No. 24-577

IN THE

Supreme Court of the United States

GILBERT PEREZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The Government's brief confirms the need for review. It recognizes that lower courts analyze warrantless searches of backpacks incident to arrest under "different analytical frameworks." BIO 11-12. Some courts "categorically allow[]" such searches, *id.* 5, while others permit them only when the backpack "remain[s] within the arrestee's reach," *id.* 10, 12. The Government does not dispute that this issue arises frequently across the country. Pet. 16.

Thus, the primary remaining question is whether this case is the right vehicle to resolve a "basic" question of Fourth Amendment law. Pet. 2 (quoting Pet. App. 66a). It is. First, contrary to the Government's argument, BIO 12, other courts would have found a Fourth Amendment violation here, Pet. 20; NAPD Br. 4-5. Second, the Government is wrong that the good-faith exception should preclude this Court's review, BIO 16-17.

The Government also defends the decision below on the merits. But that argument does not address the need, in the First Circuit's words, to grant certiorari to "bring about a measure of uniformity to an area of law that has long been lacking it." Pet. App. 67a. Worse yet, the Government proposes a rule that abandons the officer safety and evidence preservation rationales that have justified the search-incident-to-arrest exception to the warrant requirement. Pet. 22. To agree with the Government, this Court would have to reverse 55 years of search-incident-to-arrest caselaw. The Court should not go there. Instead, it should hold that the Fourth Amendment prohibits the warrantless

search of an arrestee's bag when neither officer safety nor evidence preservation is at stake.

I. There is a genuine conflict among lower courts on the question presented.

1. The Government concedes—as it must—that lower courts use "different analytical frameworks" for determining when police can search a bag incident to arrest. BIO 11-12. In some courts, the legality of the search turns on "consideration" of whether an arrestee can reach the bag "at the time a search incident to arrest is conducted." *Id.* 12 (quoting *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010)). By contrast, the Government explains, other courts treat reaching distance as "inapposite." *Id.* Those courts hold that police may search an arrestee's bags at any time—regardless of "whether the objects remain within the arrestee's reach." *Id.* 10.

The Government cannot sidestep this split by suggesting that the lower courts' "analytical differences" may not "routinely produce different outcomes." BIO 12.

For starters, the Government argued exactly the opposite below. It urged the First Circuit to "not follow the reasoning" of the Third, Fourth, Ninth, and Tenth Circuits. U.S. C.A. Br. 35. And it did so precisely because when those courts applied the requirement that searches "must be justified by specific safety or evidentiary concerns in each case pursuant to *Chimel* and *Gant*," it resulted in their "[r]ejecting" evidence seized from bags that were no longer within an arrestee's reach. *Id.* 34-35 (citing *Chimel v. California*, 395 U.S. 752 (1969), and *Arizona v. Gant*, 556 U.S. 332 (2009)).

In short, as both the First Circuit and amici have pointed out, the conflict among lower courts matters to the outcome of "countless cases each year." NAPD Br. 2; *see* Pet. App. 65a (pointing to the "varied" results in "concrete cases").

2. The Government's attempt to reconcile the decision below with the decisions of other circuits and state high courts also fails.

a. The Government claims the Fourth and Tenth Circuits engage in a "multifactor test" to determine whether a warrantless search of a bag is constitutional. BIO 13-14 (citing *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021); *United States v. Knapp*, 917 F.3d 1161 (10th Cir. 2019)). But the Government neglects to mention that the goal of that multifactor test is to identify "whether the [item to be searched] was within the area" the arrestee could reach "at the time of the search." *Knapp*, 917 F.3d at 1168; *see also Davis*, 997 F.3d at 198. Here, the district court found that the backpack was not "within reaching distance" of Mr. Perez at the time of the search. Pet. App. 53a, 58a.

b. The Government's discussion of cases from the Third, Seventh, Eighth, and Ninth Circuits (BIO 12-13) fares no better. When those courts upheld the searches at issue, they did so because the defendants *were* within reaching distance of their bags at the time of the search. *See Shakir*, 616 F.3d at 321 ("there remained a sufficient possibility that [the arrestee] could access a weapon in his bag"); *United States v. Hill*, 818 F.3d 289, 295 (7th Cir. 2016) (the arrestee was "exercising immediate control over" his bag); *United States v. Perdoma*, 621 F.3d 745, 751, 753 (8th Cir. 2010) (the arrestee's "bag was within 'the area

into which [the] arrestee might reach'" (citation omitted)); *United States v. Cook*, 808 F.3d 1195, 1200 (9th Cir. 2015) (the arrestee's "backpack was easily within 'reaching distance'" (citation omitted)).

Had the arrestees in those cases been unable to reach their bags, the outcomes would have been different, as subsequent cases show. *See* Pet. 9, 11 (collecting cases). Thus, as the district court in this case correctly observed, had Mr. Perez's case arisen in the circuits that the Government's BIO discussed, the court would have found a Fourth Amendment violation. *See* Pet. App. 59a.

c. The Government's survey of state cases is similarly unavailing. As the petition explains, there is a square conflict among state courts of last resort. Pet. 12-15. And the Government is wrong that every state court would agree with the First Circuit on the facts here. BIO 14-16.

Searches of bags in Missouri are governed by *State v. Carrawell*, 481 S.W.3d 833 (Mo. 2016), which held that police may search bags only "within the immediate control of the arrestee." Pet. 11 (quoting *Carrawell*, 481 S.W.3d at 838-39). The Government errs in reading *Greene v. State*, 585 S.W.3d 800 (Mo. 2019), to the contrary. BIO 15. *Greene* explained that although *Carrawell* does not govern a search of an arrestee's *pockets*, it remains the standard for "bag[s] held by the arrestee during the arrest." *Id.* at 806. Consistent with this reading, courts in Missouri have continued to apply *Carrawell* to invalidate searches of bags after *Greene*. *See, e.g.*, *State v. Branson*, 639 S.W.3d 556, 559 (Mo. Ct. App. 2022); *State v. Ledbetter*, 599 S.W.3d. 540, 547 (Mo. Ct. App. 2020).

New Mexico's rule also squarely conflicts with the First Circuit's. In *State v. Ortiz*, 539 P.3d 262 (N.M. 2023), the court invalidated a search incident to arrest "[a]bsent evidence that Defendant could reach the purse." *Id.* at 269. The Government suggests that Mr. Perez had greater access to his bag than the defendant in *Ortiz*. BIO 15-16. But here again, the Government simply ignores the district court's factual finding to the contrary. Pet. App. 53a, 58a.

At bottom: A Fourth Amendment question that arises every day has been condemned to inconsistent "circuit-by-circuit and state-by-state resolution." Pet. App. 66a. With "no consensus yet emerging," *id.*, this Court should intervene.

II. This case is an ideal vehicle.

1. This Court should reject the Government's additional vehicle argument: that the good-faith exception militates against review here. BIO 16-17.

This Court has not previously treated the good-faith exception as a barrier to review. Rather, this Court routinely grants certiorari in cases where the United States raised the possibility that the good-faith exception might apply. *Compare, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018), *with* BIO at 29-30, *Carpenter* (No. 16-402). The Court leaves the issue of good faith for remand. *Carpenter*, 138 S. Ct. at 321. Particularly because the good-faith issue is outside the question presented even as the Government frames it, BIO I, the Court should do the same here.

In any event, there is a strong argument that the good-faith exception will not apply on remand. Judge Montecalvo's separate opinion shows why. She would have held that the search here violated the Fourth

Amendment because it ran afoul of the decades-old *Chimel* framework that the Court applied in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Gant*. Pet. App. 44a-46a. And for that same reason, she would also have held that "the good-faith exception is not available." *See id.* 47a-49a. So if this Court were to agree that the search here was impermissible, the First Circuit on remand might well adopt Judge Montecalvo's analysis.[1]

2. The Government also points out that this Court denied certiorari in *Commonwealth v. Bembury*, 677 S.W.3d 385 (Ky. 2023), *cert. denied*, 144 S. Ct. 1459 (2024). BIO 6. That denial has no bearing on whether the Court should grant review in Mr. Perez's case. *Bembury* suffered from vehicle defects not present here.

First, as both a concurring opinion and the BIO in *Bembury* emphasized, the search there would have been upheld regardless of the search-incident-to-arrest doctrine, because the contents of Bembury's backpack had been exposed to plain view before the arrest. *Bembury*, 677 S.W.3d at 407-08 (Nickell, J., concurring); BIO at 29-30, *Bembury* (No. 23-802).

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[1] Moreover, it is an open question whether "the petitioner in a case that results in the overruling of" precedent "should be given the benefit of the victory by permitting the suppression of evidence in that one case." *Davis v. United States*, 564 U.S. 229, 248 (2011). Anything else, this Court has explained, would risk "ossif[ying]" Fourth Amendment law by deterring legal challenges. *Id.* A decision in Mr. Perez's favor would effectively "overrul[e]" the First Circuit's decision in *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975). So the First Circuit might conclude that the evidence should be suppressed here for that reason as well.

Second, there was no finding in *Bembury* as to whether Bembury's backpack was beyond his reach at the time of the search. BIO at 31-32, *Bembury* (No. 23-802); *see also* NAPD Br. 11. So the question presented may not have been outcome-determinative in Bembury's case: He might have lost even under the reaching-distance rule Mr. Perez advances here.

And were any more needed, the denial of certiorari in *Bembury* occurred before every active judge on the First Circuit "urge[d]" this Court's review of the question presented. Pet. App. 66a. It is long past time for this Court to provide "a measure of uniformity to an area of law that has long been lacking it." *Id.* 67a.

III. The First Circuit's rule is wrong.

1. Once both an arrestee and his backpack have been secured by the police and the backpack is out of the arrestee's reach, the warrantless search of the backpack cannot be justified by the search-incident-to-arrest exception. The Government argues that this rule is "untethered from this Court's precedents." BIO 10. To the contrary: Mr. Perez simply asks this Court to apply the law it first announced in *Chimel v. California*, 395 U.S. 752 (1969), and then applied in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arizona v. Gant*, 556 U.S. 332 (2009). What is untethered from this Court's precedents is the Government's BIO, which never cites, let alone addresses, *Chimel*.

In *Chimel*, the Court explained that the search-incident-to-arrest exception to the warrant requirement covers two types of searches: searches of the arrestee's "person" and searches of "the area" surrounding the arrestee. *Chimel*, 395 U.S. at 768.

Searches of the area satisfy the Fourth Amendment only when they are limited to "the area into which an arrestee might reach." *Id.* at 763. This Court has applied that reaching-distance rule to invalidate warrantless searches of a footlocker and a car's passenger compartment. *Chadwick*, 433 U.S. at 14-15; *Gant*, 556 U.S. at 335. That same rule controls here.

2. The Government's attempts to distinguish *Chadwick* and *Gant*, BIO 8, fall short.

In *Chadwick*, the Court applied *Chimel* to facts materially indistinguishable from those here. There, the Court held that "warrantless searches of luggage" are unreasonable when there is "no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." 433 U.S. at 15. Mr. Perez's case also involves the "warrantless search[] of luggage"—in his case, a backpack—absent either an officer safety or evidence preservation rationale.

The Government says that Fourth Amendment analysis should not turn on distinctions between "various objects." BIO 11. But the Government then tries to draw exactly that kind of distinction, claiming that Mr. Perez's backpack is materially different from the footlocker in *Chadwick* and materially similar to the "cigarette package in [*United States v.*] *Robinson*," 414 U.S. 218 (1973), which permitted a warrantless search. BIO 9 (citation omitted). Why? Because of the objects' relative "size[s]." *Id.* The Government had it right the first time: The extent of a person's Fourth Amendment protection does not depend on the size of the item she carries.

The Government next claims "*Gant* is even further afield" from Mr. Perez's case than *Chadwick*. *See* BIO 9. In the Government's view, and contrary to the position taken by several federal courts of appeals, Pet. 24-25, *Gant* is limited to vehicle searches, BIO 9. But that's wrong twice over.

First, *Gant* did not announce a new rule. Rather, it reaffirmed the longstanding rule from *Chimel* that area searches incident to arrest must be "[]tether[ed]" to the "officer safety and evidence preservation" rationales. *Id.* at 338-39, 343. Even had *Gant* never been decided, the rule this Court applied in *Chimel* and *Chadwick* would require reversal in Mr. Perez's case because of the district court's factual findings. Pet. App. 53a, 58a.

Second, this Court has long held that people enjoy "lessened," not heightened, Fourth Amendment protection with respect to their cars. *New York v. Class*, 476 U.S. 106, 112 (1986) (citation omitted). And this Court has declared that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Chadwick*, 433 U.S. at 13. So if the search in *Gant* was unconstitutional, the search here was even more so.

3. The Government tries to avoid the reaching-distance rule that applies to area searches by claiming that the search here is governed instead by *Robinson* and *Gustafson v. Florida*, 414 U.S. 260 (1973). But those cases categorically permit searches only "of the arrestee's person," not of things in the "area," but outside the reach, of an arrestee. *Riley v. California*, 573 U.S. 373, 383 (2014).

In *Robinson* and *Gustafson*, police searched cigarette packages that they had found in the arrestees' pockets during full-body patdowns. It makes sense that this Court has treated someone's clothing and items concealed therein as part of his "person." Indeed, the other cases in which this Court has applied the rule of *Robinson* and *Gustafson* involve exactly this situation. *See, e.g.*, *United States v. Edwards*, 415 U.S. 800, 805 (1974) (clothing); *Michigan v. DeFillippo*, 443 U.S. 31, 34-35 (1979) (tinfoil packet in pocket).

Extending the *Robinson-Gustafson* rule to the search of Mr. Perez's backpack cannot be reconciled with either *Chadwick* or *Gant*. The *Chadwick* Court treated the search of a footlocker as an area search even though it had been in Chadwick's possession at the time of arrest. 433 U.S. at 14-15. Just as the search there was unreasonable because the footlocker was no longer within Chadwick's reach, the search here was unreasonable because the backpack was no longer within Mr. Perez's reach. *Compare id. with* Pet. App. 53a, 58a. *Gant* reaffirms that "*Chimel*'s reaching-distance rule" governs the mine run of cases. 556 U.S. at 335.

4. This Court should also reject the Government's rule because that rule permits "the specific evil" that the Fourth Amendment's warrant requirement was designed to prevent: "a general, exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *see also* NAPD Br. 18-19. Probable cause to arrest someone does not invariably create probable cause to believe the person is carrying contraband or evidence of a crime. Thus, there will be many circumstances in which no neutral

magistrate would issue a search warrant for a person's bag just because the person has been arrested. Yet the Government's rule would allow those searches. And it would do so even absent any threat to officer safety or the preservation of evidence. The search-incident-to-arrest "exception" would swallow the rule, Cato Br. 4-5, because the "police can come up with some basis on which to arrest 'almost anyone,'" Pet. 18 (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring)).

5. The Government's administrability concerns fare no better. First, the Government is already living with petitioner's rule in seven circuits. *See* Pet. 8. It has pointed to no evidence that "armchair second-guessing," BIO 11, has hampered officers in any of these jurisdictions. *Chimel*'s area-search rule has worked for over half a century. If that rule presented genuine workability concerns, presumably the Government would have sought review. Its decision not to speaks volumes.

Second, the Government is wrong that the reaching-distance rule of *Chimel*, *Chadwick*, and *Gant* is unworkable because it offers "no principled basis" to distinguish between the cigarette pack in *Robinson*, the backpack here, and "everything in between." BIO 11; *see supra* at 7-8 (explaining why the search of a backpack taken outside an arrestee's reach fits within the *Chimel-Chadwick-Gant* framework). If anything, the Government's critique applies more to its own approach. Where, for example, would the Government place suitcases, purses, and gym bags on its spectrum of searches stretching from backpacks (permissible) to footlockers (impermissible)? *Cf.* BIO 9.

6. Finally, the Government's merits arguments only confirm the need for this Court's intervention. If the Government were right, then seven circuits and three state supreme courts are getting a basic question of Fourth Amendment law wrong. That is hardly an argument against certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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