No. 24-577

In the
Supreme Court of the United States

GILBERT PEREZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense (NAPD) is an organization of more than 25,000 practitioners dedicated to the effective legal representation of accused persons who cannot afford to retain private counsel. Lawyers, social workers, case managers, investigators, sentencing advocates, academics, and legislative advocates make up NAPD's membership, reflecting the wide range of expertise necessary for providing robust public defense. NAPD professionals represent the interests of America's most marginalized communities.

As part of its mission, NAPD seeks to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAPD is appearing in this case because an overbroad extension of the search incident to arrest exception would open the door to undue infringements on the privacy interests and constitutional rights of the people NAPD serves. NAPD respectfully asks the Court to resolve the circuit split on the question presented, which not only creates confusion for public servants across the criminal justice system, but also threatens the Fourth Amendment rights of the nation's most vulnerable populations.

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

SUMMARY OF THE ARGUMENT

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

First, the lower courts' inconsistent interpretation of the search incident to arrest exception has created a disparity in the privacy rights that defendants are afforded across U.S. jurisdictions. Americans' Fourth Amendment protections should not vary unpredictably across state lines. And the constitutional rights of indigent defendants should not depend on where they are arrested.

Second, the significant uncertainty in this corner of Fourth Amendment jurisprudence burdens public servants at every level of the criminal justice system and ties up legal resources that could otherwise be dedicated to underserved populations. Police, prosecutors, public defenders, and judges alike should not be required to expend their limited time and resources litigating this unresolved, recurrent issue in countless cases each year. Leaving this question unsettled clogs the courts and diverts advocates' time away from other individuals who need representation, especially indigent defendants.

Third, the First Circuit's decision below is at odds with the two rationales this Court has long relied on to justify the narrow search incident to arrest

exception: officer safety and the preservation of destructible evidence. Adhering to its prior decision in *United States v. Eatherton*, the First Circuit endorsed a categorical rule that warrantless searches of containers like backpacks in the possession of an arrestee at the time of arrest are permissible, regardless of whether the arrestee could have accessed the backpack at the time of the (later-occurring) search. *See United States v. Perez*, 89 F.4th 247, 257 n.4, 261 (1st Cir. 2023); *see generally United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975). But allowing law enforcement to search backpacks and similar containers that are outside the arrestee's reach is unnecessary to serve the goals of safety and evidence preservation. The categorical "time of arrest" rule instead unduly curtails the Fourth Amendment rights of millions of Americans living in numerous jurisdictions.

Finally, the First Circuit's holding below undervalues arrestees' privacy interests in their personal effects. This Court has already recognized the heightened privacy interests that people have in their luggage. *See United States v. Chadwick*, 433 U.S. 1, 11-16 (1977) (holding that the warrantless search of the arrestees' footlocker violated the Fourth Amendment), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). And for good reason: people carry their most intimate possessions in their bags, including journals, medications, and religious items. This is especially true for the unhoused, who must carry all their personal belongings in bags and similar containers. For many indigent defendants, warrantless searches

of bags constitute significant intrusions on privacy, above and beyond those inherent in arrest.

NAPD respectfully asks that the Court grant certiorari.

ARGUMENT

I. The Split In The Lower Courts On The Search Incident To Arrest Exception Makes Defendants' Constitutional Privacy Rights Contingent On Their Location.

This case presents an opportunity to resolve a deep and persistent split in the lower courts over how to interpret this Court's precedent on the search incident to arrest exception to the Fourth Amendment's warrant requirement. Following this Court's decisions in *United States v. Robinson*, 414 U.S. 218 (1973), *United States v. Chadwick,* 433 U.S. 1 (1977), and *Arizona v. Gant*, 556 U.S. 332 (2009), the courts of appeals and state high courts have divided on whether police may, without a warrant, search an arrestee's backpack or other external bag or container in the arrestee's possession even when there is no reasonable possibility that the arrestee could access the container at the time of the search.

In the proceedings below, the First Circuit remained on the side of the state supreme courts of Kentucky, North Dakota, Illinois, Colorado, and Washington by holding that an external bag in an arrestee's possession at the time of arrest is subject to a warrantless search, regardless of whether the arrestee could have reached the container to retrieve a weapon or destroy evidence at the time the search was conducted. *See Perez*, 89 F.4th at 257 n.4, 261; *Commonwealth v. Bembury*, 677 S.W.3d 385, 388, 407

(Ky. 2023), *cert. denied*, 144 S. Ct. 1459 (2024); *State v. Mercier*, 883 N.W.2d 478, 491 (N.D. 2016); *People v. Cregan*, 10 N.E.3d 1196, 1207 (Ill. 2014);[2] *People v. Marshall*, 289 P.3d 27, 28-29 (Colo. 2012) (en banc); *State v. Brock*, 355 P.3d 1118, 1122-23 (Wash. 2015). But under the precedent of the Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits, and the state supreme courts of New Mexico, Missouri, and South Carolina, police cannot search an arrestee's bag without a warrant if there is no reasonable possibility that the arrestee could access the container at the time of the search. *See United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010); *United States v. Davis*, 997 F.3d 191, 200 (4th Cir. 2021); *United States v. Perdoma*, 621 F.3d 745, 752-53 (8th Cir. 2010); *United States v. Cook*, 808 F.3d 1195, 1200 (9th Cir. 2015); *United States v. Knapp*, 917 F.3d 1161, 1170 (10th Cir. 2019); *United States v. Brown,* 2021 WL 4955823, at *2 (11th Cir. Oct. 26, 2021); *State v. Ortiz*, 539 P.3d 262, 268-69 (N.M. 2023); *State v. Carrawell*, 481 S.W.3d 833, 845 (Mo. 2016) (en banc); *State v. Brown*, 736 S.E.2d 263, 269 (S.C. 2012).

The issue is pressing: since the First Circuit issued its *Perez* decision in December 2023, lower courts have continued to come out the other way. *See, e.g.*, *State v. Scullark*, 2024 WL 3886203, at *1 (Iowa Ct. App. Aug. 21, 2024) ("Because [the defendant] had no realistic ability to access the fanny pack after he

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[2] *See generally* Brian Scott, *Don't Get Caught Holding the Bag in Illinois: Analyzing the Court's Decision in People v. Cregan, 2024 IL 113600*, 40 S. Ill. U. L.J. 561, 576-77 (2016) (contrasting the *Cregan* court's reasoning with the competing "reasonable possibility" standard adopted in other jurisdictions).

was handcuffed and escorted to the patrol car, the search did not meet the incident-to-arrest exception to the warrant requirement."); *see also Rivera v. State*, 2024 WL 4714970, at *6 (Fla. Dist. Ct. App. Nov. 8, 2024) ("[S]earch of an item from which a defendant has been physically separated cannot be upheld as a search incident to the defendant's arrest." (citation omitted)). And on the same day Perez filed his petition for certiorari, two other defendants filed a petition raising a similar question about warrantless bag searches incident to arrest. *See generally* Petition for Writ of Certiorari, *Miffin v. United States*, No. 24-6024 (U.S. Nov. 21, 2024).

The lack of uniformity in this area of Fourth Amendment jurisprudence has troubling consequences. Most importantly, a person's protections under the Fourth Amendment vary depending on the jurisdiction in which the defendant is arrested. Nearly identical searches violate the Fourth Amendment under the law in some jurisdictions but not others. Below, the First Circuit upheld a warrantless search of Perez's backpack under the search incident to arrest exception, even where Perez was on the ground, handcuffed, and "not in reaching distance of the backpack when the search of the backpack took place" on the hood of a state trooper's car. *Perez*, 89 F.4th at 249; *see also United States v. Perez*, 2021 WL 2953671, at *2 (D. Me. July 14, 2021), *aff'd*, 89 F.4th 247 (1st Cir. 2023). But the Fourth Circuit has held that a warrantless search of an arrestee's backpack violated the Fourth Amendment because the arrestee was on the ground, handcuffed, and "not within reaching distance of his backpack when [the police] unzipped and searched it."

Davis, 997 F.3d at 198. These decisions are irreconcilable.

Just last month, the district court for the Eastern District of North Carolina, applying the logic of *Davis*, found that a warrantless search of a bag was unjustified where the defendant, like Perez, was sitting up and had "his hands cuffed behind his back." *United States v. Allen*, 2024 WL 4652823, at *2 (E.D.N.C. Nov. 1, 2024); *see also Perez*, 2021 WL 2953671, at *2 (noting that a trooper had "handcuffed [Perez] behind his back, then sat him up on the pavement"). That court rejected the government's argument that the defendant "could have slipped free of his handcuffs and lunged for the bags," because "such gymnastics are extraordinarily unlikely," making the "search of the bags incident to [his] arrest . . . impermissible." *Allen*, 2024 WL 4652823, at *2.

The fact that defendants in substantially the same circumstances as Gilbert Perez enjoyed greater Fourth Amendment protection in the Fourth Circuit and Eastern District of North Carolina than Perez did in the First Circuit raises serious concern. As this Court has recognized, the "Fourth Amendment's meaning," should not "vary from place to place." *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (citation omitted). NAPD has an interest in ensuring that the indigent defendants it serves have equal rights, regardless of where they live. NAPD urges the Court to grant certiorari and clarify the contours of the search incident to arrest exception to ensure greater uniformity in Fourth Amendment protection around the country.

II. The Uncertainty Surrounding Searches Incident To Arrest Burdens Public Servants And Harms Indigent Defendants.

The muddled state of search incident to arrest law burdens public servants at every level of the criminal justice system. First, the uncertainty about what items the police may search incident to arrest has the potential to create needless conflict between arresting officers and arrestees. As this Court has said: "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60 (1981). Then, after an arrest involving the search of a backpack or other bag takes place—an exceedingly common occurrence—prosecutors and public defense lawyers must dedicate their limited time and resources to litigating the legality of the search at suppression hearings. Public defenders, whose mission NAPD shares, are already burdened with heavy workloads and staffing shortages.[3] The perennial need to relitigate this issue adds to that

[3] *See generally* Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense*, at 10 (July 27, 2011) (reporting that only 27% of county-based public defense offices had enough attorneys to meet caseload guidelines); *see also* American Bar Association Standing Committee on Legal Aid and Indigent Defense & Moss Adams LLP, *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards*, at 5 (Jan. 2022) (explaining that in 2022, Oregon's contract public defense attorneys would need to work an impossible 26.6 hours per work day to provide adequate representation to clients).

burden, tying up time and resources that defenders could otherwise spend providing assistance to new and existing clients. For as long as this constitutional question remains unresolved, America's most vulnerable populations suffer the downstream consequence of less available legal aid.

Finally, judges at every level of the judiciary must spend time adjudicating these hearings and the inevitable appeals they generate. As former Second Circuit Judge Roger Miner contended, "allowing circuit conflicts to continue generates litigation, because the law remains unsettled," and consequently, "the lower courts become clogged with cases that would not be brought if the law was clearly stated."[4] This concern is particularly acute in criminal cases, where court systems are already "systematically overworked and underfunded," heightening the risk to indigent defendants.[5]

Only a clarifying decision from this Court can fix the current fragmentation in the law, as judges on both sides of the divide have reiterated. The judges of the First Circuit have specifically asked this Court for guidance:

> A Fourth Amendment issue as basic as this one—concerning as it does when the things that people commonly carry may be

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

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

> warrantlessly searched incident to an arrest—seems especially poorly suited to circuit-by-circuit and state-by-state resolution. Yet, for more than fifty years, that has been how this issue has been decided, with no consensus yet emerging. . . . We thus urge the Supreme Court, having held many decades ago that the container at issue in *Robinson* was subject to the categorical rule, to consider *Robinson*'s applicability to those questions. A ruling by the Supreme Court that addressed the search incident to arrest exception and *Robinson* in the more mundane context of wallets, purses, briefcases, backpacks, or other commonly carried containers would do much to help bring about a measure of uniformity to an area of law that has long been lacking it.

United States v. Perez, 113 F.4th 137, 139-140 (1st Cir. 2024) (denying petition for rehearing en banc). As the Kentucky Supreme Court has explained, until this Court "opine[s] on this issue, lower federal and state courts" will be "left to [their] own devices in determining how to draw the line between what constitutes a '*Robinson* search' of an arrestee's person and a '*Chimel* search' of the area within an arrestee's immediate control," in cases involving "purses, backpacks, suitcases, briefcases, gym bags, computer bags, fanny packs," and similar containers. *Bembury*, 677 S.W.3d at 397. Until this Court "clearly demarcate[s] where the person ends and the 'grab area' begins," confusion will persist. *Knapp*, 917 F.3d at 1166.

Perez is the ideal vehicle for this Court to resolve this important issue. The undisputed facts establish that Perez could not have accessed his backpack at the time law enforcement conducted the warrantless search. The district court acknowledged that because the backpack was "not within reaching distance of Perez . . . destruction of evidence or access to weapons was not at stake." *Perez*, 2021 WL 2953671, at *3. The Court should grant certiorari to resolve confusion among the lower courts and so reduce the burden currently felt throughout the criminal justice system.

III. The First Circuit's Decision Severs The Search Incident To Arrest Exception From The Two Policy Rationales That Justify It.

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

magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley*, 573 U.S. at 382 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

There are few exceptions to the Fourth Amendment's warrant requirement; the search incident to a lawful arrest exception is one. *Chimel v. California*, 395 U.S. 752 (1969), "laid the groundwork for most of the existing search incident to arrest doctrine." *Riley*, 573 U.S. at 382-83 (discussing the origins of and rationales behind the exception). In *Chimel*, this Court fashioned the following rule for assessing the reasonableness of a search incident to arrest:

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

395 U.S. at 762-63 (emphasis added). Applying this standard, the Court held that the "extensive

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

In subsequent cases, this Court has carefully cabined the exception, keeping these two justifications front of mind. *See, e.g.*, *Robinson*, 414 U.S. at 235 (holding that "[t]he authority to search the person incident to a lawful custodial arrest [is] based upon the need to disarm and to discover evidence"); *Gant*, 556 U.S. at 338, 343 (observing that "[t]he exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations" before holding that "*Chimel* . . . authorizes police to search a vehicle . . . only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"); *Thornton v. United States*, 541 U.S. 615, 625 (2004) (Scalia, J., concurring) (noting that in *Chimel*, the Court "limited such searches to the area within the suspect's '"immediate control"'—*i.e.*, 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" (alteration in original) (citation omitted)).

Particularly instructive for the case at bar is *United States v. Chadwick*. In that case, the Court considered whether federal agents violated the Fourth Amendment by conducting a warrantless search of a footlocker they had lawfully seized at the time of its

owners' arrest. 433 U.S. at 3. After arresting the owners, the agents had taken possession of the footlocker and safely transferred it to the Boston Federal Building before conducting the warrantless search. *Id.* at 4. The search thus violated the Fourth Amendment: by the time the search took place, "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates," nor was there "reason to believe that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once." *Id.* The Court reasoned that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' or no exigency exists." *Id.* at 15 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). The Court concluded:

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

Id. Here, once again, the Court centered its analysis of whether a search was lawful on the question of whether officer safety or evidence preservation required it. Because they did not, the search was unconstitutional. *Id.*

The same principles should have governed the decision below and should require rejecting the categorical "time of arrest" rule adopted by the First Circuit and numerous other courts. That rule is divorced from the key rationales on which the Supreme Court has based the exception. Under the First Circuit's categorical rule, which it adopted in *United States v. Eatherton* and applied in the case at bar, "probable cause for the arrest alone support[s] a warrantless search of . . . the property in [an arrestee's] immediate possession, even after law enforcement ha[s] removed it from his immediate possession." *Perez*, 2021 WL 2953671, at *3 (citing *Eatherton*, 519 F.2d at 610-11). The rule ignores whether the arrestee could have accessed the container or whether there is any conceivable risk to officer safety. *See id.* (explaining that "destruction of evidence or access to weapons was not at stake" in *Perez*).

As most of the federal circuits that have considered the issue have concluded, such a rule is at odds with this Court's precedent, which "stand[s] for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it." *Shakir*, 616 F.3d at 320; *see also Davis*, 997 F.3d at 197 ("[P]olice officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search.'" (second alteration in original) (quoting *Gant*, 556 U.S. at 343)); *United States v. Salazar*, 69 F.4th 474, 478 (7th Cir.) ("*Gant* stands for the principle that a search incident to arrest is reasonable if it is possible that an arrestee

can access a weapon or destroy evidence in the area to be searched."), *cert. denied*, 144 S. Ct. 308 (2023).

But the First Circuit, in denying Perez's petition for rehearing en banc, stood by its *Eatherton* precedent, which held that *Robinson* and not *Chimel* controlled searches of bags because "distinctions between a briefcase in hand and a cigarette container in a pocket were too 'gossamer' to justify drawing a line." *Perez*, 113 F.4th at 138. But this reasoning in *Eatherton* is flawed. *Robinson* lends no support to a broad "time of arrest" rule. In *Robinson*, the Court held that a search of an arrestee's *person* incident to arrest need not be justified by case-by-case adjudication of whether there was a particular need to discover evidence or disarm the arrestee. 414 U.S. at 235-36. Accordingly, the Court upheld the warrantless search of a cigarette box the police found in the arrestee's jacket pocket. *Id.*

But as the Tenth Circuit has persuasively explained, the search in *Robinson* did not stretch beyond the arrestee's immediate person, worn clothing, or containers *concealed within worn clothing*. *See Knapp*, 917 F.3d at 1166-67. Because an arrestee's potential ability to access weapons concealed in clothing or pockets poses a risk to officer safety, "an officer must necessarily search those areas because it would be impractical (not to mention demeaning) to separate the arrestee from her clothing." *Id.* at 1166. By contrast, once a backpack or other container is separated from the arrestee's person, "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Chadwick*, 433 U.S. at

15. Thus, "the animating reasons supporting arresting officers' 'unqualified authority' to search an arrestee's person are less salient in the context of visible, handheld containers such as purses" or backpacks. *Knapp*, 917 F.3d at 1166 (quoting *Robinson*, 414 U.S. at 225). And in *Robinson*, this Court recognized that searches of the arrestee's person and searches of the areas within the arrestee's immediate control are "two distinct propositions" that "have been treated quite differently." *Robinson*, 414 U.S. at 224.

The rule that the First Circuit adopted collapses that distinction and "risks expanding *Robinson'*s limited exception." *Knapp*, 917 F.3d at 1167. As Justice Scalia counseled, "conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring). But the *Eatherton* rule that the First Circuit reaffirmed below is *not* justified by necessity. When a backpack is not on an arrestee's person or "in the area within his immediate control . . . the two purposes for the exception—protecting officers and safeguarding evidence from concealment or destruction—are inapplicable . . . and the searches of the backpack cannot be justified as searches incident to arrest." *United States v. Williams*, 669 F. Supp. 3d 8, 20 (D.D.C. 2023). The law should not "needlessly divorce[] the exception from its justification and limits." *State v. Byrd*, 310 P.3d 793, 804 (Wash. 2013) (Fairhurst, J., dissenting). Perez's case presents an ideal opportunity for this Court to recenter search incident to arrest jurisprudence on its two established rationales, thus ensuring that Americans receive the

full protection of the Fourth Amendment.[6] The Court should reverse.

IV. The First Circuit's Decision Disproportionately Encroaches On Indigent Persons' Privacy Interests In Their Personal Effects.

The First Circuit's categorical rule that allows warrantless searches regardless of whether officer safety or evidence preservation rationales are implicated undervalues the real-world privacy interests of the many vulnerable populations that NAPD serves. The Supreme Court of Kentucky, which like the First Circuit adopts a categorical rule for searches, has speculated that this Court would not consider "an arrestee's privacy interests in . . . containers [like backpacks] to be significant enough that a search would constitute more than a minor additional intrusion in relation to the arrest itself." *Bembury*, 677 S.W.3d at 404. NAPD urges this Court to instead bear in mind the reality that many indigent persons without homes carry all their personal and private belongings in bags.

As this Court has recognized, "the central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."

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[6] *See generally* Laura Zanzig-Wong, *The "Time of Arrest" Rule: How the Washington State Supreme Court Untethered Its Search Incident to Arrest Jurisprudence from the Exception's Underlying Rationales*, 93 Wash. L. Rev. Online 27, 48 (2018) (discussing how search incident to arrest law, both federally and in Washington state, has become disconnected from the goals of officer safety and evidence preservation).

Gant, 556 U.S. at 345. This makes sense, because people carry some of their most intimate "private effects" in their bags. As Justice Keller wrote in dissent in *Bembury*:

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

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

Indigent people who do not have homes or access to other safe storage spaces have even greater privacy interests in their bags. Hundreds of thousands of unhoused Americans are "dependent upon suitcases, backpacks, grocery carts and even garbage bags" to carry all of "'the privacies of life' which for another citizen might be stored in a house." *Id.* at 414-15 (Thompson, J., dissenting) (quoting *Riley*, 573 U.S. at 403). Yet these individuals are also more likely to be exposed to the warrantless searches the decision below would permit. They often face arrest for low-level offenses like loitering or sleeping in parks, triggering the exception at issue.

This Court's precedent has recognized that searches of containers like backpacks represent a significant privacy intrusion, beyond what is required

by arrest. In *Chadwick*, this Court held that the search of the arrestees' footlocker was unreasonable, in part because of the arrestees' heightened privacy interests in their luggage. 433 U.S. at 11. "Unlike searches of the *person*," the Court reasoned, "searches of *possessions* within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." *Id.* at 16 n.10 (emphasis added). Arrestees' "privacy interest in the contents" of their bags is "not eliminated simply because they [are] under arrest." *Id.* Rather, arrestees have significant, heightened privacy interests in their luggage and other bags because their "contents are not open to public view" or "subject to regular inspections and official scrutiny on a continuing basis," and their primary purpose is to be "a repository of personal effects." *Id.* at 13. The Court in *Chadwick* concluded that arrestees were "entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded." *Id.* at 15-16. So too here. The Court's reasoning in *Chadwick* applies with equal force to the case at bar and would apply with even greater force to a case involving the search of all of an unhoused person's belongings. This Court has long recognized "the right of privacy as one of the unique values of our civilization." *McDonald v. United States*, 335 U.S. 451, 453 (1948). NAPD urges the Court to reject the rule adopted below, which deepens divisions burdening the criminal justice system and disproportionately infringes on indigent persons' privacy interests.

CONCLUSION

The Court should grant certiorari and reject the categorical rule adopted by the First Circuit below.

Respectfully submitted,

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