No. 24-5381

IN THE

Supreme Court of the United States

NATHAN COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should overrule the frisk holding of *Terry v. Ohio*, 392 U.S. 1 (1968), which allows police officers to search people absent probable cause to arrest.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Those key ideas include the freedoms and rights protected by the Fourth Amendment to the United States Constitution, including in particular the freedom from unreasonable searches and seizures as understood by the original framers of the amendment. As part of its mission, AFPF appears as *amicus curiae* before federal and state courts.

AFPF is committed to defending the constitutional principles of liberty enshrined in the Bill of Rights. It believes all Americans should be shielded from the arbitrary exercise of the police power, a principle directly implicated in the present case.

SUMMARY OF ARGUMENT

This case does not concern the authority of the police to search an individual incident to a lawful arrest. Instead, the governmental power in question, recognized by the Court in *Terry v Ohio*, 392 U.S. 1 (1968),

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[1] All parties received timely notice of AFPF's intent to file this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part and no person other than *amicus curiae* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

authorizes the police to frisk an individual they have stopped for questioning absent probable cause that any crime has been committed or that the individual concerned is connected to a crime. A frisk, recognized by the *Terry* court as a search within the meaning of the Fourth Amendment, is an authorization of a physical trespass of a person on the mere suspicion that the individual might be carrying a weapon, leaving it to the subjective whim of the police officer whether to conduct the frisk. The Court's decision in *Terry* was not grounded in the text of the Fourth Amendment or the framers' understanding of the amendment's scope. In fact, the holding directly contradicts the protections enshrined in the Fourth Amendment. The Court should grant the Petition so that it may revisit the *Terry* frisk doctrine and overturn it.

ARGUMENT

I. THE FOURTH AMENDMENT IS A SHIELD AGAINST THE UNBRIDLED, ARBITRARY EXERCISE OF THE POLICE POWER.

The Fourth Amendment to the U.S. Constitution lies at the heart of individual liberty, privacy, and the protection of private property. In full, it provides:

> The 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.

The fundamental purpose of the Fourth Amendment is "to secure the privacies of life against arbitrary power . . . [and] to place obstacles in the way of

a too permeating police surveillance." *Carpenter v. United States*, 585 U.S. 296, 305 (2018) (cleaned up); *see Soldal v. Cook Cty*, 506 U.S. 56, 69 (1992) ("What matters is the intrusion on the people's security from governmental interference.").

"Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures," this Court affirmed in *Byrd v. United States*, stating further that:

> The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit police officers unbridled discretion to rummage at will among a person's private effects.

584 U.S. 395, 402–03 (2018) (cleaned up). But it is precisely a police officer's "unbridled discretion to rummage at will," not merely in a person's home but on the person himself, that is at issue in this case.

A. The Fourth Amendment protects against all physical invasions of people and their property.

Beginning with Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), Fourth Amendment jurisprudence became rooted in the idea of "reasonable expectations of privacy." *See, e.g.*, *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979). More recently, however, this Court has emphasized that the proper

means to vindicate the text and purpose of the Fourth Amendment is to return to first principles and focus on the Amendment's common law foundations in trespass.

The Fourth Amendment protects the "right of the people to be secure in their *persons, houses, papers, and effects*." U.S. Const., amend. IV (emphasis added). That text, explained the Court in *United States v. Jones*, "reflects [the Amendment's] close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." 565 U.S. 400, 405 (2012).

As the Court later explained, *Jones* was decided "based on the Government's *physical trespass* of the vehicle" upon which the FBI had placed a tracker. *Carpenter*, 585 U.S. at 307 (emphasis added). Similarly, in *Florida v. Jardines*, the Court emphasized that the Fourth Amendment "establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by *physically intruding* on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." 569 U.S. 1, 5 (2013) (cleaned up) (emphasis added).

In his concurrence in *Hudson v. Michigan*, Justice Kennedy likewise explained:

> As to the basic right in question, privacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic. This common understanding ensures

> respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force. It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry.

547 U.S. 586, 603 (2006) (Kennedy, J., concurring).

But it is not only protection against the physical intrusion of one's home or property that is central to the Fourth Amendment. The Amendment also protects against the physical trespass of persons. Indeed, protection against unreasonable searches or seizures of persons arguably is the most important since the Amendment lists "[t]he right of the people to be secure in their persons" first among the four items expressly included. Even the Court in *Terry v. Ohio*, recognized the heighted necessity under the common law and the Fourth Amendment of protecting persons:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Terry, 392 U.S. at 8–9 (quoting *Union Pac. Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891)); *see Horton v. Goose Creek Indep. Sch. Dist.,* 690 F.2d 470, 478 (5th Cir. 1982) ("[S]ociety recognizes the interest in the integrity of one's person, and the fourth amendment

applies with its fullest vigor against any intrusion on the human body.").

Thus, where there is a physical trespass or invasion—whether of "persons, houses, papers, or effects"—the question of "reasonable expectations of privacy" is not the primary test to apply in adjudicating claims of Fourth Amendment violations. The reasonable-expectations-of-privacy test is *in addition* to the core, common-law trespass test contained in the express text of the Amendment, and the former is unnecessary to address when the search or seizure in question involves a physical trespass. As *Jardines* explained:

> The *Katz* reasonable-expectations test has been added to, not substituted for, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.

569 U.S. at 11 (cleaned up); *see id.* ("Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."); *accord Jones,* 565 U.S. at 406–08; *Byrd,* 584 U.S. at 403–04; *Soldal*, 506 U.S. at 64–70; *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring).

B. A trespass without probable cause or a particularized warrant violates the common law core of the Fourth Amendment.

To help make the point that the Fourth Amendment is rooted in the common law of trespass—and applies with especial force in the context of searches of both persons and homes—the *Jones* court quoted Lord Camden's famous opinion in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765). *See* 565 U.S. at 405. *Entick* was one of a series of English cases decided in the mid-1760s that condemned the use of general warrants that had allowed the seizure of individuals, and all of their books and papers, based on the allegation of seditious libel for advocating political views disfavored by the Crown. This Court summarized this history and context in *Stanford v. Texas*:

> It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth, and eighteenth centuries. In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan. In later years warrants were sometimes more specific in content, but they typically authorized the arrest and search of the premises of all persons connected with the publication of a particular libel, or the arrest and seizure of all the papers of a named person thought to be connected with a libel. It was in the context of the latter kinds of general warrants that the battle for individual liberty and privacy was finally won—in the landmark cases of *Wilkes v. Wood* and *Entick v. Carrington*.

379 U.S. 476, 482–83 (1964); *see Carpenter*, 585 U.S. at 303 ("The Founding generation crafted the Fourth Amendment as a 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.") (cleaned up); *Payton v. New York*, 445 U.S. 573, 583 n.21 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment.").[2]

In *Boyd v. United States*, this Court quoted the judgment of Lord Camden in *Entick* verbatim and at length. It characterized the case "as one of the landmarks of English liberty," 116 U.S. 616, 626 (1886), and further explained its importance to the U.S. Constitution:

> [Lord Camden's judgment] was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time. As every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and

[2] *Cf.* James Otis, *Against Writs of Assistance* (1761) ("Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.").

> ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Id. at 626–27; *see* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833) (the Fourth Amendment "seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more. than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution."); *Stanford*, 379 U.S. at 486 ("Two centuries have passed since the historic decision in *Entick v. Carrington*, almost to the very day. The world has greatly changed, and the voice of nonconformity now sometimes speaks a tongue which Lord Camden might find hard to understand. But the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King.").

In further explaining the relevance of *Entick* in the American context, the *Boyd* court explained that, although the searches and seizures at issue in *Entick* had been violent, that was *not* the essence of the violation. Rather, it was the unjustified physical trespass of a person and his property:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; *but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence*,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Campden's judgment.

116 U.S. at 630 (emphasis added); *see Carpenter*, 585 U.S. at 303 ("The basic purpose of this Amendment, our cases have recognized, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.") (cleaned up); *Henry v. United States*, 361 U.S. 98, 100–01 (1959) ("The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required. [The colonies] rebelled against that practice . . . [and] [t]hat philosophy later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even strong reason to suspect was not adequate to support

a warrant for arrest. And that principle has survived to this day.") (footnotes omitted).

Thus, the meaning of *Entick,* and the numerous Supreme Court cases since then that have hearkened back to it to explain the Fourth Amendment, is that government acts illegitimately when, without a proper nexus to an actual crime or alleged wrongdoing (that is, probable cause), or a properly particularized warrant,[3] it intrudes on an individual or his property in an attempt to find or secure evidence. *See Jones*, 565 U.S. at 408 n.5.

In such circumstances, there is no need to assess whether a plaintiff's reasonable expectations of privacy have been violated or any other standards are applicable because the protections identified in the Constitution—the supreme law of this Republic—are immediately applicable. *Cf. Henry*, 361 U.S. at 102 ("It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen."); *Terry*, 392 U.S. at 39 (Douglas, J., dissenting) ("Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable

[3] *See, e.g.*, *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 309 (1967) ("But if its rejection [of the 'mere evidence' rule] does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate."); *Henry*, 361 at 100 ("[I]t is the command of the Fourth Amendment that no warrants for either searches or arrests shall issue except 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.").

The Fourth Amendment, in other words, precludes any intrusion or trespass unless the government can justify its action with probable cause. Mere suspicion, even strong suspicion, is not enough. This Court summarized this core of the Fourth Amendment in *Dunaway v. New York*:

> The requirement of probable cause has roots that are deep in our history. Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that common rumor or report, suspicion, or even strong reason to suspect was not adequate to support a warrant for arrest. The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the reasonableness requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.

442 U.S. 200, 213 (1979) (cleaned up); *cf. Terry*, 392 U.S. at 37 (Douglas, J., dissenting) ("In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. . . . The term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.' Moreover, the meaning of 'probable cause' is deeply imbedded in our constitutional history.").

II. THE COURT SHOULD GRANT THE PETITION BECAUSE *TERRY V. OHIO* WAS WRONGLY DECIDED AND VIOLATES THE COMMON LAW CORE OF THE FOURTH AMENDMENT.

The Petition presents a compelling argument for why this particular case presents the Court with an appropriate opportunity to revisit *Terry v. Ohio* and thus why it should grant certiorari here. *Amicus curiae* AFPF agrees with that presentation and adds its support to it. In further support of the Petition, AFPF notes the following.

Terry v. Ohio expands the right of the government over and against—and at the expense of—the right of individuals to be secure from governmental intrusion. It expressly found that the police frisk at issue was a search within the meaning of the Fourth Amendment and conducted without probable cause, *Terry*, 392 U.S. at 15–19,[4] and yet it nevertheless found the practice (both generally and in *Terry*) to be constitutional under a totality of the circumstances test. *Id.* at 20–31. For the expansion of such government power to the detriment of individual freedom, the opinion is notable for its failure to ground its holding in a rigorous examination of the meaning of the Fourth Amendment's text, its historical context, or the framers' intent. Indeed, the Court made a virtue of its failure, explaining that "[g]iven the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's

[4] *See, e.g., Terry*, 392 U.S. at 19 ("We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'").

power when he confronts a citizen without probable cause to arrest him." *Id.* at 16.

It is therefore unclear on what ground, other than the majority's preferred policy outcome, the Court made its decision. Indeed, in his dissent, Justice Douglas found the majority opinion unfathomable:

> But it is a mystery how that 'search' and that 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause' to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed. . . . We hold today that the police have greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action. We have said precisely the opposite over and over again.

Id. at 35–36; *see id.* at 38 ("The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime.").

In addition, it appears the *Terry* court not only ignored the common-law principles at the core of the Fourth Amendment but relied to some degree on its then recently announced "expectations-of-privacy" test. *See id.* at 9 (noting that the Court "recently held that the Fourth Amendment protects people, not places, and wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free

from unreasonable governmental intrusion.") (cleaned up); *id.* at 34 (Harlan, J., concurring) (the circumstances justified the police officer's "right to interrupt Terry's freedom of movement and invade his privacy[.]"); *id.* at 31 ("Mr. Justice Black concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States* and the concurring opinion in *Warden v. Hayden*.").

But as outlined above, where there is a physical invasion by the police of a person's body, reliance on expectations of privacy to the exclusion of the common law of trespass is not warranted. The Fourth Amendment protects both person and places against trespass, and expectations of privacy are superfluous when the police *physically* invade the person or his property. Absent probable cause or a particularized warrant, such intrusions categorically are prohibited.

Terry v. Ohio misapplied and misunderstood the full scope of the protections afforded by the Fourth Amendment. This Court should revisit that holding and reaffirm the Amendment's core common-law foundations.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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