premises. The state drew an analogy to the search of the passengers' parcel in *Houghton*, but the court rejected that argument:

> The State acknowledges that both *Ross* and *Houghton* involve the warrantless search of automobiles under the federal automobile exception. The automobile exception is justified in part by the recognition that passengers, as well as drivers, 'possess a reduced expectation of privacy with regard to the property that they transport in cars.' We do not believe that the principles underlying [*United States* v.] *Ross* [, 456 U.S. 798 (1982)] and *Houghton* apply in this matter because neither case involves the search of the personal property of a person who is not subject to the search warrant.

Id. at 543 (internal citations omitted). The New Mexico court therefore was "not persuaded that these cases warrant a conclusion that the search of Defendant's purse was supported by probable cause or that the search was authorized by the warrant to search the premises of the theater." *Id.*

Still other courts have observed that *Houghton* is particularly inapposite when—as here—the officers lacked independent probable cause to search a visitor's belongings. In *Houghton*, this Court relied on the key fact that the officers had established probable cause ***on the scene*** to search the entire vehicle. *Cf.* App. 21a

(acknowledging that "[i]n *Houghton*, police gained probable cause during a traffic stop to believe that narcotics were present in the subject vehicle"). Here, again, at no time did the State or any of the lower courts find probable cause to search or arrest Powers, and at no time did Powers relinquish ownership and control of her purse. By contrast, in *Houghton*, the passenger had left her purse in the car voluntarily, which this Court interpreted as a forfeit of any heightened privacy interests in its contents. The Kansas Supreme Court summarized these crucial distinctions in *State* v. *Boyd*, 64 P.3d 419 (Kan. 2003)*:*

> In *Houghton*, probable cause to believe illegal drugs would be found in the car ***existed before the officer entered the car***. The officer found a passenger's purse, which had been voluntarily left in the back seat. Here the officer found no drugs on Lassiter and had no probable cause to believe illegal drugs were in the car when Boyd was told by the officer to get out of the car. ***Thus, at that point, the officer did not have probable cause to search Boyd or her purse.*** The officer had no right to order her to leave her purse in the car. The State conceded at oral argument that if Boyd would have been allowed to take her purse with her the officer could not have lawfully searched her or her purse. If we hold an officer can lawfully order a passenger to leave her purse in the car and thereby make it subject to search, then what prevents the officer from ordering the passenger to remain in the car, thus subjecting her to be subsequently searched along with the car. The protection of the Fourth Amendment cannot be defined at the discretion of a law

> enforcement officer. The heightened privacy interest and expectation in the present case is sufficient to tip the balance from governmental interest in effective law enforcement, which outweighed the privacy interest in *Houghton* where the purse was voluntarily left in the back seat unclaimed.

Id. at 427 (emphasis added).

Here, as in *Boyd*, the police lacked any independent probable cause to search Powers or her purse at Moyers' residence, and Powers retained a substantial privacy interest in her purse throughout the execution of the warrant. *Cf. Nabarro*, 525 P.2d at 577. The Supreme Court of Alabama's reliance on *Houghton* thus placed it at odds with the supreme and appellate courts of several states and at least one federal circuit, raising a significant legal question for the Supreme Court's resolution.

5. The Search Of Powers' Purse Was Unreasonable Under An Examination Of The Totality Of The Circumstances

Reviewing the totality of the circumstances surrounding the search of Powers' purse, the search was unreasonable. The warrant was issued for the property of a man, not a woman; the police did not expect Powers to be present at the residence during the search; she was not named in the warrant or the underlying affidavit; Powers was not found in a bedroom or in a state indicating occupancy or a status other than that of a temporary visitor; the purse was located immediately next to her; there is no evidence that the police had identified her as "Nancy" prior to the search of her purse; and she had advised the officers prior to the search that

the purse was hers and she never abandoned it. Moreover, as discussed *infra*, the fact that Powers was asleep on a couch in the front room is also not dispositive. *See, e.g.*, *Hayes*, 234 S.E.2d at 362; *Ingersoll*, 1994 WL 615127, at *1; *Thomas*, 818 S.W.2d at 354. Under these circumstances, searching Powers' purse pursuant to the premises warrant for Moyers' residence was unreasonable. The police officers executing the warrant could not reasonably have believed that the purse was part of the premises subject to the search warrant, and not Powers' personal property. *See, e.g.*, *Lambert*, 710 P.2d at 697-698; *Gross*, 465 N.E.2d at 122.

The Supreme Court of Alabama reasoned that, because Powers was not "'wearing' her purse when it was searched," it was "not necessary to consider whether, or when, the search of a personal effect that might be considered 'wearable' is the equivalent of searching a 'person' for purposes of precedent like *Ybarra*." App. 12a n.3. This logic is hard to follow, but the court seems to be saying that, as a categorical matter, a wearable but unworn item is properly subject to search pursuant to a premises warrant. But the reasonableness of a search under *Ybarra* does not turn on whether or not a wearable item was being worn at the moment of the search. Rather, whether an item is "wearable" and whether it was being worn are factors to consider amongst others in a totality of the circumstances examination, which also includes factors such as where an item is in relation to the individual to whom it belongs.

A person who places a heavy box at his feet to catch his breath, lays her jacket on the back of a chair before sitting down, or places his wallet on the table in front of them may still exert control over these personal effects. The circumstances in this case are thus easily distinguishable from cases concluding that

"wearable" articles "abandoned" to closets or other rooms or belonging to someone who is taking a shower when
police execute a premises are not in their owners' "possession." *See Teller*, 397 F.2d at 497-498; *Gilstrap*, 332 P.3d at 44. A purse is also fundamentally different than a mere container an individual is carrying; it contains key possessions and materials that are some of the most private and essential items in one's life, such as house keys, medicine, credit cards, and pictures of loved ones.

Moreover, any determination that Powers was more than a mere visitor is based on a flawed understanding of the record. At the suppression hearing, Officer Wood testified that his confidential informant identified someone referred to only as "Nancy," who "would sometimes stay" at the residence and who "usually had meth." R.5-6 (Tr. 8/13/2019). The State noted in its brief before the Supreme Court of Alabama that "[i]t is unclear when … officers learned that the woman on the couch was Powers." State Sup. Br. at 7. However, even if officers had established at the time of the search that the woman on the couch was named "Nancy Powers," there is nothing in the record itself indicating that they knew Powers to be the "Nancy" that the confidential informant mentioned to Officer Wood. Critically, Officer Wood testified that he was not the officer who searched Powers' purse, and the State has never argued at any level that there was independent probable cause to justify a search of her person. R.5.

In sum, the totality of the facts and circumstances here are not meaningfully distinguishable from those in *Lambert*, *Gross*, *Nabarro* or *Brown*. In those cases, the courts found the searches to be unreasonable. The search of Powers' purse was as well. To prevent unjust

outcomes like the one that has befallen Powers from continuing to occur, this Court should take this opportunity to clarify its holding in *Ybarra* and provide guidance to lower courts on: (1) what test to apply when examining the reasonableness of the search of the person and possessions of a visitor to a premises subject to a warrant; (2) what indicators may help establish the difference between a possession and the person; and (3) what factors may help guide the totality analysis.

III. THIS ISSUE WILL CONTINUE TO BE REPEATED

The question of whether a premises warrant authorizes the search of personal effects belonging to a visitor arises frequently. In the time between Powers' arrest and the Supreme Court of Alabama decision, at least three courts have issued written opinions addressing this question. *See United States* v. *Simmermaker*, 423 F. Supp. 3d 626 (N.D. Iowa 2019), *aff'd*, 998 F.3d 1008 (8th Cir. 2021); *People* v. *Duffi*e, 2021 WL 4762638 (Ill. App. Ct. Sept. 24, 2021); *State* v. *Merritt*, 567 S.W.3d 778 (Tex. App. 2018). However, the frequency of written opinions almost certainly fails to capture the totality of cases involving circumstances such as those present here. Motions to suppress evidence are often decided in the form of unpublished opinions and bench rulings, many of which may result in resolution of the case through a guilty plea or other outcome that does not result in a written opinion or appeal. And it is common for plea agreements in such matters to include appellate waivers. *See*, *e.g.*, King & O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005) (reviewing written plea agreements in 971 cases and concluding that nearly two-thirds contained an appeal waiver). Because this issue is one that

occurs regularly but easily evades appellate review, this Court should use the occasion of this case, where the issue is preserved and squarely presented, to resolve the split among the lower courts on the proper test to be applied and conclusion to be reached on these facts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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