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

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

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QUESTION PRESENTED

Does the Fourth Amendment prohibit the warrantless search of a backpack, piece of luggage, or other bag carried by an individual at the time of his arrest once police have secured the bag and eliminated any possibility of reaching a weapon or evidence inside it?

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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 protect against warrantless—and in some cases even suspicionless—searches incident to arrest against the backdrop of an overcriminalized society in which many if not most people could be arrested for one thing or another.

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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 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.*

In its decision below, the First Circuit elided the justifications underlying the search incident to arrest exception by holding that it extends to personal items outside the area accessible to the arrestee. In doing so, the court further widened an acknowledged split of authority and opened the door for police to search virtually any purse, backpack, briefcase, or other physical item found with an arrestee, regardless of how sensitive the contents of that accessory may be and even when there is no reason to suspect that it contains relevant evidence, contraband, or weapons that might put officers or others at risk.

As Petitioner explains, the First Circuit's decision was no isolated legal error, but was instead part of a troubling pattern of both state and federal courts disregarding the search incident to arrest exception's limited application. Pet. at 8–15. The decision below illustrates how decades of excessive deference to the prerogatives 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, is at risk of becoming the exception, rather than the norm.

The Court should grant certiorari to resolve the split of authority among lower courts by clarifying that the search incident to arrest exception is to be narrowly applied in a manner consistent with its animating rationale. 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.

ARGUMENT

I. EXPANSION OF THE SEARCH INCIDENT TO ARREST EXCEPTION 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 engendered by 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. Consistent with 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 principle, "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) [hereinafter Logan, *Exception Swallows Rule*].

Taken together, the numerous exceptions to the warrant requirement have severely undermined the exacting protections that the Framers sought to enshrine in the Fourth Amendment. The accretion and expansion of exceptions to the warrant requirement have, over a period of decades, agglomerated into an ethic of permissiveness that appears increasingly boundless. 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 largely obviated the constitutional default of requiring judicial authorization to conduct intrusive searches of the kind that so vexed the colonists.

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 investigative expediency. *See, e.g.*, *Mitchell v. Wisconsin*, 588 U.S. 840, 856 (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" during traffic stop voluntary even though the motorist did not know he was free to go); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (upholding "consent search" of vehicle despite passenger'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. *Heien v. North Carolina*, 574 U.S. 54, 68 (2014).

Id. at 578.

When combined, exceptions to the warrant requirement expose to intrusive and even suspicionless searches people suspected of committing even the most trivial infractions. *See* Logan, *Exception Swallows Rule*, 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 First Circuit's decision stretches the law yet another step further, giving police virtually unlimited authority 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 many other exceptions to the warrant requirement, the decision below represents an additional incremental step toward a system

that mirrors the general warrant regime the Fourth Amendment was designed to prevent.

The decision below is not 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 RULE EMBRACED IN THE DECISION BELOW DISPROPORTIONATELY HARMS HOMELESS INDIVIDUALS AND PEOPLE OF COLOR.

It is well established that America's criminal justice system features substantial racial disparities that 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 investigators, modern jurisprudence tends to minimize the very real problem of racially motivated policing. The impact of the First Circuit's decision will not be felt equally by all people.

Decades of extra-constitutional deference to the judgment and prerogatives 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 asserted probable cause is plainly a pretext for a stop with an

entirely different impetus—including such unlawful motives as "selective enforcement of the law based on considerations such as race"—the ensuing stops and searches will nevertheless be deemed "reasonable" under Fourth Amendment precedent. *Id.*

In effect, *Whren* drew a roadmap 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-expedition 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) [hereinafter Balko, *Overwhelming Evidence*].[3] According to the New York affiliate of the ACLU, "90 percent of people stopped by the NYPD" between 2003 and 2023 "were people of color." *A Closer Look at Stop-and-Frisk in NYC*, NYCLU (last visited

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

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

Dec. 13, 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 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, *Overwhelming Evidence*. 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.

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

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

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

The First Circuit's expansion of the search incident to arrest exception will disproportionately impact homeless individuals 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, grocery carts and even garbage bags to secure their personalty." *Id.*

This is exceptionally concerning considering that homelessness in America is becoming endemic. In 2023, "[a] record-high" of 653,104 Americans experienced homelessness. *State of Homelessness: 2024 Edition*, NAT'L ALL. TO END HOMELESSNESS (last visited Dec. 12, 2024).[7] More than 50 percent of individuals experiencing homelessness were unsheltered, meaning their primary nighttime residence was a "location[] unfit 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—*

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

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

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

This past term, the Court upheld a municipal ordinance criminalizing public camping, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024), with the result that states and cities have felt empowered "to employ more aggressive measures around the challenge of homelessness." Patrick Sisson, *California Cities Rethink Homelessness Tactics After Supreme Court Ruling*, BLOOMBERG (July 22, 2024).[10] Within a few weeks of that decision, California Governor Gavin Newsom issued an executive order "direct[ing] state agencies to remove homeless encampments from state land." Jaimie Ding, *Gov. Newsom passed a new executive order on homeless encampments. Here's what it means*, AP NEWS (July 25, 2024, 8:34 PM).[11] And cities throughout California quickly began enacting stricter policies aimed at policing homelessness. *See* Sisson, *supra*.[12]

The increasing criminalization of homelessness has allowed police to arrest people for doing nothing more

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

[10] Available at https://bit.ly/3ZBgv9G.

[11] Available at https://bit.ly/49Hxmfx.

[12] *See also* Sam Morgen, *Palm Springs to restrict sleeping in public, allow clearing of homeless encampments*, DESERT SUN (July 10, 2024, 6:02 AM), https://bit.ly/49zAUQR (Palm Springs ordinance granting police "new power to arrest people who build encampments or sleep in public areas"); Yusra Farzan, *Orange County cities ramp up anti-camping laws after Supreme Court*

than trying to exist in public spaces. These people have no choice but to carry the bulk of their possessions with them at all times. 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 warrantless searches of bags and backpacks that play a similar role for homeless people as a desk drawer or nightstand might for a homeowner, the decision below strips a vital constitutional protection from a uniquely vulnerable population.

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 expansion of the search incident to arrest exception.

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

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ruling and Newsom's order, LAIST (Sept. 3, 2024, 5:00 AM), https://bit.ly/4gsVtke (listing cities in Orange County that have enacted stricter policies policing homelessness); Martin Kaste, *San Francisco ramps up policing of homeless camps, with the Supreme Court's blessing*, NPR (Sept. 30, 2024, 1:00 PM), https://bit.ly/3ZxKRcX (San Francisco officials authorizing arrests for violations of a California state law prohibiting "lodging" in public).

ensuring that all citizens enjoy the full protection of 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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