No. 18-1166

In the
Supreme Court of the United States

COLTON W. SIEVERS,
Petitioner,
v.
STATE OF NEBRASKA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nebraska

BRIEF FOR *AMICI CURIAE* POLICING PROJECT AT NEW YORK UNIVERSITY SCHOOL OF LAW; CATO INSTITUTE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF NEBRASKA; AND NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Policing Project at New York University School of Law is dedicated to ensuring that policing agencies adhere to basic principles of democratic accountability before they act. To that end, the Project facilitates public input and engagement on policing policies and practices, with the twin goals of giving communities a voice in how they are policed and developing greater mutual trust between the police and the communities they serve. In its many endeavors, the Policing Project works closely with policing agencies and communities. The Project promotes transparency around policing by, among other things, helping departments get their policy manuals online. It writes rules, policies, and best practices for policing agencies. It also works with experts and policing agencies on groundbreaking cost-benefit studies of policing practices, from de-escalation training to vehicle pursuit policies. The Director of the Policing Project is also the Reporter for the American Law Institute's *Principles of the Law: Policing*.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici* certify that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU regularly participates in cases before this Court involving the right to privacy protected by the Fourth Amendment. For example, the ACLU was counsel of record in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and *Missouri v. McNeely*, 569 U.S. 141 (2013), and participated as *amicus curiae* in *Riley v. California*, 573 U.S. 373 (2014), and *Maryland v. King*, 569 U.S. 435 (2013). Because this case addresses an important Fourth Amendment question, its proper resolution is of substantial concern to the ACLU and its members. The ACLU of Nebraska is a statewide, nonprofit, nonpartisan organization with approximately 5,750 members and supporters.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. As

part of its advocacy, LDF launched the Policing Reform Campaign to transform policing culture and practices, eliminate racial bias and profiling in policing, and end police violence against citizens. The Fourth Amendment issues in this case raise grave concerns about the significant risk of abusive and discriminatory police practices in communities of color and, thus, are of particular importance to LDF.

SUMMARY OF THE ARGUMENT

This case is about first principles of the Fourth Amendment. The Nebraska Supreme Court lost sight of those principles, and so too have other courts. The Framers crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era." *Riley v. California*, 573 U.S. 373, 403 (2014). Those devices, which "helped spark the Revolution itself," gave British officers unfettered discretion to engage in arbitrary searches in an "'unrestrained'" pursuit of "'evidence of criminal activity.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). In light of the Framers' antipathy for British search-and-seizure practices, this Court has had no trouble discerning the "essential purpose" of the Fourth Amendment: "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials … in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'" *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (footnote omitted). In short, the Fourth Amendment provides a bulwark against official arbitrariness.

The Fourth Amendment's protections against arbitrary searches are not one-size-fits-all, but rather

vary according to the nature of a search. As the Court's cases reveal, there are two broad categories of searches. The first includes traditional "suspicion-based" searches, such as when the police target a particular individual based on some belief of criminal wrongdoing. In such "category one" cases, the Fourth Amendment's protections against arbitrariness are clear and familiar: The police must have "probable cause" or "reasonable suspicion" before they may search or seize a suspect. *See id.* at 661. But some search programs are inherently "suspicionless," such as when government officers conduct searches at airports or government buildings without any individualized suspicion *ex ante*. *See Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000). In these "category two" cases, the Fourth Amendment requires very different safeguards against arbitrariness: The police must subject all people (or some truly randomized subset of them) to the same treatment, for only then are the people protected against the "evil" of "unbridled discretion." *Prouse*, 440 U.S. at 661, 663.

In the decision below, the Nebraska Supreme Court conflated these two categories of searches. As the state has conceded, the police targeted petitioner as a "suspect" when stopping his vehicle, because they believed that the vehicle may have contained stolen goods and illicit narcotics. Pet.App.88a. Accordingly, the state had an obligation to prove that it had the necessary level of individualized suspicion to stop the vehicle, just as the state must do in all other "category one" cases. But rather than conduct that inquiry, the Nebraska Supreme Court upheld petitioner's stop under the Fourth Amendment after borrowing principles from a paradigmatic "category two" case—

namely, *Illinois v. Lidster*, 540 U.S. 419 (2004), in which the Court considered a checkpoint where the police stopped all vehicles to determine whether their occupants had any information about a hit-and-run accident that had generated no leads.

Because *Lidster* implicates Fourth Amendment principles applicable to "suspicionless" stops, it provides no guidance regarding "suspicion-based" stops like the one here. Yet the Nebraska Supreme Court nonetheless held that *Lidster* could be invoked to justify an individualized, *targeted* stop even if the police lacked the constitutionally required level of individualized suspicion, on the theory that *Lidster* allows the police to stop essentially anyone so long as they purport to be "seeking information." That is plainly not the proposition for which *Lidster* stands—nor could it be, as that proposition is antithetical to core Fourth Amendment principles. The Nebraska Supreme Court's error is far from academic. Relieving the state of its burden to prove that it had sufficient cause to stop petitioner (or any other suspect) simply because the state sought information would restore the kind of search-and-seizure regime the Fourth Amendment was designed to prevent. The fact that the government seeks information from the people describes the problem that the Fourth Amendment is meant to address, not the basis for an exception to its protections.

Unfortunately, the error committed by the Nebraska Supreme Court, while particularly glaring, is not an isolated mistake. Federal and state courts around the country are getting it wrong in similar cases and are therefore green-lighting "category one"

searches that lack the level of individualized suspicion that the Fourth Amendment demands. *See, e.g.*, *United States v. Brewer*, 561 F.3d 676 (7th Cir. 2009); *Bruce v. Beary*, 498 F.3d 1232 (11th Cir. 2007); *Gipson v. State*, 268 S.W.3d 185 (Tex. Ct. App. 2008). This Court should grant certiorari to ensure that the "lessons of history" that gave rise to the Fourth Amendment are not forgotten, *United States v. Di Re*, 332 U.S. 581, 595 (1948), and that the police are not permitted to conduct the kind of searches and seizures the Framers sought to eliminate.

ARGUMENT

I. The Framers Adopted The Fourth Amendment To Provide Safeguards Against Arbitrary Searches By Government Officials.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. As this Court and others have explained, the Amendment developed as a response to the Framers' opposition to the "general warrants" and "writs of assistance" used by British officers, which armed those officers with virtually unfettered discretion to engage in arbitrary invasions of personal privacy. *See, e.g.*, *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands 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."); *Marcus v. Search Warrants of Prop. at 104 E. Tenth St., Kansas City, Mo.*, 367 U.S. 717, 726 (1961) (general warrants "often gave the most general discretionary authority"); Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (1937) ("writs of assistance" gave officials "practically absolute and unlimited" discretion).

A series of incidents in the 1760s in both the colonies and England galvanized colonial opposition to these "despised" devices. *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting). In 1761, in *Paxton's Case*, 1 Quincy 51 (Mass. 1761), a group of merchants in Boston—where customs officials frequently employed writs of assistance in an effort to quash the trade in smuggled goods—brought a legal challenge against the writs in Massachusetts court. *See* Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 908 (2010). The merchants' attorney—"the patriot James Otis," *Riley*, 573 U.S. at 403—"argued passionately" against the writs, denouncing them as "'the worst instrument of arbitrary power, the most destructive of English liberty … that was ever found in an English law book.'" Michael 908. Although Otis could not convince the colonial court to rule in his favor, he swayed many others, including a young John Adams, who witnessed Otis speak firsthand. *See id.* at 909. As Adams later recounted: "Otis was a flame of fire! … Every man of a crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance.

Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.* (quoting Letter from John Adams to William Tudor (Mar. 29, 1817) in 10 *The Works of John Adams* 247-48 (Boston, Little Brown & Co. 1856)).

Two English cases that "played a pivotal role in the drafting of the Fourth Amendment"—*Wilkes v. Wood* (1763), 98 Eng. Rep. 489, and *Entick v. Carrington* (1765), 95 Eng. Rep. 807—followed on the heels of the events in Boston, and underscored concerns about the unfettered and arbitrary exercise of state power. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1838 (2016). The *Wilkes* case arose after John Wilkes, a Member of Parliament, "published an anonymous attack on the majesty and ministry of King George III in a 1763 pamphlet," which resulted in a "general search and arrest warrant" that "authorized henchmen to round up the usual suspects and gave the henchmen discretion to decide who those suspects were." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 n.54 (1994); *see also* Lasson 43 (describing the "absolute discretion" granted to the Crown's messengers). After Wilkes filed suit against the Crown's messengers, Chief Justice Pratt (soon to become Lord Camden) condemned the "discretionary power given to [the] messengers to search wherever their suspicions may chance to fall," decrying it as "totally subversive of the liberty of the subject." *Wilkes*, 98 Eng. Rep. at 498. The *Wilkes* case quickly became "a cause célèbre in the colonies, where 'Wilkes and Liberty' became a rallying cry for all those who

hated government oppression." Amar 772 n.54. Indeed, "Americans across the continent named cities, counties, and even children in honor of Wilkes and the libertarian judge, Lord Camden." *Id.*

Entick was no less significant. *See, e.g.*, *Boyd v. United States*, 116 U.S. 616, 626 (1886) (describing *Entick* as a "landmark[]" decision). After John Entick published "a pamphlet alleged to contain seditious libel," the Crown "issued a warrant for Entick's arrest, which gave messengers authority to make a general search of Entick's house and to seize any and all papers at their discretion." Michael 911. "The messengers in this instance …, as might be expected, made the most of the discretion granted them," Lasson 47, and "carted away great quantities of books and papers," *Marcus*, 367 U.S. at 728. Inspired by the *Wilkes* decision, Entick filed suit against those who executed the warrant, and Lord Camden likewise declared the general warrant illegal, as "no law allowed 'such a general search as a means of detecting offenders.'" Michael 911 (alterations omitted). Lord Camden's denunciation in *Entick* of British search-and-seizure abuses was "'undoubtedly familiar' to 'every American statesman' at the time of the Founding." *Florida v. Jardines*, 569 U.S. 1, 7-8 (2013).

In the following decade, the colonists' opposition to general warrants and writs of assistance continued to grow, and indeed "helped spark the Revolution itself." *Carpenter*, 138 S. Ct. at 2213; *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 658 (1999) (noting that Parliament "reauthorized the general writ of assistance" in 1767). In the wake of the Revolution, a

majority of the new states adopted provisions in their state constitutions to restrict government searches and seizures. *See* George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 Notre Dame L. Rev. 1451, 1463, 1465 & n.63 (2005). But the Framers initially did not include such a provision in the federal Constitution, leading the antifederalists to "sarcastically predict[] that the general, suspicionless warrant would be among the Constitution's 'blessings.'" *King*, 569 U.S. at 467 (Scalia, J., dissenting); *see also* 3 *Debates on the Federal Constitution* 588 (J. Elliot 2d ed. 1836) (Patrick Henry warning that the Constitution would permit searches and seizures "in the most arbitrary manner, without any evidence or reason"). The Framers responded with the Fourth Amendment. In 1789, James Madison introduced the Fourth Amendment, which had been "copied" from the search-and-seizure provision in Massachusetts' constitution. Baude & Stern 1838. The Massachusetts provision in turn "had been drafted by none other than John Adams, who remained indelibly impressed by James Otis's argument against the writ of assistance." Michael 912.

As this historical record reveals, the Framers were determined to leave behind the arbitrary search-and-seizure practices they had endured under British rule. Thus, time and again, this Court has explained that the "essential purpose" of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials … in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'" *Prouse*, 440

U.S. at 653-54; *see also, e.g.*, *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 613-14 (1989) ("The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."); *Boyd*, 116 U.S. at 630 (the Fourth Amendment seeks to secure "the privacies of life" against "arbitrary power").

II. The Fourth Amendment's Protections Against Arbitrariness Vary Based On Whether A Search Is "Suspicion-Based" Or "Suspicionless."

The Fourth Amendment's safeguards against arbitrary government conduct are not the same in all settings, but rather vary according to the nature of the search. This Court's cases reveal two broad categories of Fourth Amendment searches that government officers may conduct: (1) "suspicion-based" searches and (2) "suspicionless" searches. These two forms of searches may differ in their particulars, but the same Fourth Amendment concern for arbitrariness applies universally: Government officers are constitutionally precluded from exercising "unfettered discretion" when engaging in searches or seizures. *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *see also, e.g.*, *Camara v. Mun. Court*, 387 U.S. 523, 532-33 (1967).

The first category of searches—*i.e.*, "suspicion-based" searches—are the most familiar. Such searches occur when a government officer targets a particular individual based on a belief that he is "about to commit a crime," is "committing a crime," or "was involved in or is wanted in connection with a completed felony." *United States v. Hensley*, 469 U.S. 221, 227-29 (1985); *cf. Navarette v. California*, 572 U.S. 393, 402 n.2 (2014). Take this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which is a classic example of a "suspicion-based" search. In *Terry*, a police officer subjected two men to a search after observing behavior that indicated that the men were preparing to conduct a burglary or robbery. *See id.* at 4-7. Although the Court emphasized the general rule that the police must have "probable cause" before searching or seizing a suspect, *see id.* at 20, it upheld the police officers' conduct as consistent with the Fourth Amendment because the officers at least had "reasonable suspicion" to believe that criminal activity may be afoot and that the suspects may be armed and dangerous, *see id.* at 27-31.

These "cause" requirements—*i.e.*, "probable cause" or, at a minimum, "reasonable suspicion" in certain circumstances—are the Fourth Amendment's basic protection against arbitrary treatment in "suspicion-based" or "category one" cases. *See, e.g.*, Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 Geo. Wash. L. Rev. 281, 320 (2016). They ensure that an individual who is uniquely targeted by the police is not searched or seized based on nothing "more than an inchoate and unparticularized suspicion or 'hunch'" that does not sufficiently differentiate that individual

from any other member of the public. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quotation marks omitted); *accord* Pet.7 ("Reasonable suspicion is the bedrock constitutional requirement for seizing a suspect to investigate suspected criminal activity."). The cause standard thus prevents arbitrariness by providing the line that separates those who are properly subject to government seizures and searches from those who are not.

As this Court has explained, however, "the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). This is because "certain … forms of police activity" simply do not "involve[] suspicion, or lack of suspicion, of the relevant individual." *Lidster*, 540 U.S. at 425-26. This "suspicionless" police activity thus gives rise to "category two" Fourth Amendment stops and searches.

Consider the routine searches that occur "at places like airports and government buildings." *Edmond*, 531 U.S. at 47-48. The government maintains those security checkpoints not because it has reasonable suspicion or probable cause to believe that particular individuals are planning to attack those sites at every moment of every day, but rather to deter such activity in the first instance and promote "public safety" in especially sensitive areas. *Id.* Such "suspicionless" searches can plainly be "valid[]," *id.*, but because they are inherently different from "suspicion-based" searches, the Fourth Amendment requires different safeguards to protect against arbitrariness. If the police wish to conduct "suspicionless" searches, they must abide by

principles of generality and nondiscrimination: either subject all similarly situated people to the same search (*e.g.*, every vehicle passing through a sobriety checkpoint), or select some truly randomized subset of people to undergo the search (*e.g.*, every other vehicle passing through a sobriety checkpoint). *See, e.g.*, *Mich. Dep't of State Police v. Sitz,* 496 U.S. 444, 453 (1990) (upholding sobriety checkpoint where "uniformed police officers stop every approaching vehicle"); *see also* Friedman & Stein 320-23. In addition, such searches must generally further government interests beyond "'the general interest in crime control.'" *Edmond*, 531 U.S. at 44 (quoting *Prouse*, 440 US at 659). Absent these safeguards, the very same concern about arbitrariness in "category one" searches is reintroduced into "category two" searches.

This Court's decision in *Delaware v. Prouse* puts these pieces together. In *Prouse*, the Court considered whether Delaware police officers could constitutionally "stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law." 440 U.S. at 650. This Court answered that question with a resounding no, as it could not "conceive of any legitimate basis upon which a patrolman" could stop a single vehicle without any individualized suspicion. *Id.* at 661. But in reaching

that eminently correct conclusion, the Court made clear that it did not intend to preclude states from performing "suspicionless" stops *in toto*.

To the contrary, the Court noted, there are some circumstances in which states may conduct suspicionless stops, but to do so, they must provide adequate safeguards against arbitrary conduct. Providing "one possible alternative," the Court explained that states could "[q]uestion[] … *all oncoming traffic at roadblock-type stops*" to verify driver's licenses and vehicle registration information. *Id.* at 663 (emphasis added). And in a concurring opinion, Justice Blackmun, joined by Justice Powell, suggested that states could conduct "purely random stops (such as every 10th car to pass a given point)." *Id.* at 664 (Blackmun, J., concurring). But *Prouse* makes equally clear that what states *cannot* do is exactly what Delaware sought to do: grant police officers "unbridled discretion" to stop vehicles on a whim. *Id.* at 663. It could hardly be otherwise, as such a search regime would reincarnate the very "evil," *id.* at 661, the Framers sought to avoid in adopting the Fourth Amendment.

In sum, the Fourth Amendment's protections against arbitrariness manifest in different ways depending on whether a stop is "suspicion-based" or "suspicionless." Suspicion-based or "category one" cases require the government to prove a sufficient level of individualized suspicion, such as "reasonable suspicion" or "probable cause," whereas suspicionless or "category two" cases require the government to treat all people evenhandedly—until, of course, sufficient individualized suspicion arises. *See, e.g.*,

Brown v. Texas, 443 U.S. 47, 51 (1979) ("the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers").

III. The Nebraska Supreme Court Conflated "Suspicion-Based" And "Suspicionless" Searches And Thus Deprived Petitioner Of His Fourth Amendment Rights.

Against these principles, the problem with the Nebraska Supreme Court's decision is obvious: The court failed to honor the distinction between "suspicion-based" and "suspicionless" searches. That error not only deprived petitioner of his fundamental Fourth Amendment rights, but threatens to do the same to every other person in Nebraska.

In the proceedings below, the state candidly admitted that, when the police stopped petitioner's vehicle, they treated him like a "suspect" in a "classic traffic stop." Pet.App.88a. That concession should have made the Fourth Amendment analysis easy for the Nebraska Supreme Court, for all parties agree that this case involves a suspicion-based "category one" stop. Accordingly, the state bore the burden of proving that it at least had "reasonable suspicion" that petitioner "was about to commit a crime," "was committing a crime," or "was involved in or is wanted in connection with a completed felony." *Hensley*, 469 U.S. at 227-29; *but see* Pet.App.7a ("The stop occurred five blocks from the target address and was made

without the observation of a traffic or other law violation."); Pet.App.9a ("None of the officers who testified … observed Sievers inside the residence, leave the residence, put anything into the truck, or enter the truck. The informant had not provided any information about Sievers or the truck."). Indeed, even the state recognized below that "[t]he proper analysis in this case is under the traditional reasonable suspicion framework." Pet.App.85a.

The Nebraska Supreme Court nonetheless refused to heed the parties' agreement. Rather than assess the stop under the reasonable suspicion framework that even the state advocated, the court instead addressed a question that no one (including the trial court) had ever asked: whether seizing petitioner was "reasonable under the Fourth Amendment even in the absence of articulable suspicion of criminal conduct." Pet.App.11a-12a. Worse, the court answered that unasked question in the affirmative. In its view, because petitioner may have taken "stolen property and narcotics" from the "target address," Pet.App.24a, the police could conduct a "suspicionless information-seeking stop" of petitioner's vehicle to investigate further. Pet.App.13a; *see also* Pet.App.23a ("The stop was focused on gathering information about the presence of drugs and specific stolen property[.]"); *but see* Pet.App.85a (state conceding that "[t]he stop was not authorized as an information seeking stop" (emphasis omitted)).

In reaching the remarkable conclusion that suspicionless stops of specifically targeted individuals are constitutionally permissible, the court relied on

this Court's decision in *Illinois v. Lidster*. But *Lidster* provides no support whatsoever for the radical proposition that police may conduct targeted searches of potential suspects so long as they purport to be "seeking information." To the contrary, *Lidster* upheld the constitutionality of a checkpoint at which "[t]he police stopped *all* vehicles *systematically*" to determine whether they had information regarding a hit-and-run accident for which the police had no suspect. 540 U.S. at 428 (emphases added). *Lidster* thus did not involve individualized stops, but rather involved a classic "category two" case: the suspicionless stop of *everyone*.

The Nebraska Supreme Court's decision and its reading of *Lidster* is profoundly wrong, as the police cannot be relieved of their obligation to prove the necessary level of individualized *suspicion* to stop a targeted individual through the simple expedient of declaring that they were merely "seeking information" about criminal activity *that purportedly involved that individual*. After all, the whole point of the Fourth Amendment is to *prevent* government officers from engaging in "unrestrained search[es] for evidence of criminal activity" without an appropriate level of individualized suspicion. *Riley*, 573 U.S. at 403. When it comes to targeted government investigatory practices, the fact that the government has an information-seeking purpose is hardly a justification for dispensing with individualized suspicion. To the contrary, the government's interest in information-gathering is the *raison d'etre* of the Fourth Amendment.

The Nebraska Supreme Court's reliance on *Lidster* makes clear that the court made a category mistake. *Lidster* is a prototypical "category two" case: It involved a checkpoint that subjected "each vehicle" to the same treatment, without targeting any particular individual on the basis of suspicion of criminal conduct. *See* 540 U.S. at 422. Although *Lidster*'s analysis may be relevant in cases involving "suspicionless" stops—because such an information-gathering motivation may distinguish such stops from the kind of law-enforcement-only stops invalidated in *Edmond*—it provides no assistance in a case like this one, in which the police have acknowledged that they targeted a single individual, not general "members of the public." *Id.* at 423. Contrary to the Nebraska Supreme Court's view, the government may not "use *Lidster* to expand its power to make individualized stops even when it cannot meet the requirements of *Terry*." *United States v. Kalb*, No. CR 16-12, 2017 WL 132164, at *3 (E.D. Pa. Jan. 13, 2017), *aff'd,* 891 F.3d 455 (3d Cir. 2018).

IV. Federal And State Courts Around The Country Are Committing Similar Errors.

That petitioner and everyone else in Nebraska no longer enjoy the full suite of Fourth Amendment protections is reason enough for this Court to grant review. But the Nebraska Supreme Court is by no means the only court committing grave mistakes in Fourth Amendment cases. Indeed, courts around the country are permitting targeted stops of criminal suspects without the requisite level of cause.

The Seventh Circuit's decision in *United States v. Brewer*, one of the main decisions on which the

Nebraska Supreme Court relied, is illustrative. *See* Pet.App.16a-17a; *see also* Pet.12. There, the Seventh Circuit considered whether, even without reasonable suspicion, a police officer could stop a single vehicle on a road leading to a particular apartment building based on a hunch that its occupants "may have been involved in [a] shooting" that had occurred at the building. *Brewer*, 561 F.3d at 679. Relying on *Lidster*, the court concluded that the answer was yes. Relying on the Fourth Amendment, the answer obviously should have been no. Yet the Seventh Circuit so thoroughly conflated the principles that govern suspicion-based and suspicionless searches that, in its view, the fact that the driver of the vehicle "might be the gunman," rather than a mere witness, provided even more "compelling" reasons for stopping him. *Id.* Thus, in the Seventh Circuit just as in Nebraska, the police's utter lack of the minimal level of suspicion to seize potential criminal suspects under this Court's established Fourth Amendment principles is no longer a barrier to forging ahead as long as the police are engaged in information-gathering. *Cf. Gipson*, 268 S.W.3d at 186, 190 (justifying vehicle stop under *Lidster* when occupants "were potential suspects or witnesses to a crime"); *see also* Pet.App.12a n.6 (citing *Gipson*). Information-gathering that is devoid of individualized suspicion but nonetheless targeted at individuals is precisely what the Fourth Amendment protects against.

The problems also extend beyond cases that rely on *Lidster* to justify dubious stops of potential criminal suspects. In *Bruce v. Beary*, for example, the Eleventh Circuit addressed a case in which a Florida sheriff's office had received a criminal complaint from an

individual about a particular auto body shop. *See* 498 F.3d at 1235-36. Although the complaint "did not rise to the level of probable cause that would have supported application for a warrant," *id.* at 1242, the authorities nonetheless relied on the complaint to conduct a warrantless "administrative inspection" of the shop—with "approximately twenty officers" arriving on scene "with guns drawn" and some "dressed in SWAT uniforms," *id.* at 1236. The officers "block[ed] all exits," "ordered the employees to line up along the fence," and "point[ed] a shotgun" at one of them. *Id.* The Eleventh Circuit held that the officers could constitutionally conduct a warrantless administrative search of the shop in light of the complaint, even if the officers lacked sufficient cause to conduct an ordinary "suspicion-based" search. *But see Whren v. United States*, 517 U.S. 806, 811-12 (1996) ("the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes"). Like the Seventh Circuit, the Eleventh Circuit has thus endorsed the sort of arbitrary conduct the Fourth Amendment is designed to prevent—*i.e.*, targeting individuals (or businesses) for a search based on "the discretion of the official in the field." *Camara*, 387 U.S. at 532.

In short, there is no question that the decision below is wrong. But while this Court can certainly resolve this case by summarily reversing the Nebraska Supreme Court's judgment, *see* Pet.17-18, the reality is that this case reflects a more systemic problem. Courts nationwide have lost sight of Fourth Amendment first principles, and they are accordingly

getting things backwards in a number of cases implicating fundamental Fourth Amendment rights. That phenomenon warrants either clear guidance in a summary reversal or this Court's plenary review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari. Alternatively, the Court should summarily reverse the judgment of the Nebraska Supreme Court.

Respectfully submitted,

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