No. 23-802

In the Supreme Court of the United States

WILLIAM BEMBURY,

Petitioner,

v.

KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. The Kentucky Supreme Court's decision exacerbates a deep split among federal and state courts regarding how the search incident to arrest exception applies to containers, like backpacks and purses, in the arrestee's possession.

The Commonwealth of Kentucky acknowledges the split in the lower courts, Br. in Opp. 1, 27, but tries to minimize its importance by asserting that the outcome under the conflicting approaches *sometimes* would be the same. This misses the point. The split involves a fundamental disagreement among lower courts regarding the analytical framework for assessing the legality of a warrantless search. Resolving that conflict is important because, even if the two approaches *sometimes* produce the same outcome, they often lead to different results.

The Kentucky Supreme Court adopted the "time of arrest rule," under which law enforcement officials can *always* search an external container in the arrestee's possession at the time of arrest, regardless of whether there is any safety or evidence-preservation justification for the search. Pet. App. 44a.

In adopting this per se rule, the Kentucky Supreme Court joined the Supreme Courts of Washington, Illinois, and North Dakota; the Texas Court of Criminal Appeals; and the First Circuit, which likewise hold that such searches are always

permissible. *See, e.g., Washington v. Byrd*, 310 P.3d 793, 798 (Wash. 2013) ("[S]earches of purses, jackets, and bags in the arrestee's possession at the time of arrest are lawful under both the Fourth Amendment [and the state constitution]."); *Illinois v. Cregan*, 10 N.E.3d 1196, 1207 (Ill. 2014) ("The true measure of whether an object . . . is 'immediately associated' with an arrestee is whether he is in actual physical possession of the object" when arrested); *North Dakota v. Mercier*, 883 N.W.2d 478, 491 (N.D. 2016) ("[W]here the object searched is immediately associated with the arrestee . . . no additional justification beyond the lawful arrest is necessary to justify the search."); *Price v. Texas*, 662 S.W.3d 428, 438 (Tex. Crim. App. 2020) (concluding that where arrestee is "in actual possession of a receptacle[,]a warrantless search of that receptacle at or near the time of the arrest is reasonable under the Fourth Amendment as a search incident to the arrestee's person."); *United States v. Perez*, 89 F.4th 247, 254–55 (1st Cir. 2023) (following Circuit precedent that warrantless searches of items in the arrestee's possession at the time of arrest are permissible).

On the other side of the split, the Fourth, Third, Seventh, Ninth, and Tenth Circuits, as well as the Supreme Courts of Missouri and New Mexico, have refused to adopt the "time of arrest" rule, holding instead that a warrantless search is permissible only if, at the time of the search, the arrestee could reasonably access the container to destroy evidence or reach a weapon. *United States v. Davis*, 997 F.3d 191, 197 (4th Cir. 2021); *United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010) ("[A] search is permissible

incident to a suspect's arrest when . . . there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched."); *United States v. Salazar*, 69 F.4th 474, 478 (7th Cir. 2023) ("[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."); *United States v. Cook*, 808 F.3d 1195, 1200 (9th Cir. 2015) ("The brief and limited nature of the search, its immediacy to the time of arrest, and the location of the backpack ensured that the search was 'commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense[.]'" (quoting *Arizona v. Gant*, 556 U.S. 332, 339 (2009))); *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019) ("Applying *Gant* and *Chimel*, it was unreasonable to believe [arrestee] could have gained possession of a weapon or destructible evidence within her purse at the time of the search."); *Missouri v. Carrawell*, 481 S.W.3d 833, 843 (Mo. 2016) (en banc); *New Mexico v. Ortiz*, 539 P.3d 262, 267 (N.M. 2023). These courts thus require a case-by-case determination of whether a particular warrantless search was lawful. In doing so, they have extended this Court's reasoning in *Gant* beyond cases involving vehicles. *See, e.g.*, *Davis*, 997 F.3d at 197 ("[W]e conclude that the first *Gant* holding applies . . . and . . . that police 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.'" (quoting *Gant*, 556 U.S. at 343)); *Ortiz*, 539 P.3d at 268 ("The language in *Gant* supports our interpretation that the United States Supreme Court

intended to limit the scope of searches of the area in an arrestee's immediate control to instances where officers demonstrate an arrestee may gain access to a weapon or destroy evidence.").

The two approaches thus reflect irreconcilable understandings of the Fourth Amendment's core requirements and limitations. One adopts a per se rule, whereas the other requires a fact specific, case-by-case analysis. Unsurprisingly, the conflicting approaches regularly lead to divergent outcomes.

For example, in *Carrawell*, *Ortiz*, and *Davis*, the courts held searches to be unlawful that would have been lawful under the time of arrest rule. *See Carrawell*, 481 S.W.3d at 836 (at the time of arrest, the officer "rip[ped] the plastic bag from [defendant]'s hands"); *Ortiz*, 539 P.3d at 267 (defendant was "wearing the purse on her shoulder" when arrested); *Davis*, 997 F.3d at 194 (defendant was "carrying a backpack" when arrested).

The Commonwealth suggests that cases using the case-by-case approach that upheld the search do not contribute to the split, but that is wrong. Going forward, courts in those jurisdictions will be bound to review the totality of the circumstances to determine whether the container was in the grab area in assessing the legality of a warrantless search. Inevitably, many of those searches will be found unlawful under that test but would have been lawful under the per se rule. Indeed, on the facts of this case, the warrantless search of Bembury's backpack is lawful in Kentucky but would not be permitted in

jurisdictions adopting the totality of circumstances test.

There is thus a compelling need for this Court to clarify the law. The Kentucky Supreme Court itself called out the need for guidance by observing that because "the U.S. Supreme Court has not yet directly opined on this issue, lower federal and state courts have been left to our own devices." Pet. App. 22a. It adopted the time of arrest rule as the better of the conflicting approaches "until the U.S. Supreme Court speaks on the matter." *Id.* at 44a. Other courts have likewise commented on the need for this Court's guidance. *Price*, 662 S.W.3d at 443 (Newell, J., dissenting) ("Ultimately, any confusion or inconsistency emanates from the Supreme Court's precedent and it's up to that Court to fix it."); *Knapp*, 917 F.3d at 1166 ("Indeed, the Supreme Court has not clearly demarcated where the person ends and the 'grab area' begins."); *Mercier*, 883 N.W.2d at 492 ("The United States Supreme Court also seemed to support this conclusion when it suggested, without directly holding, that inspecting certain physical items 'carried by the arrestee' may be reasonable."); *Cregan*, 10 N.E.3d at 1205 ("Defining 'immediately associated' in terms of the nature or character of the object rather . . . the defendant's connection to the object at the time of arrest results in an unworkable rule and produces unpredictable results.").

Considering the number of arrests daily and how often individuals carry external containers, the potential for inconsistent and unfair results deriving from this split is enormous. This Court's review is

urgently needed not only because the scope of the search incident to arrest exception goes to a fundamental constitutional right, but also because all parties need guidance regarding how properly to conduct searches incident to arrest. *See* Br. Nat'l Ass'n Pub. Def. as *Amicus Curiae* Supporting Petitioner at 6 (asserting that the uncertainty around this issue, demonstrated by *Bembury,* forces officers, prosecutors, defense attorneys, clerks, and judges to devote "their limited time and resources" to navigating this split).

II. The decision below is inconsistent with this Court's precedents and further confuses the search incident to arrest exception.

As this Court has explained, the search incident to arrest exception, which is designed to protect the public and preserve evidence, is a limited exception to the Fourth Amendment's general warrant requirement. The exception extends only to searches of the person and that area within the arrestee's immediate control at the time of the search. *Chimel v. California*, 395 U.S. 752, 768 (1969); *see also Gant*, 556 U.S. at 339 (explaining that the exception's limits "ensure[] the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest"). By adopting a per se rule, the Kentucky Supreme Court departed from this Court's precedents. *See* Pet. Br. 25–31.

Contrary to the Commonwealth's contention, *United States v. Robinson*, 414 U.S. 218 (1973), does not mandate a different conclusion. There, the Court approved, under *Chimel*, a warrantless search of a small cigarette pack concealed within the arrestee's clothes, holding that the container was effectively part of the arrestee's person. *Robinson* says nothing about possession of an external container over which the arrestee lacked control at the time of the search.

Instead, this case falls within the rationale of *United States v. Chadwick*, 433 U.S. 1 (1977), in which the Court held that the exception for a search incident to arrest did not justify the search of a footlocker found in the trunk of the arrestee's car, because the footlocker did not fall within "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 14.

The Commonwealth's per se rule is inconsistent with this Court's precedents because it permits a search of external containers in *every* case, regardless of whether concerns regarding safety or evidence preservation exist that justify the search. *Chimel* and *Gant* teach that a warrantless search is unlawful unless supported by one of those justifications. Strikingly, five of the six federal courts of appeals that have considered the issue have rejected the per se time of arrest rule in favor of the case-by-case approach.

The Commonwealth also incorrectly argues that Bembury's use of the backpack in illegal activities diminished his expectation of privacy in its contents.

The officers' observations did not diminish Bembury's ordinary expectation of privacy in the backpack's contents; they instead gave the officers probable cause to arrest Bembury and obtain a search warrant. *Chadwick*, 433 U.S. at 16 n.10 ("Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest."). Accepting the Commonwealth's radical suggestion that officers may conduct a warrantless search of any container used in an illegal transaction would gut the Fourth Amendment.

III. This case is an ideal vehicle for deciding the Question Presented.

None of the Commonwealth's scattershot arguments for why this case is an unsuitable vehicle withstands scrutiny.

1. It does not matter whether the police "knew" when they conducted the search that Bembury's backpack contained evidence of a crime. The search incident to arrest exception does not depend on "the probability in a particular arrest situation that weapons or evidence [will] in fact be found." *Robinson*, 414 U.S. at 235. Rather, the exception's scope depends upon whether the item to be searched is within the grab area of the arrestee. *Chimel*, 395 U.S. at 763. As noted above, the officers' asserted awareness that the backpack contained contraband goes to probable cause to obtain a warrant. No one questions that the police had probable cause: the issue is whether they were permitted to bypass the Fourth Amendment's warrant requirement.

It is true, of course, that a person does not have a "legitimate" privacy interest in possessing contraband. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). Accordingly, a search that by its nature can "*only* reveal[] the possession of contraband," such as a dog sniff, "compromises no legitimate privacy interest." *Id.* But the search of Bembury's backpack was not so limited. The Commonwealth does not (and could not credibly) argue that the officers had reason to believe that Bembury's backpack contained *only* evidence of a crime. To the contrary, they had every reason to believe that it also contained personal effects in which Bembury maintained a reasonable expectation of privacy.

2. Equally deficient is the Commonwealth's unsupported assertion that review is not warranted because the search revealed only contraband. Br. in Opp. 32. The Kentucky Supreme Court's opinion notes that the police found contraband during the search; it does not say those were the backpack's only contents. *See* Pet. App. 4a.

More importantly, the reasonableness of a search is determined by the facts "as they existed at the time th[e] invasion occurred." *Jacobsen*, 466 U.S. at 115. A search cannot "be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered." *Id.* at 114. In other words, what the police discovered when they searched Bembury's backpack cannot justify the search itself.

The search must have been lawful ex ante, before anything was uncovered.

3. The Commonwealth's attempt to question Bembury's ability to access his backpack at the time of the search is a red herring. The Commonwealth observes that the Kentucky Supreme Court did not explicitly find that Bembury was unable to access his backpack, but it ignores the fact that there was no reason for the court to have done so. This is because it adopted a per se rule under which the search was proper *regardless* of whether the backpack was in Bembury's grab area. Moreover, the court had no basis for making such a finding because the Commonwealth did not even attempt to argue below that the backpack was in Bembury's grab area; to the contrary, it argued only for the per se rule the Kentucky Supreme Court ultimately adopted. Br. of Appellee at 18, *Kentucky v. Bembury*, (2022-SC-0018-DG).

4. Likewise, the Commonwealth's argument that the search could have been upheld under other Fourth Amendment exceptions to the warrant requirement is both irrelevant and wrong. First, the mere possibility that the Kentucky Supreme Court might have invoked another basis for decision is not a reason to deny review of the decision that it rendered. That court decided the case on one ground and one ground only: that a warrantless search of a container in an arrestee's possession is always permissible regardless of the circumstances of arrest and search. This Court routinely reviews cases that potentially could have been (but were not) decided below on alternative

grounds. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 243 (2009) (holding qualified immunity barred claim because the law was not clearly established instead of resolving whether officer's actions were illegal); *see also, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 (2006) (noting decisions in which the Court addressed the merits without addressing significant jurisdictional questions).

In any event, no alternative doctrine suggested by the Commonwealth applies here. The plain view doctrine permits seizures of "items visible to a police officer." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983). As explained above, the contents of Bembury's backpack were not visible when the officers decided to conduct the search.

Nor does the more specific exception in *Andreas* apply. In that case, law enforcement authorities had already discovered contraband in a lawful search before conducting the search at issue. Here, in contrast, the police did not discover any such contraband until they searched the backpack. Pet. App. 69a.

Likewise, the inevitable discovery rule applies only if the prosecution establishes "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). Below, the Commonwealth never introduced any such evidence—as recognized by both the Kentucky Court of Appeals, Pet. App. 77a ("[N]o evidence was elicited to justify the search of Bembury's backpack on the

grounds of inevitable discovery."), and by Justice Keller in her dissent, *id.* at 61a (Keller, J., dissenting) ("[T]his record is completely void of any of the aforementioned testimony, and therefore, I cannot hold that the evidence would have been inevitably discovered."). Moreover, if the inevitable discovery doctrine applied, it might justify withholding the remedy of suppression at Bembury's criminal trial, but it would not render the search lawful.[1]

Finally, the Commonwealth's suggestion that *Gant expands* the scope of permissible warrantless searches outside the vehicle context is meritless and, if anything, highlights the need for review. As explained above, the lower courts are badly split on whether *Gant's* rationale applies to *limit* the scope of permissible warrantless container searches. Pet. Br. 13 (collecting cases); *see* p. 3, *supra*. No court has read *Gant* as the Commonwealth suggests to *expand* the scope of permissible searches.

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In sum, Kentucky fails to undermine the petitioner and amici's showing that this case is an ideal vehicle for resolving the critically important issue stated in the Question Presented.

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[1] Decisions adopting the per se rule will also control in civil actions brought under 42 U.S.C. § 1983, which turn on whether an individual's constitutional rights have been violated without regard to whether evidence is admissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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