No. 23-802

In the Supreme Court of the United States

WILLIAM BEMBURY,
Petitioner,
v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the exception to the Fourth Amendment's warrant requirement for searches incident to arrest permit a warrantless search of a backpack, purse, luggage, or other external container in the arrestee's possession at the time of arrest if, at the time of the search, the container is separated from the person and there is no reasonable possibility that the arrestee could access the container to obtain a weapon or destroy evidence?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's interest in this case arises from its mission to support the rights that the Constitution guarantees to all citizens. *Amicus* has a particular interest in this case as it concerns the continuing vitality of the Fourth Amendment and its ability to act as a meaningful restraint on the exercise of government power.

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

When the Supreme Court created an exception to the Fourth Amendment's warrant requirement in *Chimel v. California*, 395 U.S. 752 (1969), it took great care to carve it narrowly. *Chimel* held that the Fourth Amendment permits limited, warrantless searches of the arrestee's person and the area within his immediate control, which the Court defined as "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. *Chimel* explained that such searches are reasonable to disarm the arrestee and prevent the destruction or concealment of evidence. *Id.*

However, in its decision below, the Kentucky Supreme Court flouted the justifications underlying the search incident to arrest exception by holding that it extends to personal items outside the area accessible to the arrestee. By the time Officer Kennedy searched Petitioner's backpack, Petitioner was handcuffed and the backpack was secured. *Commonwealth v. Bembury*, 677 S.W.3d 385, 388–89 (Ky. 2023). But the court found these facts immaterial, and upheld the search pursuant to its adoption of the "time of arrest" rule.

The rule embraced below considers an item part of the arrestee's person for the purposes of a search incident to arrest if it is "in the arrestee's actual and exclusive possession . . . at or immediately preceding the time of arrest such that the item must necessarily accompany the arrestee into custody." *Id.* at 406. But the practical application of this rule would result in virtually any container, accessory, or other physical item found with the arrestee being fair game for a warrantless search. As the principle dissent correctly

reasoned, this Court's precedents require a different rule and a different result. Pet. App. 58a–60a.

As Petitioner explains, the Kentucky Supreme Court's decision was no isolated legal error, but was instead part of a troubling pattern of lower courts disregarding the search incident to arrest exception's limited application. The decision below illustrates how decades of excessive judicial deference to the judgment of law enforcement have led to increasingly grave incursions on the purpose and command of the Fourth Amendment. The warrant requirement, which presumptively applies to all searches and seizures, has itself become the exception, rather than the norm.

The Court should grant certiorari to rebuff this trend and clarify that the search incident to arrest exception is meant to be narrowly applied. That correction is especially urgent considering how the decision below will disproportionately affect people of limited financial means with scant ability to influence the levers of public policy. Unfortunately, conscious and unconscious biases in policing practices are longstanding and well-established, and affect virtually every facet of the criminal justice system. Studies show that people of color and homeless individuals are frequently singled out for disfavorable treatment by law enforcement, whether intentionally or not, and not always with adequate legal cause. The time of arrest rule embraced by the majority below and by various other state and federal courts gives police even more power to engage in warrantless searches based on bias and stereotypes and leaves some of our most vulnerable citizens with less protection of their persons and effects than the Fourth Amendment in fact provides.

ARGUMENT

I. THE KENTUCKY SUPREME COURT'S DECISION WOULD ALLOW ABUSES AKIN TO THOSE THAT MOTIVATED THE FOURTH AMENDMENT.

The Fourth Amendment's protections against unreasonable searches and seizures "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England." *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). These writs "granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *Id.* at 8. The Fourth Amendment is "a reaction to the general warrants and warrantless searches that so alienated the colonists and had helped speed the movement for independence." *Chimel v. California*, 395 U.S. 752, 761 (1969).

The form of general warrant that most roused the colonists' ire was the so-called "writ of assistance"—a tool used to aid the British in combatting colonial resistance to rising taxation by giving law enforcement carte blanche authority to search for smuggled goods. *See, e.g.*, RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 8 (2013). These writs were perpetual and general search authorizations that permitted the holder (and any transferees) to search a person or place at whim. The abuses that came from these writs were "[v]ivid in the memory" of the Framers when the Fourth Amendment

was crafted. *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

While "framing-era sources did not always agree on the details of the criteria for regulated searches and seizures, they were united in seeking objective criteria to measure the propriety of government actions." Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L. J. 979, 980 (2011). The language they settled upon for the Fourth Amendment was "precise and clear" and "reflect[ed] the determination of those who wrote the Bill of Rights" that Americans should be secure "from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford*, 379 U.S. at 481. Given this historical backdrop, precedent reflects that "[a]lthough the text of the Fourth Amendment does not specify when a search warrant must be obtained," a "warrant must generally be secured" for a search to be "reasonable." *Kentucky v. King*, 563 U.S. 452, 459 (2011).

In theory, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). In practice, however, these "exceptions" have become so expansive that "warrants are the exception rather than the rule." William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991); *see also* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to*

Search Incident to Arrest, 19 YALE L. & POL'Y REV. 281, 384 (2001).

The many exceptions to the warrant requirement have severely undermined the exacting protections that the Framers sought to enshrine. Decades of concessions made in the interest of protecting law enforcement have led to exceptions applicable to "limited circumstances" that are themselves virtually limitless. From pretextual stops, to the "good-faith" exception to the exclusionary rule, to exceedingly permissive interpretations of *Terry v. Ohio*, court-created exceptions to the warrant requirement have almost completely swallowed the warrant rule.

Consider, for example, the practical evolution of this Court's jurisprudence regarding the vehicle exception. In *Carroll v. United States*, 267 U.S. 132, 153–54 (1925), the Court found that the warrantless search of a vehicle is reasonable so long as law enforcement has probable cause to believe the vehicle contains contraband, given that it often "is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Over time, however, the vehicle exception has been extended to include "vehicles" that are not functionally mobile, in situations that do not appear to implicate any of *Carroll*'s practical concerns. *See Florida v. Meyers*, 466 U.S. 380, 382–83 (1984) (approving warrantless search of impounded car in secured area); *Texas v. White*, 423 U.S. 67, 68–69 (1975) (per curiam) (upholding warrantless search of seized car parked at police station); *Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970) (approving warrantless

search and seizure despite car being impounded and occupants jailed).

Exigency, another exception to the warrant requirement, has likewise been applied liberally in favor of police expediency. *See, e.g.*, *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2531 (2019) (permitting warrantless blood test where driver is unconscious and cannot give breath test); *Kentucky v. King*, 563 U.S. 452, 455 (2011) (allowing warrantless entry even though it was officer's knock that caused defendants to attempt destruction of evidence). The same can also be said of the circumstances necessary to obtain consent to search. *See, e.g. Ohio v. Robinette*, 519 U.S. 33 (1996) (finding "consent search" voluntary even though consenter did not know he was free to go); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (upholding "consent search" of vehicle despite consenter's lack of knowledge that he could refuse).

The aggregation of these and other doctrines "already enables a host of aggressive and intrusive police tactics." *United States v. Johnson*, 874 F.3d 571, 577 (7th Cir. 2017) (en banc) (Hamilton, J., dissenting):

> The Fourth Amendment . . . allows police to arrest suspects for minor traffic infractions even if a court could impose only a fine, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and arrested persons can be strip-searched, *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 339 (2012), fingerprinted, photographed, and perhaps even subjected to a DNA test, *see Maryland v. King*, 569 U.S. 435, 481 (2013) (Scalia, J., dissenting). Moreover, a *Terry* stop can even be justified by an

> officer's *mistake* of either law or fact. *Heinen v. North Carolina*, 135 S. Ct. 530, 536 (2014).

Id. at 578.

When combined, exceptions to the warrant requirement enable a cascade of severe consequences for anyone committing even a trivial infraction. On its own, the search incident to arrest exception already serves as a powerful tool for law enforcement by empowering police to rely on minor offenses as justification for invasive warrantless searches. Logan, *supra*, at 404 (noting that courts have condoned searches incident to arrest for littering, civil contempt, riding a bike on a sidewalk, juvenile curfew violation, truancy, speeding, driving with a suspended license, seatbelt violations, underage possession of alcohol, urinating in public, and riding a bike with a suspended driver's license). But the Kentucky Supreme Court's decision stretches the law yet another step further, giving police virtually unlimited power to search physical items found with the arrestee, regardless of whether there is a particularized concern about officer safety or destructible evidence. When combined with the other exceptions to the warrant requirement, the decision below takes us one step closer to a system that mirrors the general warrant regime the Fourth Amendment was designed to prevent.

The Kentucky Supreme Court's decision should not be seen as an isolated misapplication of this Court's search incident to arrest doctrine. Rather, it is a troubling illustration of how easily Fourth Amendment

"exceptions" can expand until they eclipse the baseline rules they were originally meant to modify.

II. THE RULING BELOW DISPROPORTIONATELY HARMS HOMELESS INDIVIDUALS AND PEOPLE OF COLOR.

It is no secret that America's criminal justice system features massive and widespread racial disparities. Those disparities include everything from the frequency of traffic stops and vehicle searches to the length of prison sentences. While the Fourth Amendment is supposed to act as a shield between citizens and overzealous police officers, modern jurisprudence ignores the very real problem of racially motivated policing. The impact of the Kentucky Supreme Court's decision will not be felt equally by all Kentuckians.

Decades of excessive deference to the judgment of law enforcement have created doctrinal loopholes that encourage racial profiling in policing. Consider, for example, the practical evolution of this Court's case law on pretextual traffic stops. In *Whren v. United States*, 517 U.S. 806, 813 (1996), this Court "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." In other words, even where the alleged probable cause is merely pretext for a stop motivated by an entirely separate concern—including unlawful motives, such as "selective enforcement of the law based on considerations such as race"—such stops are nevertheless still "reasonable" under Fourth Amendment precedent. *Id.*

Whren created a judicially approved method for racially motivated policing, even while disclaiming the lawfulness of that practice. *Id.* ("We of course agree

with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race."). A quarter century later, the practical results have proven both predictable and disturbing. Allowing pretextual traffic stops led to a statistically significant increase in stops of drivers of color relative to white drivers, especially "during the daytime, when officers could more easily ascertain a driver's race." Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 644 (2021).

Police have not hesitated to push the boundaries of *Whren* even further. For example, in *United States v. Escalante*, 239 F.3d 678 (5th Cir. 2001), the Fifth Circuit upheld a search and seizure where the purported probable cause was that the defendant drove carelessly by "weav[ing] across the lane divider lines two or three times." *Id.* at 679. But this justification was almost certainly pretextual, as the officer "candidly acknowledged at the suppression hearing that he suspected drug smuggling when Escalante passed him." *Id.* at 682 (Stewart, J., dissenting). As the dissent noted, the officer went beyond effecting a pretextual stop as envisioned by *Whren* and effectively "manufacture[d] probable cause by tailgating a motorist." *Id.* *See also United States v. Chhien*, 266 F.3d 1, 4 (1st Cir. 2001) (upholding search and seizure by member of an elite police team trained to "look beyond the traffic ticket" and use "routine traffic patrols" to "ferret out serious criminal activity").

Officers have used these sorts of fishing practices outside the automobile context as well. According to a *Los Angeles Times* investigation, deputies frequently stop and search bike riders, especially Latino cyclists,

when there is no reason to suspect criminal activity. Ben Poston & Alene Tchekmedyian, *Sheriff's Department bike stops: How we reported the story*, L.A. TIMES (Nov. 4, 2021).[2] Los Angeles deputies use obscure, rarely enforced bicycle traffic laws as pretext for stops often ending with a search of riders and their belongings. *Id.* The *Times'* analysis of more than 44,000 bike stops logged by the Sheriff's Department since 2017 found that seven out of every ten involved Latino cyclists, and bike riders in poorer communities with large nonwhite populations were stopped and searched grossly disproportionately. *Id.*

Recent studies consistently demonstrate that people of color are more likely to be stopped and searched by police than their white counterparts. *See* Radley Balko, *There's overwhelming evidence that the criminal justice system is racist. Here's the proof.*, WASH. POST (June 10, 2020).[3] According to the New York affiliate of the ACLU, "90 percent of people stopped by the NYPD" between 2003 and 2022 "were people of color." *A Closer Look at Stop-and-Frisk in NYC*, NYCLU (last visited Jan. 22, 2024).[4] Black people in New York "were stopped at a rate nearly eight times greater than white people, and Latinx people were stopped at a rate four times greater." *Id.* A similar examination of police stops in Cincinnati revealed that "blacks were stopped at a 30% higher rate than whites" and made up "52% of all vehicle and pedestrian stops between 2012 and 2017, despite being 43% of the city's population." Kevin S. Aldridge, *Editorial: Racial*

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[2] Available at https://lat.ms/3SvZdIQ.

[3] Available at http://bit.ly/4b7LrU0.

[4] Available at https://bit.ly/3SrbyxB.

disparities in police stops demands attention, CINCINNATI ENQUIRER (Dec. 20, 2019).[5] Additionally, Cincinnati police "arrested more than three times the number of blacks pulled over as whites, 15,127 compared to 4,315," and black individuals accounted for "76% of all arrests." *Id.* In Washington, D.C., a study examining 11,000 police stops revealed that black individuals accounted for "70 percent of police stops, and 86 percent of stops that didn't involve traffic enforcement," even though black people account for only "46 percent of the city's population." Balko, *supra*. A similar report from the *Los Angeles Times* revealed that during traffic stops, "24% of black drivers and passengers were searched, compared with 16% of Latinos and 5% of whites," even though white people were likeliest to have contraband. Ben Poston & Cindy Chang, *LAPD searches black and Latinos more. But they're less likely to have contraband than whites*, L.A. TIMES (Oct. 8, 2019 3:52 PM).[6]

People of color are not the only ones who will disproportionately bear the weight of the decision below. In his dissent, Justice Thompson correctly points out how the majority's rule will disproportionately impact the homeless population because "[s]uch persons do not have the luxury of fences, doors, and locks found in traditional residences wherein they can secure their possessions." *Commonwealth v. Bembury*, 677 S.W.3d 385, 414–15 (Ky. 2023) (Thompson, J. dissenting). Instead, they "are dependent upon suitcases, backpacks,

[5] Available at https://bit.ly/3SrdFBx.

[6] Available at https://bit.ly/48FchkD.

grocery carts and even garbage bags to secure their personalty." *Id.*

This is exceptionally concerning considering the fact that homelessness in America is at an all-time high. In 2022, more than half a million Americans experienced homelessness. *State of Homelessness: 2023 Edition*, NAT'L ALL. TO END HOMELESSNESS (last visited Jan. 23, 2024).[7] Of those people, "40 percent . . . live unsheltered, which means their primary nighttime residence is a place not suitable for human habitation." *Id.*

Increasing rates of homelessness have caused state and local governments to react by adopting laws and policies aimed at vanishing the homeless population from public view. Over the last decade, "[l]aws criminalizing homelessness have dramatically increased." NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10 (2016).[8] Police have broad authority to arrest and cite homeless individuals "for minor 'public nuisance' crimes—such as camping, loitering, and public urination." Emily Peiffer, *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, URBAN INST. (Sept. 16, 2020).[9] Local governments rely on law enforcement to remove visibly homeless people from public spaces by

[7] Available at https://bit.ly/492kLlr.

[8] Available at https://bit.ly/3OfYTvb.

[9] Available at https://bit.ly/3Odpt86.

arresting or relocating them for harmless, unavoidable behaviors. HOUSING NOT HANDCUFFS, *supra*, at 8, 10–11.

The criminalization of homelessness has allowed police to arrest people for doing nothing more than trying to exist in public spaces. These people have no choice but to carry "all the privacies of life" with them at all times. *Bembury*, 677 S.W.3d at 415 (Thompson, J., dissenting). They do not have the luxury of guarding the most intimate details of their lives behind a closed door, and by allowing officers to conduct overly expansive searches of personal items without a warrant, the decision below strips some of our most vulnerable citizens of a vital constitutional protection.

The level of security provided by the Fourth Amendment should not vary based on a person's race or economic status; but given the prevalence of race-motivated policing tactics and the seemingly intractable problem of homelessness, it is inevitable that certain groups will be disproportionately harmed by the Kentucky Supreme Court's decision.

There is no panacea for the systemic problems plaguing the American criminal justice system—there are serious structural issues that exceed the bounds of any one case or doctrine. But by reversing the decision below and ensuring that the search incident to arrest doctrine is not expanded beyond its original scope, this Court can take a small but significant step toward

providing all citizens with meaningful protection under the Fourth Amendment.

CONCLUSION

For these reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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