No. 07-542

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

—v.—

RODNEY JOSEPH GANT,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

BRIEF *AMICUS CURIAE* OF THE ACLU AND THE ACLU OF ARIZONA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The ACLU of Arizona is one of its stateside affiliates. *Amici* are dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice systems, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

In late August, 1999, two Tucson police officers went to a home to investigate a tip about narcotics activity. After Rodney Gant came to the door and informed the officers that the homeowner would return later that afternoon, the officers departed. Upon running a records check on Gant, the officers discovered that his driver's license had been suspended and that he was the subject of an arrest warrant for driving with a suspended license.

After the officers returned to the home that evening, Gant drove up, parked in the driveway, and got out of his car. One of the officers summoned him.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

As soon as Gant covered the eight-to-twelve-foot distance between them, the officer arrested and handcuffed him, then placed him in the rear of a patrol car, under the supervision of another officer. Two officers then searched the passenger compartment of Gant's vehicle, finding a weapon and a baggie of cocaine.

Gant was charged with possession of a narcotic for sale and possession of drug paraphernalia. After the trial court denied his motion to suppress the evidence found in his car, he was convicted of both offenses. The Arizona court of appeals reversed the denial of Gant's suppression motion and his convictions. *State v. Gant*, 43 P.3d 188 (2002). This Court then vacated the court of appeals opinion and remanded the case for reconsideration in light of an intervening state court decision. *Arizona v. Gant*, 540 U.S. 963 (2003). Following an evidentiary hearing, the trial court again denied the motion to suppress, the court of appeals again reversed that decision, *State v. Gant*, 143 P. 3d 379 (2006), and the Arizona Supreme Court affirmed. *State v. Gant*, 216 Ariz. 1 (2007).

The state petitioned this Court for a writ of *certiorari* to the Supreme Court of Arizona. On February 25, 2008, this Court granted the writ.

SUMMARY OF ARGUMENT

In *Chimel v. California*, 395 U.S. 752 (1969), this Court concluded that searches incident to arrest rested on the twin justifications of officer safety and evidence preservation. These rationales dictated a

limitation of the scope of the search to the person of an arrestee and the area within his immediate control. In *New York v. Belton*, 453 U.S. 454 (1981), the Court declared an entire passenger compartment of a car to be within an arrestee-occupant's immediate control. The Court then decided that a search of that area was reasonable even though an arrestee was not inside the vehicle if he was a "recent" occupant. This unexplained expansion of the scope of search incident authority cannot be reconciled with the *Chimel* justifications. Because the vast majority of *Belton* searches occur when arrested occupants are under official control and no longer have access to vehicles, weapons inside passenger compartments pose no safety threats and evidence inside passenger compartments is not at risk. *Amici* respectfully suggest that *Belton*'s grant of authority to conduct warrantless and causeless searches under these circumstances is unjustifiable and should be abandoned.

The possibility that some police officers may choose to leave arrestees unrestrained if necessary to justify a vehicle search is insufficient reason to maintain *Belton*. First, it should not be assumed that police officers will place their own safety and the safety of others in jeopardy. More fundamentally, an unreasonable search cannot and should not be justified based on unreasonable police practices designed to avoid Fourth Amendment safeguards. In addition, in a case where an arrest is for a nonevidentiary offense—*i.e.*, an offense that provides no basis for believing that evidence will be found nearby–*Belton* authority cannot be justified by the

state's general interest in evidence gathering. In that situation, an evidence-gathering search is a wholly unjustified fishing expedition.

This case highlights the serious constitutional flaws in the *Belton* rule. After being arrested for driving with a suspended license, Gant was properly restrained in a police car. He posed no safety risk. He could no longer tamper with or destroy any evidence in the car. And, given the nature of his offense, there was no reason to believe that the car contained any evidence of the crime for which he was arrested. The search of the vehicle therefore violated the Fourth Amendment and *Belton* should be overruled to the extent it says otherwise. There is no reason in this case to decide whether an evidence-gathering rationale could render an automatic vehicle search reasonable following an arrest for an offense that might involve evidence. This Court should reserve that question for a case where it is actually raised.

However, if the Court addresses the constitutionality of a vehicle search after the arrest of an occupant for an offense that *might* involve evidence, it should declare that an arrest alone does not justify an exploration of vehicle contents. The constitutional text, history, and a long line of precedents all point toward one unavoidable conclusion—probable cause to search is a *sine qua non* for a reasonable evidentiary search of a vehicle. A mere arrest for an offense that "might" entail evidence does not, by itself, establish the "fair probability" required for probable cause *to search*.

Moreover, the balance of interests cannot support diminution of the Fourth Amendment norm in this context. An arrest for an evidentiary offense does not decrease the severity of the intrusion upon individual privacy interests and there are no heightened or uniquely weighty government interests in the balance. The Court should not revive a discredited evidence-gathering rationale that predated and was resoundingly and properly rejected in *Chimel*.

A decision by this Court that police officers may not rely on a risk of physical danger or destruction of evidence to search a vehicle when neither concern is present will still leave law enforcement with ample authority to conduct vehicle searches. The inventory doctrine, the "automobile exception," and the broad authority to search pursuant to voluntary consent will justify many of the searches currently permitted by *Belton*. Overruling *Belton* will not unduly tie the hands of the police, but will, however, ensure that routine police practices conform to traditional Fourth Amendment principles.

ARGUMENT

I. THE TWIN JUSTIFICATIONS THAT UNDERLIE THE *CHIMEL* DOCTRINE CANNOT SUPPORT AUTOMATIC AUTHORITY TO SEARCH VEHICLES INCIDENT TO THE ARREST OF RECENT OCCUPANTS

A. *Belton*'s Extension Of Search Incident To Arrest Authority Has Undermined The *Chimel* Court's Effort to Rationalize and Stabilize The Doctrine

The history of the search incident to arrest doctrine is scarred by disconcerting instability. During the half century following the Court's first allusion to the doctrine in dictum,[2] the scope of the authority accorded law enforcement "underwent at least five radical course changes."[3] In *Chimel* the Court strove to stabilize and rationalize the doctrine.[4] *Chimel* recognized two justifications for the authority to conduct causeless, warrantless searches incident to arrests—to ensure officer safety

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[2] *See Weeks v. United States,* 232 U.S. 383, 392 (1914).

[3] James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity,* 200 U. ILL. L. REV. 1417 (2007). For a description of this period, see *id.* at 1421-1429.

[4] The Court was unanimous regarding reform of search incident to arrest authority. Two dissenters disagreed with the result only because they believed that probable cause to search and an exigency had been demonstrated. *Chimel*, 395 U.S. at 780, 781-82 (White, J., dissenting).

and to preserve evidence. *Id.* at 762-63.[5] Acknowledging that weapons pose threats and that evidence is jeopardized *only* if they are accessible to an arrestee, the Court declared that a search incident to arrest could no longer extend beyond the person of the arrestee and "the area that was 'within his or her *immediate* control'" at the time of arrest—that is, "the area into which an arrestee *might reach* in order to grab a weapon or evidentiary items." *Id.* at 763 (emphasis added).

In *Belton,* the Court confronted lower court uncertainty over the proper scope of a search incident to the arrest of a vehicle occupant. To furnish needed guidance *and* based on a belief that vehicle occupants "generally, even if not inevitably," can reach weapons or evidence anywhere within the "narrow compass of the passenger compartment," the majority announced that passenger compartments and containers located there are within an arrestee-occupant's *immediate* control. *Id.* at 460.[6]

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[5] It is critical to recognize that the search incident to arrest doctrine suspends the substantive showing ordinarily needed for a reasonable search—probable cause. The doctrine demands no particularized showing that weapons or evidence will be found. A lawful arrest alone triggers search incident authority. *See United States v. Robinson,* 414 U.S. 218, 235 (1973).

[6] One enduring ambiguity is whether *locked* containers are included. The majority referred merely to "closed or open" containers, *Belton,* 453 U.S. at 461 n.4, while a dissent complained that "locked" containers could be searched. *See id.* at 472 (White, J., dissenting).

The majority also decided that officers could conduct thorough searches of passenger compartments and private belongings when the arrestee was a "recent occupant" of the vehicle searched, *i.e.*—that is, when the arrested individual was an occupant "just before" the arrest. *Id.* at 462. The Court did not explain *why* passenger compartment contents should be subject to warrantless, causeless searches when an occupant is outside the vehicle when arrested and when the search occurs. This substantial expansion of search incident authority was not reconciled with and, indeed, is quite irreconcilable with *Chimel*'s core premise—that weapons pose threats and that evidence is at risk only when they are within an arrestee's reach. 395 U.S. at 762-63.[7]

B. The Time Is Ripe To Abandon *Belton*'s "Extreme Extension" Of Search Incident To Arrest Authority

The Court *could* affirm the ruling below on the narrow, fact-specific ground relied upon by a majority of the Arizona Supreme Court. Confining a

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[7] Although the *Belton* majority proclaimed fidelity to *Chimel*, a dissent described how the Court had increased the scope of search incident to arrest authority. *Belton*, 453 U.S. at 466 (Brennan, J., dissenting). Indeed, Justice White deemed *Belton* an "extreme extension" of *Chimel*. *Id.* at 472 (White, J., dissenting); *see also Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part) (referring to the "erosion" of Fourth Amendment protection that "is a direct consequence" of *Belton*); *id.* at 633 (Stevens, J., dissenting) (observing that *Belton* "allowed…a broader search than" *Chimel*).

handcuffed suspect in a police car surely eliminates the only threats that can justify *Belton* searches. *See State v. Gant*, 162 P. 3d 640, 643-44 (2007).[8] The dissent below nonetheless read *Belton* to authorize an intensive search whenever an arrestee *was* recently within a vehicle and the search is contemporaneous with the arrest—whether or not the *Chimel* dangers are conceivably present at the time of the search.[9] The fact that *Belton* is so unclear and malleable that it can be interpreted to support such divergent outcomes is just one reason why the Court should undertake wholesale reform. Further refinement of *Belton* will only yield further

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[8] In *Thornton,* the Court acknowledged that "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search." 541 U.S. at 622. Perils posed by persons other than the arrestee have not served as justifications for automatic searches incident to arrest. Upholding the search here because others might have gained access to Gant's car would not only be unprecedented and unjustified, it would expand a doctrine that has already exceeded constitutionally legitimate bounds.

[9] The analysis of the Arizona court's majority is *far* preferable to that of the dissent. *Belton's* fictions have temporal and spatial limits. The obvious concern with unprincipled expansion of automatic authority to search that underlies these constraints supports the conclusion that a search is reasonable *only* when an arrestee is near enough to make access a genuine possibility. That spatial restriction is essential to cabin *Belton's* overbroad bright-line authority. Bright line rules are constitutionally defensible *only* when they "generally, even if not inevitably" produce the same results that case-by-case adjudication would produce. *See Belton,* 453 U.S. at 460. They must fairly approximate reality.

confusion.[10] More important, it will perpetuate the flawed constitutional reasoning that has rendered *Belton* questionable from the outset.

Four years ago, in *Thornton v. United States*, 541 U.S. 615 (2004), a splintered Court held that *Belton* permits a thorough search even though officers first contact an arrestee outside a vehicle. It was apparent then that *Thornton*, which involved a handcuffed arrestee sitting in the back of a police car during the search, was representative of the vast majority of *Belton* searches. *See id.* at 628 (Scalia, J., concurring in the judgment). Officers routinely perform warrantless, causeless vehicle searches putatively justified by safety and evidence preservation concerns when there are positively no risks because the areas searched are entirely inaccessible to arrested occupants. Responding to this irrational, constitutionally intolerable state of affairs, Justice Scalia proposed "honest" reform. *Id.* at 631 (Scalia, J., concurring in the judgment). This case furnishes a clear opportunity for such reform. Nearly a century after the Court fist adverted to the

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[10] The Arizona Supreme Court's division here and the lower court split over *Belton*'s application to confined arrestees illustrate the confusion engendered by the doctrine. The controversy settled in *Thornton*—whether an arrestee must be in a vehicle when first approached—and other issues that continue to arise prove that efforts to clarify by refining *Belton's* standards are futile. A doctrine adopted primarily because it could provide bright-line guidance, *see Belton,* 453 U.S. at 458-60, surely is due for a major overhaul when it engenders such ambiguity and confusion. *See* Tomkovicz, *supra* note 3, at 1444 n.177.

authority to search arrestees, see *Weeks v. United States,* 232 U.S. 383, 392 (1914), the time is ripe to revisit vehicular searches incident to arrests of occupants and to end the unjustifiable privacy invasions spawned by *Belton.*[11]

C. Officer Safety And Evidence Preservation Concerns Do Not Justify Passenger Compartment Searches Incident To Arrests Of Occupants

The vast majority of *Belton* searches occur today when arrestees cannot reach passenger compartments. *Thornton,* 541 U.S. at 628-29 (Scalia, J., concurring in the judgment).[12] The authority to search cannot be justified as bright-line guidance reflecting a fair approximation of the relevant interests. In fact, officers routinely invade privacy when there is not even a remote chance of the dangers that supposedly support their searches. *Id.* at 628. These searches, entirely unjustified by safety or evidentiary concerns, are nothing other than the "'exploratory searches'" categorically forbidden by the Fourth Amendment. *Id.* (quoting *United States v.*

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[11] The unquestioned authority to search arrestees' persons is not at issue. The *only* issue here is the reasonableness of an automatic vehicle search following an arrest for an offense that involves no cognizable prospect of finding evidence—driving with a suspended license.

[12] Justice Scalia entertained the possibility that it *may* have once been "true that the passenger compartment" was "within the . . . immediate control" of those arrested in vehicles, but declared that "it is not true today." *Thornton,* 541 U.S. at 628 (Scalia, J., concurring in the judgment).

McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

Belton, a decision concerned *exclusively* with the propriety of searching "the interior of an automobile" incident to the arrest of a recent occupant, was simply an effort to provide a "workable definition" of *Chimel*'s "'area within the immediate control of the arrestee'" in that special, limited context. *Belton,* 453 U.S. at 460. Because the only safe and reasonable law enforcement practice is to remove and restrain arrestees who are occupants of vehicles, it is clear that *Belton*'s definition of *Chimel*'s scope *in vehicular contexts* is not supported by the rationales on which *Chimel* is based.

Nor should *Belton* authority be sustained on the ground that a holding that searches incident to arrest are unjustified when arrestees have no access to vehicles might prompt law enforcement officers to modify current practices by allowing arrestees to remain unrestrained either inside or within easy reach of their vehicles. As Justice Scalia explained in *Thornton*, if "'sensible police procedures' require that suspects be" restrained, "then police should" restrain them, "and not conduct [a] search." *Thornton,* 541 U.S. at 627 (Scalia, J., concurring in the judgment).

Not only does this approach strike the proper balance, it finds potent support in the Framers' undeniable hostility to unregulated official discretion to search. Once officers decide to take a vehicle occupant into custody, they have not only the constitutional authority, but also the professional obligation to control the arrestee, preventing him

from endangering the lives of officers and members of the public or destroying evidence of crime.[13] A decision to leave an unrestrained arrestee in or near a vehicle would inevitably *increase* these perils and is entirely inconsistent with the harm-prevention rationales for search incident authority.[14]

To maintain *Belton* authority because officers could leave or have left an arrestee unrestrained would be to sanction intolerable bootstrapping. Officers could generate unnecessary, easily preventable risks, then rely on those risks to justify otherwise unreasonable searches.[15] The Court

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[13] The inherent dangers posed by vehicle occupants entitle officers to control drivers and passengers who are *not* subject to custodial arrest. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Maryland v. Wilson*, 519 U.S. 408 (1997). The greater threats posed by arrestees is surely the reason why the prevailing practice is to control occupants and put them beyond reach of vehicles. An unjustified failure to exert control could also give rise to civil liability for harms caused by an arrestee. For all these reasons, restraint is the responsible choice, the only option that an officer truly concerned with public safety, with evidence preservation, and with avoiding liability, would ordinarily entertain.

[14] It is sometimes suggested that officers may need to search vehicles and other spaces surrounding arrestees to prevent them from "lunging" into those areas for weapons or evidence. *See Thornton,* 541 U.S. at 621. If an officer exerts control, it seems unlikely that an arrestee would be able to lunge successfully. Moreover, diverting attention from an unrestrained arrestee in order to search a vehicle could only increase the odds of such a precipitous move.

[15] Indeed, if the Court were to validate this choice, officers could decide to pause while exiting homes, leaving uncontrolled arrestees within reach of private spaces in order to gain

should foreclose this option, denying authority to search passenger compartments incident to arrests of occupants and thereby eliminating any incentive for unsafe arrest practices.[16] By restricting search incident authority, the Court will promote safe practices consistent with the central objectives of the

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authority to search those now accessible areas. *Chimel's* exigency-based rationale allows officers to remove items at the moment of arrest. 395 U.S. at 763. Officers should be expected to control individuals in custody, preventing access to additional areas that could pose perils. They should not be allowed to conduct otherwise unjustified searches based on threats gratuitously created.

[16] The rejection of this sort of "pretextual" search is not inconsistent with *Whren v. United States*, 517 U.S. 806 (1996). *Whren* holds that when an officer has *probable cause* to seize or search, her actual motives are irrelevant. *Id.* at 811-12. The question here is whether an officer may engage in an objectively unreasonable arrest practice because she subjectively wishes to conduct a search she *cannot* justify by probable cause. There is precedent for denying officers the authority to evade Fourth Amendment commands. *See Georgia v. Randolph*, 547 U.S. 103, 121 (2006) (officers may not remove arrestee because they wish to avoid objection to another's consent to search a jointly-occupied home); *see also Maryland v. Buie*, 494 U.S. 325, 335-36 (1990) (officers must complete arrest and leave home, not delay departure in the hope that a reasonable suspicion of danger will arise and justify a home sweep). Similarly, courts condemn warrantless searches when officers create exigencies to avoid the warrant requirement. *See, e.g., United States v. Coles,* 437 F.3d 361, 362 (3d Cir. 2006); *United States v. Chambers,* 395 F.3d 563, 566 (6th Cir. 2005); *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir. 1990).

search incident to arrest doctrine. *See Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment).[17]

Search incident to arrest authority rests on a presumed *need* to take swift, preventative action to counter the risks posed by every arrestee. When the need to search does not exist—and it clearly does not when vehicle occupants are arrested and restrained as they should be—officers have no right, entitlement, or constitutional authority to invade privacy. The notion that "one way or another, the search [of a vehicle] must take place," *id.* at 627 (Scalia, J., concurring in the judgment), may be understandable from a law enforcement perspective. From a Fourth Amendment vantage point, however, it is an indefensible outgrowth of *Belton*'s erroneous recognition of authority to search vehicles incident to arrests of recent occupants. It is time to correct the misconceptions and end the abuses resulting from that constitutional misstep.

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[17] An officer might choose to leave an arrestee unrestrained and near a vehicle not because he wishes to conduct a search, but because he does not fear the arrestee. Although he should be free to exercise that discretion, it would be irrational to allow the officer to search a vehicle based on dangers he has deemed negligible or nonexistent. In the exceedingly unlikely case involving a demonstrable reason to leave a potentially dangerous arrested occupant unrestrained and within immediate reach of a vehicle, *Chimel*'s rationales would permit a search.

II. AN INTEREST IN GATHERING EVIDENCE CANNOT JUSTIFY VEHICLE SEARCHES INCIDENT TO ARRESTS OF OCCUPANTS FOR OFFENSES THAT INVOLVE NO EVIDENCE

In *Thornton,* Justice Scalia suggested that there *might* be an "honest" alternative justification for *Belton* searches—the interest in gathering evidence of the crime that is the subject of the arrest. 541 U.S. at 629 (Scalia, J., concurring in the judgment). Even the most cursory examination of the interests involved confirms the validity of his conclusion that evidence gathering cannot support a passenger compartment search after an arrest for an offense whose nature provides "no reasonable basis to believe that relevant evidence might be found in the car." *Id.* at 632.[18]

A. Explorations Of Passenger Compartment Contents Are Serious Intrusions Upon Significant Privacy Interests

"[T]here is 'no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails.'" *Terry v. Ohio,* 392 U.S. 1, 21 (1968) (quoting *Camara v. Municipal Court,* 387 U.S. 523, 536-37 (1967)). On one side of the balance is the harm done to privacy. Searches of vehicles incident to arrests effect substantial privacy deprivations.

[18] These offenses are referred to here as "nonevidentiary," while offenses that might involve evidence are called "evidentiary."

Moreover, because of officers' extensive authority to arrest vehicle occupants, the *aggregate* threat to privacy is enormous.

Under rulings since *Belton*, officers may constitutionally arrest drivers (or passengers) for any offense committed in their presence, no matter how minor, *Atwater v. City of Lago Vista,* 532 U.S. 318 (2001), even if state law permits no arrest. *See Virginia v. Moore,* 128 S.Ct. 1598 (2008). Because they may arrest for any vehicle code infraction, officers can surely identify objectively valid bases for arresting many, perhaps most, motorists. Many exceed the posted speed limit, and those who do not might well commit another violation. Moreover, even irrefutable proof that an officer had no real interest in the minor offense but desired to conduct an exploratory search incident to the arrest will not render the arrest unreasonable. *Whren v. United States,* 517 U.S. 806, 813 (1996). Thus, officers have incredibly broad authority to arrest individuals for relatively insignificant infractions. The cumulative threat to privacy interests from searches incident to arrests for minor, nonevidentiary offenses is extensive.[19]

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[19] In addition, officers can evade the prohibition on searches incident to traffic citations. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (holding that officers do not have authority to conduct searches incident to traffic citations). If an officer announced that a traffic offender was under arrest, conducted a search, found nothing, then "decided" to be lenient and merely issue a citation, his conduct would appear consistent with *Whren*'s interpretation of the Fourth Amendment. This option

Equally, if not more, important is the *nature* of the damage to privacy interests occasioned by passenger compartment searches. Vehicles are "effects," clearly entitled to Fourth Amendment shelter. The fact that vehicular privacy interests are less weighty than those in homes and other locations, *see United States v. Chadwick,* 433 U.S. 1, 12-15 (1977), does *not* mean that those interests are insignificant. The significance of those privacy interests is demonstrated by the fact that the showing ordinarily needed to breach the privacy of vehicle contents is the identical showing needed to secure a search warrant for a home. *See United States v. Ross,* 456 U.S. 798, 809 (1982) ("a [vehicle] search is not unreasonable if based on facts that would justify the issuance of a warrant").[20] The Court has "always" viewed the privacy interests in passenger compartments as "substantial" enough to trigger the "probable cause" demand. *United States v. Ortiz,* 422 U.S. 891, 896 (1975). This unflinching insistence on probable cause reflects a judgment that passenger compartment searches are serious infringements upon Fourth Amendment values. Moreover, the deprivations are not limited to the

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increases the aggregate jeopardy to privacy from vehicle searches incident to arrests of occupants.

[20] In recognition of the intensely private nature of items placed within personal belongings *not* located in vehicles, officers must obtain warrants before searching those belongings. *See United States v. Chadwick,* 433 U.S. 1 (1977). For historical and practical reasons, warrant protection is suspended when a container enters a vehicle. *See California v. Acevedo,* 500 U.S. 565, 574-76 (1982).

vehicles and containers of arrestees. Currently, privacy interests in vehicles and containers belonging to individuals who have committed no offense whatsoever are in jeopardy following any recent occupant's arrest.[21]

In sum, because officers possess broad powers to arrest vehicle occupants and because privacy interests of arrestees and innocent third parties in vehicle contents are weighty, the privacy invasions resulting from the exploratory searches permitted by *Belton* are severe.[22]

B. Explorations Of Passenger Compartment Contents Incident To Arrests Of Occupants For Nonevidentiary Offenses Further No Cognizable Government Interests

The other side of the Fourth Amendment balance analyzes "the degree to which [an intrusion]

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[21] Like the automobile exception, *see Wyoming v. Houghton*, 526 U.S. 295 (1999), there can be no doubt that the *Belton* doctrine extends to all containers, not just those belonging to arrestees.

[22] As in Gant's case, officers *do* exercise their authority to arrest for minor, nonevidentiary offense and *do* conduct searches of vehicles incident to those arrests. *See, e.g., United States v. Reavill,* No. 8:07CR62, 2007 WL 1557135, at*1 (D. Neb. May 24, 2007); *United States v. Tillman*, No. CR. 06-31-KKC, 2006 WL 3780557, at *3 (E.D. Ky. Dec. 20, 2006); *United States v. Southerland*, No. 03-216 (RBW), 2005 WL 5748476, at *1 (D.D.C. Apr. 20, 2005). Thus, in this situation, there is no "dearth of horribles demanding redress." *Atwater*, 532 U.S. at 321. Constitutionally protected privacy interests are, in fact, at risk.

is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton,* 526 U.S. 295, 300 (1999). Searches following arrests for nonevidentiary offenses are fishing expeditions, wholly unnecessary to promote *legitimate* interests. By itself, an arrest for a nonevidentiary offense furnishes *no* basis to believe that a passenger compartment search will actually yield evidence. The character of the offense—speeding or driving with a suspended license, for example—generates absolutely no likelihood that evidence will be found in the area the arrestee occupied. *See Knowles v. Iowa,* 525 U.S. 113, 118 (1998) (speeding is not an offense for which evidence would be found). A mere arrest for this sort of offense furnishes no counterbalance for the *certain* damage to privacy. When an arrestee has no access to a vehicle and when her alleged offense provides no reason at all to suspect that evidence might be present, there is no weight on the government's side of the Fourth Amendment scales. Because the constitutional balance tips so decidedly in favor of the individual, any search is unreasonable.

In sum, the search of Gant's car cannot be justified by the officer safety or evidence preservation rationales that underlie the *Chimel* doctrine because the officers did what they should do upon arresting a vehicle occupant, they deprived him of access. Because Gant's arrest was for driving with a suspended license, an interest in gathering evidence cannot justify the search of his car. For these reasons, the Court should affirm the decision of the Arizona Supreme Court.

III. THE COURT SHOULD NOT ADDRESS THE CONSTITUTIONALITY OF SEARCHING A VEHICLE FOLLOWING THE ARREST OF AN OCCUPANT FOR AN OFFENSE THAT MIGHT INVOLVE EVIDENCE

Gant was arrested for driving with a suspended license, an offense that engendered *no* prospect that evidence would be found nearby.[23] Consequently, the Court can resolve this case on the sole ground that officers may not search a vehicle merely because an occupant has been arrested for a nonevidentiary offense. The Court need not address the reasonableness of a vehicle search after an arrest for an offense that might involve evidence. Resolution of that issue should await a future case involving an arrest for an evidentiary offense—a case in which the issue has been briefed and argued by the parties.

This Court does not customarily issue advisory opinions. *See Powerex Corp. v. Reliant Energy Services, Inc.,* 127 S. Ct. 2411, 2419 (2007). Its ordinary practice is to apply the law to the facts of the particular case before it and to avoid dicta. *See Ferguson v. City of Charleston,* 532 U.S. 67, 85 n.24 (2001); *Local 144 Nursing Home Pension Fund v.*

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[23] Under Arizona law, this offense is a misdemeanor consisting of the following elements: "(1) driving a motor vehicle; (2) on a public highway in this state; (3) when the privilege to drive has been suspended." *State v. Brown*, 986 P.2d 239, 241 (Ariz. Ct. App. 1999); *see also* Ariz. Rev. Stat. § 28-3473 (2008). Evidence of this offense will not be found in a vehicle following an arrest. In its merits brief, Arizona makes no argument to the contrary.

Demisay, 508 U.S. 581, 592 n.5 (1993); *United States v. U.S. Gypsum Co.,* U.S. 364, 411 (1948) (Frankfurter, J., concurring). Deciding an issue only after it had been "fully aired" by the parties, *Clay v. United States,* 537 U.S. 522, 526 n.2 (2003), and avoiding unnecessary pronouncements honors the "virtue" of "judicial restraint." *Demisay,* 508 U.S. at 592 n.5. Moreover, addressing a significant constitutional question only after thorough briefing and argument by the parties guarantees that the Court has "investigated [it] with care, and considered [it] in its full extent." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399-40 (1821) (Marshall, C.J.); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta,* 57 STAN. L. REV. 953, 1021-22 (2005).

This case does not afford the best opportunity for the Court to consider the immediate and long-term ramifications of automatic vehicle searches based on arrests of occupants for evidentiary offenses. Endorsement or rejection of an alternative, evidence-gathering rationale as the foundation for sustaining some searches permitted today under *Belton* will have significant implications for law enforcement and for Fourth Amendment rights. Neither the facts of this case nor the lower court proceedings alerted the parties of a need to explore the many facets of this issue. The Court, therefore, should allow the question to percolate further in the lower courts and should resolve it only after it is squarely presented and fully explored in a future case.

IV. AN INTEREST IN GATHERING EVIDENCE DOES NOT FURNISH A CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR VEHICLE SEARCHES INCIDENT TO ARRESTS OF OCCUPANTS FOR OFFENSES THAT MIGHT INVOLVE EVIDENCE

In *Thornton,* Justice Scalia suggested that it might be rational to preserve *Belton* authority when the *nature* of an arrested occupant's offense renders it "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton,* 541 U.S. at 632 (Scalia, J., concurring in the judgment). In his view, a *Belton* search *could* be reasonable "simply because the car *might* contain evidence relevant to the crime for which [an occupant] was arrested." *Id.* at 628 (emphasis added).[24] In fact, every relevant consideration militates strongly against the recognition of "evidence-gathering" authority based *solely* on the character of an offense.

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[24] It is not *entirely* clear that Justice Scalia meant to suggest that the nature of the offense *alone* might justify a *Belton* search. He may have meant merely that the nature of the offense is a relevant factor. The foundation for his suggestion, *United States v. Rabinowitz,* 339 U.S. 56 (1950), involved specific facts beyond the arrest that made it likely that a search would yield evidence. The officers not only had "probable cause to believe" that the arrestee was conducting an illegal business, but also had "most reliable information" that the items they sought were in his possession and "concealed . . . in the very room where he was arrested." *Id.* at 62-63.

A. The Fourth Amendment's Text, History, And Precedents Demand That An Evidence-Gathering Search Be Supported By Probable Cause To Search

The Fourth Amendment provides a right against "unreasonable searches and seizures" and specifies a substantive reasonableness norm—"probable cause." The Framers constitutionalized the probable cause standard in direct response to the general warrants and writs of assistance that were anathema to the colonists and a primary cause of the American Revolution. *See Virginia v. Moore,* 128 S.Ct. 1598, 1603 (2008); James J. Tomkovicz, *California v. Acevedo*: *The Walls Close in on the Warrant Requirement,* 29 AM. CRIM. L. REV. 1103, 1130-31 (1992).[25] Their intent was to outlaw these tools of tyranny by declaring that a bare suspicion or a mere possibility is insufficient to render a search reasonable. *See* Tomkovicz, *supra,* at 1130-31. Privacy should be forfeit *only* when the government establishes a more substantial likelihood that

[25] Although the "probable cause" demand is found in the Warrant Clause, the Court has long held that it is a norm of reasonableness for warrantless investigative searches. *See Wong Sun v. United States,* 371 U.S. 471, 479-80 (1963). It would be incongruous and inconsistent with the history of the Fourth Amendment to permit officers to search for evidence on grounds that could not justify a magistrate's issuance of a warrant.

legitimate interests will be served.[26] Probable cause, therefore, is "the textual and traditional standard," *Arizona v. Hicks,* 480 U.S. 321, 329 (1987), prescribed by the Framers to strike the delicate balance between freedom and order. *See Dunaway v. New York,* 442 U.S. 200, 213-15 (1979).

Moreover, probable cause is the presumptive norm for *all* searches. Neither the Fourth Amendment's text nor its history distinguishes between searches of homes, persons, or effects—including vehicles. Consequently, "the Court *always* has regarded probable cause as the minimum requirement for a lawful search" of an automobile. *United States v. Ortiz* 422 U.S. 891, 896 (1975) (emphasis added). In *Carroll v. United States,* 267 U.S. 132 (1925), the first opinion to recognize a warrant rule exception for movable vehicles, the Court "emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains" objects the government is entitled to seize. *United States v. Ross,* 456 U.S. 798, 807-08 (1982). The identical emphasis upon the centrality of probable cause permeates the Court's most recent discussion of the automobile doctrine in *Wyoming v. Houghton*, 526 U.S. 295, 300-02, 307 (1999). And while the Court has struggled in a long line of intervening cases to define the scope of that doctrine, it has insisted throughout that a particularized showing of probable

[26] The Court has held that a "fair probability" or a "substantial chance" is sufficient. *See Illinois v. Gates*, 462 U.S. 213, 238, 243 n.13 (1983).

cause is the essential precondition for a warrantless search for evidence. *See, e.g., California v. Acevedo,* 500 U.S. 565, 579 (1991); *California v. Carney,* 471 U.S. 386, 392 (1985); *Ross,* 456 U.S. at 807-08 n.9; *Texas v. White,* 423 U.S. 67, 68 (1975); *Chambers v. Maroney,* 399 U.S. 42, 51-52 (1970). For over eighty years, this Court has "read the historical evidence to show that the Framers would have regarded" the warrantless search of a vehicle and its contents "as reasonable (*if there was probable cause*)." *Houghton,* 526 U.S. at 300 (emphasis added).

B. The Balance Of Interests Does Not Justify A Passenger Compartment Search Based Solely On The Arrest Of An Occupant For An Offense That Might Involve Evidence

The balance struck by the Framers requires the government to establish probable cause, a showing *not* satisfied by the mere fact of an occupant's arrest for an offense that *might* involve evidence. Moreover, an arrest for such an offense does *not* alter the constitutional balance in any way that could justify departure from the probable cause requirement.

1. A Lawful Arrest Alone Does Not Automatically Establish A Fair Probability That Evidence Will Be Found In The Vicinity Of The Arrestee

Probable cause *to arrest* exists if there is a fair probability that the individual has committed or is committing an offense. *See Brinegar v. United States,* 338 U.S. 160, 175-76 (1949). Probable cause

to search requires a specific showing of a fair probability that fruits, instrumentalities, contraband, or evidence will be found in the place to be searched. *See United States v. Grubbs,* 547 U.S. 90, 95 (2006). Facts that support the arrest of a vehicle occupant will sometimes also establish probable cause to search the vehicle. An arrest for an evidentiary offense may be a significant factor in the totality. There are situations, however, in which there is a fair probability that an occupant has committed an offense, but a vehicle search cannot be justified. The offense may have been committed long before the arrest or at a distant location, or the arrestee may be a mere passenger with a limited connection to the vehicle or the possessions inside. The myriad possibilities belie any claim that an arrest alone always or generally furnishes the "fair probability" required for a search. *See* Tomkovicz, *supra* note 3, at 1469.

In sum, although officers have grounds to believe that an "evidentiary" offense has been committed, the *possibility* that evidence *might* be nearby does not satisfy the "textual and traditional" probable cause demand.

2. The Arrest Of An Occupant For An Evidentiary Offense Does Not Diminish The Severity Of The Privacy Deprivation

In a limited number of narrowly-defined situations involving intrusions on privacy that are markedly less severe, the Court has suspended the probable cause demand. *See Dunaway,* 442 U.S. at

208-12.[27] The arrest of an occupant for an evidentiary offense does not diminish the intrusiveness of a vehicle search.

The Court has cited the "reduced" privacy expectations in vehicles as a basis for an exception to the warrant rule. *See Carney*, 471 U.S. at 391-393. While doing so, the Court has stressed the need for probable cause *because* a "search, even of an automobile, is a *substantial* invasion of privacy." *Ortiz,* 422 U.S. at 896 (emphasis added). *Belton* searches invade not only substantial vehicular privacy interests, but even weightier privacy interests in personal containers belonging to arrestees and others. The arrest of an occupant does not lessen the severity of these intrusions. An occupant's interests in the liberty and privacy of his person are distinct from and independent of privacy interests in the contents of the vehicle. Nothing in the text or history of the Fourth Amendment or this Court's precedents suggests that an arrest somehow reduces the value of the constitutionally sheltered interests in the place surrounding the arrestee.[28]

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[27] The fact a privacy intrusion is less severe is a necessary, but not sufficient, basis for diluting the constitutional norm. A heightened government interest is also needed.

[28] A lawful, probable-cause based arrest certainly does "distinguish the arrestee from society at large." *Thornton,* 541 U.S. at 630 (Scalia, J., concurring in the judgment). The arrestee will suffer justified losses of liberty and of the privacy of his person and the belongings he carries. An arrest, however, provides no basis for devaluing privacy interests in other places associated with the arrestee. *Cf. Belton,* 453 U.S. at 460-61 (1981); *Chimel,* 395 U.S. 752, 766 n.12 (1969).

The notion that a justified deprivation of one Fourth Amendment interest diminishes the worth of separate and distinct Fourth Amendment interests is corrosive and inconsistent with the spirit of that guarantee. *See* Tomkovicz, *supra,* note 3, at 1462 n.260.

A search may also be substantially less intrusive because of its narrow scope. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 26, 29-30 (1968); *Maryland v. Buie,* 494 U.S. 325, 327, 335-36 (1990). An evidence-gathering rationale may not afford officers unbounded authority to rummage endlessly for anything they might find. *See Thornton*, 541 U.S. at 630 (Scalia, J., concurring in the judgment). Still, the scope of searches for evidence following arrests will be anything but *narrow*. The proposed alternative rationale for *Belton* searches will typically afford officers the power to explore vehicle contents thoroughly, permitting even broader searches than those currently taking place.[29] In a rare case, the arrest might support only a limited search for a discrete item. Ordinarily, however, because officers will be in quest of an indefinite amount of evidence or contraband that could be concealed anywhere, there will be no meaningful

[29] Currently, *Belton* searches have temporal and spatial limits that would not follow from an evidence-gathering rationale. Taken at face value, there would seem to be no need for recent occupancy by the arrestee or for contemporaneity of the search, and trunk searches would seem to be justified by an evidence-gathering rationale.

temporal or spatial constraints upon their privacy invasions.

More to the point, the Court has *never* suggested, because it would be inconsistent with the constitutional text and history, that a vehicle search for a single item of evidence or a determinate quantity of contraband is less intrusive and, therefore, reasonable on less than probable cause.[30] The absence of authority to rummage at will is scarcely a basis for concluding that a substantial privacy invasion is exempt from the probable cause requirement. That constitutional norm governs both limited and unlimited investigative searches. If the contrary view were accepted, "the protections intended by the Framers could all too easily disappear." *Dunaway,* 442 U.S. at 213.

Because evidence-gathering searches of vehicles effect serious and substantial invasions of privacy, the probable cause norm may not be suspended.

3. An Evidence-Gathering Search Of Vehicle Contents Following The Arrest Of An Occupant For An Evidentiary Offense Furthers No Heightened Or Uniquely Weighty Interests

[30] To the contrary, *Acevedo*, 500 U.S. 565 in which officers had probable cause to believe that contraband was located *only* in a paper bag in the trunk of a car, and, therefore, could not search the car itself, confirms that even when officers are not authorized to rummage for anything they might find, a vehicle search is sufficiently intrusive to demand probable cause. *Id.* at 572-75.

Even when privacy intrusions are sufficiently less severe, there is another essential ingredient before the Court may balance interests. A search must serve an interest weightier than the ordinary interest in gathering evidence of crime. According to Justice Scalia, "heightened law enforcement needs" might render *Belton* searches of vehicles reasonable following arrests for evidentiary offenses. *Thornton,* 541 U.S. at 631 (Scalia, J., concurring in the judgment). In fact, the societal interests implicated are not of a sort that can justify dilution of the Fourth Amendment norm.

In criminal investigation contexts,[31] the Court has authorized limited searches of persons, areas, and even homes on less than probable cause *only* when the compelling interest in officer safety has been at stake. *Terry* approved a limited pat down for weapons based upon a reasonable suspicion *only* because of the threat to officers' lives. *Michigan v. Long,* 463 U.S. 1032 (1983), endorsed a restricted passenger compartment search, but *only* if based on a reasonable suspicion that dangerous weapons are present and *only* because those weapons could endanger officers during investigative detentions. And *Buie* permitted a confined *protective* sweep of a home based on an articulable showing that a safety

[31] The Court has allowed less intrusive searches on less than probable cause to serve "special" interests outside criminal investigation contexts. *See, e.g., New Jersey v. T.L.O.,* 469 U.S. 325 (1985) (searches of students by school officials). Because an evidence-gathering search after an arrest serves no special interests, standards governing investigative searches apply.

threat exists and *only* because of the unique perils to officers' lives posed by in-home arrests.

In contrast, the Court has *never* allowed law enforcement to search for evidence or contraband on less than probable cause. *Minnesota v. Dickerson,* 508 U.S. 366 (1993), deemed unreasonable the arguably modest privacy invasion effected by brief manipulation of a lump in a suspect's pocket because it was "the sort of *evidentiary* search" on less than probable cause that the Court has consistently "condemned." *Id.* at 378 (emphasis added). Even with the significant interest in interdicting easily concealed contraband in the balance, the Court remained true to the Framers' vision and refused to authorize any privacy invasion—*i.e.*, a *search*—on a mere reasonable suspicion.[32]

The "heightened law enforcement needs," *Thornton,* 541 U.S. at 631 (Scalia, J., concurring in the judgment), generated by the possibility that individuals might employ readily moveable vehicles to further criminal enterprises, have supported a "vehicle exception" to the *warrant requirement*. *See*

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[32] *Arizona v. Hicks*, 480 U.S. 321 (1987), provides additional support. There, the relatively minor intrusion on privacy effected by revealing "nothing but the bottom of a turntable" was deemed unjustifiable on anything less than "probable cause" to believe that evidence of larceny would be found. *Id* at 325. *Dickerson* and *Hicks* establish that a less severe intrusion on privacy interests is not, by itself, sufficient reason to suspend the probable cause norm. *United States v. Place*, 462 U.S. 696 (1983), which authorized only a brief *seizure* of publicly-situated luggage based on a reasonable suspicion of contraband, is not to the contrary. No search was involved.

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). Never has the Court so much as hinted that the need for swift action could justify dilution of the Fourth Amendment's substantive norm. Instead, while acknowledging that mobility creates a need to act, the Court has demanded the same showing necessary to secure a warrant—probable cause. *See id.* at 300-03 (emphasizing the longstanding, historical need for probable cause to search a vehicle).

Thus, the other critical predicate for a lower-than-normal Fourth Amendment standard is lacking. The government's interests are typical, not uniquely weighty. Interest balancing dictates the same answer that history, the constitutional text, and the precedents mandate. An intrusive vehicle search cannot be sustained simply because evidence *might* be found there after an occupant's arrest. Only probable cause to search can suffice.

The contention that *Belton* searches following evidentiary offense arrests can be justified by an "evidence-gathering" rationale is rooted entirely in *Rabinowitz*,[33] a discredited decision which was *unanimously* repudiated in *Chimel* because it distorted Fourth Amendment principles. The *Chimel* majority declared that the arguments undergirding *Rabinowitz* were "founded on *little more than a subjective view* regarding the acceptability of certain sorts of police conduct, and not on considerations

[33] *See Thornton*, 541 U.S. at 629 (Scalia, J., concurring in judgment).

relevant to Fourth Amendment interests." *Chimel,* 395 U.S. at 764-65 (emphasis added). Justice Harlan explained that he felt compelled to abandon *Rabinowitz* because he could not "in good conscience vote to perpetuate *bad Fourth Amendment law*." *Id.* at 769 (Harlan, J., concurring) (emphasis added). Because these devastating critiques of *Rabinowitz* are as persuasive today as they were forty years ago, the Court should not revive its doctrine.

As Justice Frankfurter observed in *Rabinowitz*, "[t]o say that [a] search must be reasonable is to require some criterion of reason." *Rabinowitz*, 339 U.S. at 83 (Frankfurter, J., dissenting). The proper criteria surely are "the history and experience which [the Fourth Amendment] embodies and the safeguards afforded by it against the evils to which it was a response." *Id.* The Framers envisioned the probable cause command as a critical shield against those evils. With all due respect, the unsupported assertion that "[t]here is nothing irrational about broad police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested," *Thornton,* 541 U.S. at 630 (Scalia, J., concurring in the judgment), is an inadequate basis for diluting Fourth Amendment protection. Evidentiary searches of vehicles are constitutional *only* "upon probable cause."

C. Law Enforcement Will Retain Adequate Authority To Serve Legitimate Interests In Finding Evidence In Vehicles

The costs of forbidding the exploratory rummaging permitted and promoted by *Belton* are no reason to refrain from taking that constitutionally necessary step. The Framers decided that the privacy and liberty protections afforded by the probable cause requirement justified its impact on law enforcement.

It bears mention, nonetheless, that the price of reaffirming this core Fourth Amendment principle will not be excessive. Officers will still possess ample authority to search vehicles for evidence. First, the "automobile exception" allows warrantless searches whenever probable cause to search exists. In some, perhaps many, situations involving lawful arrests for evidentiary offenses, the totality will also establish a "fair probability" that evidence will be found. Moreover, in a substantial number of other cases, officers will have authority to impound and inventory a vehicle following an arrest. *See, e.g., Colorado v. Bertine,* 479 U.S. 367 (1987). When neither of those options is available, officers may seek consent from anyone with authority. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Matlock*, 415 U.S. 164 (1974).[34]

Over sixty years ago, in objecting to indefensibly broad authority to search places incident to arrests, Justice Jackson noted that the

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[34] When individuals lack authority, searches will still be reasonable if officers reasonably believe they have authority to consent. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). These grounds may also justify vehicle searches following arrests for nonevidentiary offenses.

Fourth Amendment embodied the Framers' fundamental commitment to privacy and that he was not "disposed to set their command at naught," even if he believed that they had placed too high a value on privacy. *Harris v. United States,* 331 U.S. 145, 198 (1947)(Jackson, J., dissenting). This Court should similarly affirm the Framers' balance by holding that the arrest of a vehicle occupant does not entitle police officers to search passenger compartment contents.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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