No. 22-978

IN THE
Supreme Court of the United States

JACKIE JACKSON,

Petitioner,

v.

OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL and the clients its attorneys represent because the Ohio Supreme Court's decision immunizes what would otherwise be an unconstitutional search merely because the component elements of the search were divided between two officers rather than one. NACDL has a strong interest in protecting the right of

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[1] Under Supreme Court Rule 37.2, *amicus curiae* provided timely notice to all parties of its intention to file this brief. Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

citizens to be free from unreasonable searches and seizures, and therefore files this brief in support of petitioner.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

During the colonial era, roving bands of British customs officers regularly trespassed, searched, and seized property with impunity. The Framers responded to this oppressive regime by enshrining "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

The Ohio Supreme Court's decision threatens a regression to the sort of unreasonable government intrusion that the Fourth Amendment was ratified to prevent, and does so based on a sophism that the Framers would have emphatically rejected—namely, an otherwise-unconstitutional invasion can become a perfectly acceptable law enforcement tactic if a search is sufficiently subdivided.

To be sure, as petitioner argues, that holding cannot be squared with the plain meaning of the word "search," nor with this Court's Fourth Amendment jurisprudence, which focuses on the intrusion of the government act itself, not on how many people it took to conduct. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("[A] violation of the [Fourth] Amendment is 'fully accomplished' at the time of an unreasonable government intrusion."); *United States* v. *Leon*, 468 U.S. 897, 906 (1984) ("The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself. . . ."). *Amicus* submits this brief to underscore just how much the Ohio Supreme Court's reasoning conflicts also with the historical understanding of searches and seizures

at the time the Fourth Amendment was adopted. The Framers would never have understood that their carefully crafted protections against unreasonable searches and seizures could be circumvented by involving more government agents in an already-intrusive search.

This Court should grant the petition.

ARGUMENT

I. The Fourth Amendment Is Properly Understood According to Its Meaning at the Founding.

The meaning of the Fourth Amendment depends on "historical understandings 'of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.'" *Carpenter* v. *United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Carroll* v. *United States*, 267 U.S. 132, 149 (1925)); see also *N. Y. State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2136 (2022) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." (citation and emphasis omitted)); *Boyd* v. *United States*, 116 U.S. 616, 624–25 (1886) (observing that the meaning of Fourth Amendment looks to "the contemporary or then recent history of the controversies on the subject, both in this country and in England"). Thus, conduct is a "search" if "such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *United States* v. *Jones*, 565 U.S. 400, 404–405 (2012). Applying that rubric here leaves no doubt that a "search" does not become *not* a "search" when its component parts are subdivided between multiple officials.

The tradition of collaborative searches can be traced back to the colonial-era practice of "writs of assistance," which, as the name denotes, cultivated a regime of assisted-search-by-mob. Described by John Adams as a key part of Britain's design for "conquering the English colonies, and subjecting them to the unlimited authority of Parliament," the writ of assistance empowered "custom house officers, tidewaiters, landwaiters, and all, to command all sheriffs and constables, &c., to attend and aid them in breaking open houses, stores, shops, cellars, ships, bales, trunks, chests, casks, packages of all sorts, to search for goods, wares, and merchandises, which had been imported against the prohibitions or without paying [] taxes." 10 Works of John Adams 246 (C. Adams ed. 1856). More perniciously, the writ of assistance also authorized royal officials to "commandeer—to dragoon, or impress—ordinary passersby to aid them in their invasions." Akhil R. Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 77–78 (1996); see also *Boyd*, 116 U.S. at 625 (recalling the practice of "issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods"); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1242 (2016). The ensuing warrantless searches were then often conducted by a small mob of government agents, accompanied by an ad hoc posse of nearby neighbors, shopkeepers, and unlucky passersby.

While the writs became especially abhorrent in the period just before the Revolution, their group-search mechanism was consistent with longstanding English search-and-seizure practices. For instance, in 1685, Parliament approved warrantless group searches for illicit tobacco and sugar imports, and authorized

agents to "appoint One or more Officer or Officers to Enter into all the Cellers Warehouses Store Cellers or other Places whatsoever belonging to such Importer to Search See and Try." 6 Statutes of the Realm (1685–1694), *Statutes of King James the Second* Ch. IV (Gr. Brit. Rec. Comm'n, 1819). In that same year, Parliament authorized similarly expansive searches for untaxed wine and vinegar imports, providing that "the Officers of His Majestyes Customes or such other Person or Persons as His Majestie shall Authorize and Appoint to collect the Duties ariseing by this Act shall have like Power and Authoritie to enter on board Shipps and Vessells and make Searches." *Id.* at Ch. III.

Parallel laws then proliferated across the colonies. In 1695, Maryland enacted a law empowering naval officers, "when and as often as he *or they* shall think fitt to Enter into any Ship or Vessell Tradeing to and from this Province or into any house Warehouse or other building and open any Trunk Chest Cask or fardel and Search." *Proceedings and Acts of the General Assembly, 1693–1697: Assembly Proceedings (Oct. 3–19, 1695)* 277, Archives of Md. (Aug. 2, 2018) (emphasis added). And in 1743, in an effort to seize contraband timber, the province of New Jersey proclaimed: the "Collector" or "any of his Deputies, and he *and they* are hereby empowered to enter on board every Raft, Float, Ship, Sloop, Boat, Flat or other Vessel, where he *or they* do suspect that any of the aforesaid Timber is, and there to make diligent Search for the same." *Acts of the General Assembly of the Province of New Jersey* 135 (Allison Samuel, 1776) (emphasis added).

By authorizing officers to act individually or in concert, using the phrase "they," these assemblies rejected any distinction between the conduct of one officer and

the conduct of two, and allowed for a search to be conducted by any number of individuals so long as the search was successful in uncovering the desired loot. The decision of how to proceed, and with how many officers, was left to each officer's discretion—though the intrusion into the colonists' homes, ships, and stores was likely more acute the more agents of the Crown joined in the search.

The colonists' contempt for these searches cannot be overstated. John Adams decried the writ as a "terrible and menacing monster." Adams, *supra*, at 217. This Court has, in fact, previously suggested that opposition to the writ was the spark that started the revolution. See *Boyd*, 116 U.S. at 625 (describing a 1761 argument against a search conducted pursuant to writ as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country"); Adams, *supra*, at 247–48 ("Every man of a crowded audience appeared to me to go away, as I did, ready to take 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.").

It was against this backdrop that the Fourth Amendment was ratified, reflecting "the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley* v. *California*, 573 U.S. 373, 403 (2014).

II. The Ohio Supreme Court's Decision Is Irreconcilable with the Fourth Amendment.

The Ohio Supreme Court's conclusion that no search occurs where one officer opens a door and a second of-

ficer looks inside it is incompatible with how the Framers would have understood a "search." The Fourth Amendment was specifically drafted in a context where agents of the Crown routinely dragooned lay mobs to toss warehouses and scour ships for contraband. It is impossible to conceive that any member of the founding generation would have accepted the notion that a search could become *not* a search through the artifice of subdivision. If anything, the squad-like nature of founding-era searches was precisely what made them so outrageous and invasive. It would have been bad enough for a single customs official to rummage through a colonist's home in pursuit of stashed sugar; such a search would become only more offensive if one or more neighbors were made to hold open doors and cabinets while a small platoon of customs officials scoured the insides.

Of course, this case does not involve a ship, sugar, or stamps. But "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132; *Jones*, 565 U.S. at 404–405 (holding that installation of a tracking device was "a physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted"); *Bruen*, 142 S. Ct. at 2132 (the "historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge").

The Fourth Amendment protects a tobacconist's cellar from search by a team of customs officials just as it protects petitioner's vehicle from search by one or more police officers. The Ohio Supreme Court's decision to the contrary diverges from the understanding of "unreasonable searches" at the time of the founding and from this Court's jurisprudence. This Court should grant the petition, and correct the Ohio Supreme

Court's cramped and historically misplaced understanding of the Fourth Amendment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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