No. 20-1202

In the Supreme Court of the United States

WILLIAM J. MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

OTHER AUTHORITIES:

INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects, and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises grassroots activities to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.

Recent examples of Restore the Fourth amicus briefs include: Brief of *Amici Curiae* Restore the Fourth, Inc. & the Rutherford Institute in Support of Petitioners, *Lombardo v. City of St. Louis*, No. 20-319 (U.S. filed Oct. 26, 2020); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Torres v. Madrid*, No. 19-292 (U.S. filed Feb. 7, 2020); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Mitchell v. Wisconsin*, No. 18-6210 (U.S. filed Mar. 4, 2019); Brief of *Amicus Curiae*, Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017).

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[1] This *amicus curiae* brief is filed with the consent of Petitioner and Respondent. No counsel for a party authored this brief in whole or in part; nor has any person or entity, other than the *amicus* and its counsel, contributed money intended to fund the preparation or submission of this brief. This brief is filed in Rule 33.2 format as allowed by the Court's April 15, 2020 order addressing the COVID-19 pandemic and every document in a case filed before a ruling on a certiorari petition.

SUMMARY OF THE ARGUMENT

"[T]his case is distasteful"—indeed, it is "worse than that." *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). Petitioner Miller stands convicted of offenses related to child exploitation. Nevertheless, Miller's case raises "broader legal implications" that warrant this Court's "concern." *Id.*

An internet service provider opened Miller's private electronic correspondence (email) and sent it to the government. Pet. App. 3a–4a. The Sixth Circuit held this did not offend the Fourth Amendment any more than a "private party who searches a physical space and hands over paper files to the government." *Id.*

This private-search doctrine, however, is a relic of when the Court "appl[ied] exclusively" a reasonable-expectations-of-privacy test regardless of whether doing so "eliminate[d] rights that previously existed." *United States v. Jones*, 565 U.S. 400, 411 (2012) (plurality op.). The Court has since clarified that the Fourth Amendment protects rights embodied by founding-era history. *See id.* at 408–10.

Founding-era history reveals the Fourth Amendment was written to regulate private searches for contraband as induced, rewarded, or shielded by government (which applies here). This history also reveals common-law hostility to the opening of private correspondence, including by those paid to transmit it.

The Court should grant review to vindicate these irreducible historical norms. The Fourth Amendment's safeguards have "frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). This is one of those controversies.

ARGUMENT

I. The Court should grant review to reconsider the private-search doctrine, which does not comport with the historical content of the Fourth Amendment.

This Court adopted the private-search doctrine in *United States v. Jacobsen*, 466 U.S. 109 (1984), The Court began with the idea that a Fourth Amendment "search" occurs upon invasion of "an expectation of privacy that society is prepared to consider reasonable," *id.* at 113 —i.e., the reasonable-expectations-of-privacy test first announced in *Katz v. United States*, 389 U.S. 347 (1967).

From there, the Court reasoned government review of "what a private party ha[s] freely made available for . . . inspection" is not a "search." *Jacobsen*, 466 U.S. at 119–20. No "legitimate expectation of privacy" existed in this context because "when an individual reveals private information . . . he assumes the risk that his confidant will reveal that information to the authorities." *Id.* at 117.

This doctrine now merits reconsideration.

1. Since *Jacobsen,* the Court has clarified that the Fourth Amendment is not limited to "searches" as defined by the reasonable-expectations-of-privacy test. The Amendment also guarantees that "degree of protection it afforded when it was adopted." *Jones*, 565 U.S. at 411 (plurality op.). This guarantee is an "irreducible constitutional minimum." *Id.* at 414 (Sotomayor, J., concurring).

For good reason: "[o]ne cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment." *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting). The Amendment was the Framers' answer "to

the evils of searches without warrants and searches with warrants unrestricted in scope" that plagued 18th-century Britain and colonial America. *Id.*

The question then is whether the private-search doctrine diminishes "the norms that the Fourth Amendment was meant to preserve?" *Virginia v. Moore*, 553 U.S. 164, 168 (2008). If so, the doctrine should fall. The Court is bound to ensure that the Fourth Amendment "affords the protection that the common law afforded." *California v. Acevedo,* 500 U.S. 565, 583 (1991) (Scalia, J., concurring).

2. The Sixth Circuit elides this essential historical inquiry in Petitioner's case by invoking *Burdeau v. McDowell*, 256 U.S. 465 (1921)—a Fourth Amendment case decided long before the Court's reasonable-expectations-of-privacy test. The Sixth Circuit observes that in *Burdeau*, this Court allowed "the government to rely on letters illegally taken and opened by private parties." Pet. App. 4a.

Not quite. The Court stressed in *Burdeau* that "no official . . . had anything to do with the wrongful seizure of the petitioner's property." 256 U.S. at 475. The Court did not declare it would reach the same Fourth Amendment conclusion had the government obtained the stolen papers by putting out a dropbox soliciting stolen papers—or by promising civil immunity to those who stole them.[2] *Id.*

All *Burdeau* then stands for is the uncontroversial point that the Fourth Amendment "applies to governmental action." *Id.* The question still remains: when does private action cross the line into government action? History, in turn, reveals

[2] To the contrary, the Court assumed in *Burdeau* that the petitioner had "an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed." 256 U.S. at 475.

that among the searches that most disturbed the Framers were those undertaken by private actors as induced, rewarded, or shielded by the Crown.

3. During the founding era, to enforce "parliamentary revenue measures that most irritated the colonists," the Crown granted "sweeping power to customs officials . . . to search at large for smuggled goods" (i.e., contraband). *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 311 (1978). At the same time, the Crown recognized these contraband searches, to be effective, required private assistance.

One way the Crown secured this assistance was by compelling it—namely, through "writs of assistance." *United States* v. *Chadwick,* 433 U.S. 1, 7–8 (1977). These writs required "individuals to assist customs officers" in searches.[3] The writs "did not authorize a search"; they "merely vouched for the identity of the customs officers who by their commissions were authorized to search."[4]

Boston merchants hired James Otis to challenge these writs in court. *See Commw. v. Haynes*, 116 A.3d 640, 649–50 (Pa. Super. Ct. 2015). Otis argued that a "person with this writ . . . may enter all houses, shops, etc., at will, **and command all to assist him**."[5] Decrying this "the worst instrument of arbitrary power,"[6] Otis offered the following example of how one "Mr. Ware" had used the writ:

> Mr. Justice Walley had called … Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day Acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied,

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3 Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1053 n.18 (2011).

4 *Id.* (internal punctuation and alterations omitted).

5 2 WORKS OF JOHN ADAMS 524 (C. Adams ed. 1850) (bold added).

6 *Id.* at 523.

> "Yes." "Well then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods"—and went on to search the house from the garret to the cellar; and then served the constable in the same manner![7]

Another way the Crown secured private assistance to contraband searches was through incentives. The Crown used "informants to learn . . . where smuggled goods were being kept." *Haynes*, 116 A.3d at 649. "The informer was essential to the . . . Boston customs house in the 1750s."[8] "[I]t was one thing to have a legal power of entry and another to know when and where to make use of it."[9]

Customs officials needed "a reliable tip-off" since "no amount of legislation could lead a customs officer to where a particular lot of smuggled merchandise lay hidden."[10] So, officials recruited informants through advertisements promising "if any Person or Persons . . . [gave] Information" on contraband, such persons would be "handsomely rewarded" and "their Names concealed."[11]

None of this was lost on the Framers. They drafted the Fourth Amendment to answer every "invasion[] on the part of the government **and its employés**." *Boyd v. United States*, 116 U.S. 616, 630 (1886) (bold added). Founding-era history then requires courts to be on guard against upholding any "insidious disguises" of the old contraband searches that the Framers "so deeply abhorred." *Id.*

4. The manner in which the government obtained Petitioner's private electronic correspondence echoes the Crown's contraband searches of yesteryear.

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7 2 WORKS OF JOHN ADAMS, *supra* note 5, at 524–25.
8 M.H. SMITH, THE WRITS OF ASSISTANCE CASE 128 (1978).
9 *Id.* at 127.
10 *Id.* at 127–28.
11 *Id.* at 128.

Through 18 U.S.C. §§ 2258A, 2258B, Congress has secured private assistance to contraband searches (for illicit images) through compulsion and incentives. *See, e.g., United States v. Ackerman*, 831 F.3d 1292, 1296, 1301 (10th Cir. 2016) ("Congress statutorily required AOL to forward Mr. Ackerman's email to NCMEC.").

On the compulsion side, Congress requires internet service providers (ISPs) to report and turnover (or save for inspection) any contraband images they know about—or face an up-to-$150,000 fine for any knowing failure to make a report. *See* 18 U.S.C. § 2258A(a), (b), (e). On the incentives side, Congress affords immunity to ISPs against any "civil claim or criminal charge" arising from "performance" of the preceding reporting and preservation responsibilities. *Id.* § 2258B(a).

The Sixth Circuit tries to sidestep these realities in two ways:

First, the Sixth Circuit highlights 18 U.S.C. § 2258A(f), which declares the law does not require ISPs to "affirmatively search, screen, or scan" for contraband. Pet. App. 16a. But the Crown did not affirmatively require informants to search for or report smuggled contraband. The Crown offered rewards and protection for doing so, just as § 2258B does through the immunity it provides ISPs.

Second, the Sixth Circuit analogizes ISP searches for contraband to classic self-interested private conduct like "shopkeepers investigating theft by shoplifters." Pet. App. 15a. But upon finding evidence of shoplifting, shopkeepers are generally free to proceed as they see fit (e.g., letting an indigent shoplifter off with a warning). Shopkeepers are generally not compelled to report this evidence to the police or face an up-to-$150,000 fine for failing to do so. *Cf.* 18 U.S.C. § 2258A(a), (e).

What §§ 2258A, 2258B then entail for ISPs is a case of better safe (i.e.. search, report, and be immunized) than sorry (i.e., do not search; risk severe fines for knowledge of contraband accrued in other ways; lack immunity). Founding-era history teaches that under these kinds of circumstances, a contraband search is no private affair, but crosses the line into Fourth Amendment territory.

5. So the Sixth Circuit turns to the common-law tradition of "hue and cry." Pet 18a. "At common law, citizens had a duty to raise . . . 'hue and cry' and report felonies of which they were aware" or otherwise be guilty of "misprision of felony." *Id.* This leads the Sixth Circuit to conclude that "[i]t would be odd to think that this reporting duty turned the entire populace into government actors." *Id.*

The common law surrounding hue-and-cry, however, observed important rights-respecting limits. For example, private persons could not raise hue-and-cry on their own accord. They first had to "acquaint the constable of the village with all the circumstances"; it was then the constable's responsibility to raise the alarm. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 291 (1770).

Such limits then expose another key flaw in the Sixth Circuit's analysis: a failure to account for the rights-respecting limits that the common law imposed on private searches of correspondence. These limits were borne from bitter experience, which taught: "[a]kin to the use of spies, to watch and betray the acts of men, is the intrusion of the government into the confidence of private letters."[12]

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[12] 2 THOMAS E. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 292 (London: Longman, et al. 1865); *see also id.* at 292 –96 (providing a detailed common-law history of "opening letters").

II. The Court should grant review to uphold the common law's hostility to the opening of private correspondence, including by those paid to transmit such correspondence.

The Sixth Circuit recognized that Google's inspection of Petitioner's email was "akin to a party 'opening' a letter." Pet. App. 35a. But the Sixth Circuit found this made no difference under the Fourth Amendment. *Id.* Because it was a private actor (Google) that putatively "engaged in the trespass," the "government's later review" of the same email "might not be considered a search." *Id.*

Such reasoning stands in stark opposition to the common-law history that led to adoption of the Fourth Amendment. This history reflects an especially strong concern for securing both private papers and correspondence against all invasions, whether by public or private actors. In this respect, the Framers recognized that the fundamental "privacies of life" were at stake. *Boyd*, 116 U.S. at 630.

1. During the founding era, the Crown sought not only to enforce much-hated taxes but also to "suppress and destroy the literature of dissent." *Stanford v. Texas*, 379 U.S. 476, 482 (1965). The Crown authorized the "seizure of all the papers of [any] named person thought to be connected with a libel." *Id.*

In the same vein, "ministers or their subordinate officers . . . had no scruples in obtaining information, through the [p]ost-office."[13] "The political correspondence of the reign of George III affords conclusive evidence that the practice of opening the letters of public men at the Post-office was known to be general."[14]

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13 2 MAY, *supra* note 12, at 292.

14 *Id.* Consider, for example, a 1783 letter from William Pitt to Lady Chatham. Pitt wrote: "I am afraid it will not be easy for me by the post to be anything else

The Framers experienced the willingness of British officials to open private letters firsthand. In a September 1792 letter to Henry Dundas (British Secretary of War), Thomas Paine related his disturbing experience of setting foot in London only to be accosted by a Crown customs agent.[15] The agent opened Paine's trunks and removed "every paper and letter, sealed or unsealed."[16]

These documents included a sealed letter that Paine was to deliver "to the American Minister at Paris [Gouverneur Morris]" and a personal letter to him from President Washington.[17] Disregarding Paine's objections to "the bad policy and illegality of seizing papers and letters," the customs agent "proceeded to read" the letters, starting with Washington's personal letter to Paine.[18]

All Paine could then do was "content[]" himself that the customs agent would eventually "have to answer for" this conduct.[19] Paine nevertheless told the agent "that it was very extraordinary that General Washington could not write a letter of private friendship to [Paine] . . . without its being subject to be read by a custom-house officer."[20] The Framers thus set America on a different path.

2. In drafting the Fourth Amendment, the Framers specifically identified "papers" as one of four areas guaranteed protection against "unreasonable searches

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than a fashionable correspondent, for I believe the fashion which prevails—of opening almost every letter that is sent—makes it almost impossible to write anything worth reading." *Id.* at 293 n.1 (punctuation altered for clarity).

15 3 WRITINGS OF THOMAS PAINE 41–42 (M. Conway ed., 1895).

16 *Id.* at 42.

17 *Id.*

18 *Id.* at 42–43.

19 *Id.* at 42.

20 *Id.* at 43.

and seizures." This is no accident: through this one word, the Framers sought to codify[21] the common law's steadfast hostility to the kind of invasion that Thomas Paine endured, along with many others during the founding era.

At the heart of the Framers' effort was *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)—a "wellspring of . . . the Fourth Amendment." *Stanford*, 379 U.S. at 484. Lord Camden declared unlawful a general warrant under which Crown messengers "ransacked [publisher John] Entick's home for four hours and carted away quantities of [Entick's] books and papers." *Id.* at 483–84.

In pronouncing this judgment, Lord Camden established that "papers are often the dearest property a man can have." *Entick*, 95 Eng. Rep. at 817–18. Hence, when "private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect." *Boyd*, 116 U.S. at 628 (quoting *Entick*).

The Fourth Amendment carries these ideas forward. The Amendment is not limited to government "mischiefs"; rather, it presumes that one "may have secrets" contained in one's "books, papers, or letters" in which "the public have no concern."[22] The Amendment then dovetails into the longstanding American norm that it is "a criminal offense for one person wrongfully to open another's letters."[23]

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[21] *See Carpenter v. United States*, 138 S. Ct. 2206, 2243 (2018) (Thomas, J., dissenting) ("The search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as 'against reason.'").

[22] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 294 (1879).

[23] *Id.*; *see also, e.g., id.* ("[T]he postmaster who detains or pries into letters is liable in damages for so doing.").

3. American common law has long taken seriously and been hostile to the opening of private correspondence. For example, in an 1818 decision, New York's Court of General Sessions held as a matter of common law "that the breaking open and publishing a private letter is a misdemeanor, and therefore indictable." *In re Noah*, 3 N.Y. City-Hall Recorder 13, 20 (N.Y. Gen. Sess. Ct. 1818).[24]

This conclusion rested on three simple points. First, "correspondence by letter" encompassed all "concerns of human life, whether of a public or private nature." *Id.* Second, a "letter is usually protected by a seal, to guard it against public inspection." *Id.* Third, allowing the seal "to be violated with impunity, would lead to incalculable evils, and strike at the root of all public and private confidence." *Id.*

New York's protection of private correspondence did not end there. In 1828, the state made it a jail-worthy offense to "willfully open, or read, or cause to be read, any sealed letter" without permission. *People v. Burns*, 16 N.Y.S. 323, 327–28 (N.Y. App. Div. 1917) (Dowling, J., dissenting). And federal law imposed like prohibitions. *See, e.g., United States v. Tanner*, 28 F. Cas. 12, 13 (C.C. Ohio 1854).

Simply put, under American law (common and statutory), opening letters was no mere private trespass, but rather a grave public concern. *See Burns*, 16 N.Y.S. at 327 ("[T]he gradual growth of the statutory provisions in the State of New York for the protection of private letters and papers . . . show[s] that the uniform tendency has been to enlarge the scope of the prohibited acts and not to restrict them."). That understanding then carried over to the innovation of the telegraph.

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[24] Reported in: DANIEL ROGERS, NEW YORK CITY-HALL RECORDER, FOR THE YEAR 1818, at 13–27 (New York: Vosburgh 1818), *available at* https://bit.ly/3tj000B.

4. The advent of the "electric telegraph" marked "an epoch in the progress of time." *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877). In little more "than a quarter of a century," the telegraph became a "necessit[y] of commerce" and an "indispensable . . . means of inter-communication." *Id.* And as the telegraph rose to prominence, so did Fourth Amendment questions about it.

Unlike private letter correspondence, "the original of any [telegraphic] message sent and a copy of the reply [were] left in possession of the telegraph company"—a private entity distinct from a post office.[25] This naturally raised the following issue: "whether telegrams in possession of the telegraph authorities are the private papers of those who have sent and received them."[26]

In a variety of ways, American law answered 'yes.' For example, state courts held that "in every contract for the transmission of a telegraphic dispatch is an obligation on the part of the transmitting company to keep its contents secret from the world." *Cocke v. W. Union Tel. Co.*, 84 Miss. 380, 385 (1904). Breaches of this duty then afforded "[a] right of action beyond question." *Id.*

Leading scholars of the time also explained the "proper view" of telegraphs was to follow "the rules which govern private correspondence by mail."[27] And under those rules, "[t]he secrecy of private correspondence by mail ha[d] been protected from the earliest days, and every invasion of it ha[d] been punishable."[28]

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25 Thomas M. Cooley, *Inviolability of Telegraphic Correspondence*, 18 AM. LAW REGISTER 65, 66 (1879) (new series; in old series: vol. 27).

26 *Id.* at 69.

27 *Id.*

28 *Id.*

5. Fast forward to the modern day and Petitioner's case. As the Sixth Circuit recognized, this case involves "apply[ing] . . . fixed constitutional rights to new technologies in an evolving world." Pet. App. 2a. But in performing this task, "there is nothing new under the sun," as the preceding Fourth Amendment history demonstrates. *Bd. of Educ. v. Hughes*, 271 Md. 335, 339 & n.3 (1974).

Email merely presents the next iteration of the same basic questions that the common law confronted generations ago in dealing with letters and then telegraphs. On each occasion, the relevant authorities recognized that the common law—and, by extension, the Fourth Amendment—put the sanctity of private correspondence first, no matter who invaded it. Email deserves nothing less.

CONCLUSION

Left standing, the Sixth Circuit's rejection of the Fourth Amendment here means that "[r]ights declared in words" about private correspondence (papers) will "be lost in reality." *Weems v. United States*, 217 U.S. 349, 373 (1910).

The Court should not accept this.

Respectfully submitted,

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