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No. 2024-06363

IN THE NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

IN THE MATTER OF A'KAHRI R.,

A Child Under Eighteen Years of Age Alleged To Be Neglected Pursuant to Article 10 of The Family Court Act

AARON R.,

Respondent,

KYON K.,

Nonparty-Appellant,

–against–

COMMISSIONER OF THE ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioner-Respondent.

NOTICE OF MOTION BY AMERICANS FOR PROSPERITY FOUNDATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF NONPARTY-APPELLANT KYON K.

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March 12, 2025

New York County Family Court Docket No. NN-00057-24

PLEASE TAKE NOTICE, that on the attached affirmation of Michael S. O'Reilly, sworn to on March 12, 2025, and all exhibits attached thereto, including a copy of the Brief of *Amicus Curiae* Americans for Prosperity Foundation in Support of Nonparty-Appellant, the undersigned will move this Court, at 27 Madison Avenue, New York, NY, 10010, on Monday March 24, 2025, at 10:00 am, or as soon thereafter as is practicable, for an order granting leave to Americans for Prosperity Foundation to file with this Court the attached Brief of *Amicus Curiae* in Support of Nonparty-Appellant in the above-captioned proceeding.

Dated: March 12, 2025
New York, NY

/s/ Michael S. O'Reilly

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AFFIRMATION OF MICHAEL S. O'REILLY IN SUPPORT OF MOTION BY AMERICANS FOR PROSPERITY FOUNDATION TO FILE *AMICUS CURIAE* BRIEF

New York County Family Court Docket No. NN-00057-24

Michael S. O'Reilly, an attorney admitted to practice before the courts of New York, affirms as follows:

1. I am counsel to Americans for Prosperity Foundation ("AFPF") and submit this affirmation in support of AFPF's motion for leave to file the attached brief as *amicus curiae* in support of the Nonparty-Appellant Kyon K. in the above-captioned appeal.

2. AFPF is a 501(c)(3) nonprofit organization. It works to educate and train Americans to advocate for the ideas, principles, and policies of a free and open society. Those key ideas include constitutionally limited government and individual constitutional rights, including those recognized under the Fourth and Fourteenth Amendments to the United States Constitution. As part of its mission, I understand that AFPF regularly appears as *amicus curiae* before state and federal courts.

3. AFPF seeks leave to file the attached *amicus curiae* brief to address important and relevant issues arising under the Fourth Amendment to the U.S. Constitution and Article I, Section 12 of the New York Constitution. Both constitutional provisions exist to protect individual liberty, privacy, and private property, and their enforcement by the courts is a fundamental check against the unbridled, arbitrary exercise of police power against innocent residents of the United States. These constitutional provisions apply directly to the proceedings at issue here.

4. The Opening Brief for Nonparty-Appellant Kyon K. introduced and argued (among other issues) the meaning of the Fourth

Amendment and its application to the present case, but because of space constraints, that brief did not explore the necessary historical reasons for the adoption of the amendment, the full ramifications of recent developments in U.S. Supreme Court Fourth Amendment jurisprudence, and relevant New York caselaw construing the Fourth Amendment. The historical context, the Supreme Court's more contemporaneous pronouncements, and the meaning of the Fourth Amendment as construed by New York courts all make it clear that the order of the New York County Family Court granting New York state agents an unconstrained and limitless right to search the Nonparty-Appellant's home and the person of her son cannot stand. AFPF's *amicus curiae* brief will provide the Court with necessary perspective and help it properly apply the relevant Fourth Amendment principles to the constitutional questions at the heart of this case.

5. In addition, AFPF's *amicus curiae* brief addresses the complementary and, at times, higher level of protection against unreasonable searches and seizures under the New York Constitution. Article I, Section 12 of the New York Constitution mirrors the language of the Fourth Amendment and New York courts often strive to remain

consistent with the Fourth Amendment jurisprudence of the U.S. Supreme Court. But the New York Court of Appeals also has stressed that state constitutional law may and often does provide a greater level of protection against unreasonable searches and seizures than that of the U.S. Constitution. As the Court of Appeals has noted, "this court has adopted independent standards under the State Constitution when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens." *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304 (1986) (quotation marks omitted).

6. The attached *amicus curiae* brief helps situate relevant New York caselaw arising under the New York Constitution to show that, together with the U.S. Constitution, there is no justification for the order of the New York County Family Court, which subjected the Nonparty-Appellant and her son, both of whom were innocent of any wrongdoing, to an ongoing, limitless search of home and person.

7. For all of these reasons, and for those presented in greater depth in the *amicus curiae* brief itself, AFPF respectfully requests leave of the Court to file the attached *amicus curiae* brief.

I affirm this 12th day of March, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: March 12, 2025
New York, NY

/s/ Michael S. O'Reilly

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BRIEF OF *AMICUS CURIAE*

Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Nonparty-Appellant Kyon K. ("Ms. K.").[1]

IDENTITY AND INTEREST OF *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 constitutionally limited government and individual constitutional rights, including those recognized under the Fourth and Fourteenth Amendments to the United States Constitution. As part of its mission, AFPF regularly appears as *amicus curiae* before state and federal courts.

SUMMARY OF ARGUMENT

This case concerns a sweeping order of the New York County Family Court that subjected Ms. K. and her son to an ongoing, limitless search of home and person, in violation of the prohibition against

[1] Pursuant to the Practice Rules of the Appellate Division (22 NYCRR) § 600.4(b) and §1250.4(f), this brief is filed under cover of a Notice of Motion by Americans for Prosperity Foundation for Leave To File *Amicus Curiae* Brief in Support of Nonparty-Appellant Kyon K. AFPF affirms that 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.

unreasonable searches and seizures in both the United States Constitution and the New York State Constitution.

Ms. K. alleged that her son's father, Aaron R., committed violence against her. After investigating, the Administration for Children's Services ("ACS") filed a neglect petition against Mr. R. ACS found that Ms. K. was a fit mother and determined that her son A'Kahri R. should remain in her home. Mr. R. was excluded from the home through a stay-away order. Nevertheless, the Family Court issued an order authorizing "ACS supervision" of Ms. K. as a condition for her son remaining in her care, including unlimited searches of her home and her son's person.

The Family Court order was issued notwithstanding the lack of any probable cause that Ms. K. committed or was likely to commit a crime, or that she had acted inappropriately in any manner toward her son. Nor was the court order limited or constrained to any time, place, or manner. The order, in substance and form, was no different than the general warrants that have long been anathematized in both the English and American legal traditions and that are directly prohibited by the Fourth Amendment to the U.S. Constitution, which is applicable to the States through the Fourteenth Amendment, and Article I, § 12 of the New York

Constitution. As such, the order violated the constitutional rights of Ms. K. and her son.

ARGUMENT

I. The protection against unreasonable searches and seizures is a shield against the unbridled, arbitrary exercise of the police power.

The Fourth Amendment to the U.S. Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), lies at the heart of individual liberty, privacy, and the protection of private property. It 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.

U.S. Const., amend. IV.

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. Ill.*, 506 U.S. 56, 69 (1992) ("[T]he reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question

whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference.").

New York jurisprudence reiterates this understanding of the Fourth Amendment. As the Court of Appeals explained: "The purpose of this prohibition [the Fourth Amendment] is to safeguard the privacy and security rights of individuals against arbitrary invasions by the government." *People v. Butler*, 41 N.Y.3d 186, 191 (2023).

Article I, Section 12 of the New York Constitution mirrors the language of the Fourth Amendment, and it serves the same purpose—with the addition that, at least in some circumstances, it provides an even *greater* level of protection than that of the U.S. Constitution:

> In the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties. Our conduct in the area of Fourth Amendment rights has been somewhat more restrained because the history of section 12 supports the presumption that the provision against unlawful searches and seizures contained in NY Constitution, article I, § 12 conforms with that found in the 4th Amendment, and that this identity of language supports a policy of uniformity between State and Federal courts. . . . The interest of Federal-State uniformity, however, is simply one consideration to be balanced against other considerations that may argue for a different State rule. When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor. Thus,

> notwithstanding an interest in conforming our State Constitution's restrictions on searches and seizures to those of the Federal Constitution where desirable, this court has adopted independent standards under the State Constitution when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens.

People v. P.J. Video, Inc., 68 N.Y.2d 296, 303–04 (1986) (cleaned up); *see also People v. Robinson*, 97 N.Y.2d 341, 362 (2001) (Levine, J., dissenting) ("This Court, in applying the identical language of the first paragraph of article I, § 12 of the State Constitution, has afforded citizens even greater protections [than the Fourth Amendment] in order to fulfill the underlying constitutional purpose of preventing not only unsupported searches and seizures, but also the arbitrary exercise of lawful authority to seize or search.").

"Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures," the U.S. Supreme Court reaffirmed 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 the "unbridled discretion to rummage at will among a person's private effects," *id.*, that the Family Court's order allowed in this case, in violation of Ms. K. and her son's federal and state constitutional rights.

A. The Fourth Amendment protects against all physical intrusions of people and their property, with or without consideration of reasonable expectations of privacy.

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, the U.S. Supreme Court has emphasized that the proper means to vindicate the text and purpose of the Fourth Amendment is to return to first principles by focusing on the Amendment's common law foundations in trespass and property.

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 U.S. Supreme Court in

United States v. Jones, "reflects [the Fourth 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 Supreme Court later emphasized, *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 explained 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 and emphasis added).

In his concurrence in *Hudson v. Michigan*, Justice Kennedy likewise explained the importance of enforcing the Fourth Amendment to protect the sanctity of the home against intrusion by the state:

> 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); *cf.* *Lange v. California*, 594 U.S. 295, 309–10 (2021).

But it is not only the physical intrusion of one's home or property that is central to Fourth Amendment protections. The Amendment also protects against the physical trespass of persons. Protection against unreasonable searches or seizures of persons arguably is preeminent since it is listed first, as the New York Court of Appeals has explained:

> The Fourth Amendment protects those important [property] interests from unreasonable intrusion by the government. Indeed, although this Court has at times described governmental intrusion into the home as the chief evil against which the Fourth Amendment is directed the text of the Constitution notably lists "[t]he right of the people to be secure in their persons" first among the several areas entitled to protection, and the Supreme Court has recognized the heightened nature of that interest.

Butler, 41 N.Y.3d at 195 (citing cases); *see* *Terry v. Ohio*, 392 U.S. 1, 9 (1968) ("[A]s 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.'") (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *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 intrusion—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 or property 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 intrusion. 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); *see United States v. Weaver*, 9 F.4th 129, 141 (2d Cir. 2021) (en banc) ("The Supreme Court has articulated two tests for determining whether a police officer's conduct constitutes a 'search' for purposes of the Fourth Amendment: whether the police officer *physically intrudes* on a constitutionally protected area and, if not, whether the officer violates a person's reasonable expectation of privacy.") (emphasis in original) (cleaned up).

This same conclusion applies under the New York Constitution. *See People v. Levan*, 62 N.Y.2d 139, 144 (1984) ("Because physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, defendant has no burden to show he had an

expectation of privacy in his apartment. Both the Fourth Amendment and section 12 of article I of the New York Constitution expressly provide that the right of the people to be secure in their houses shall not be violated.") (cleaned up).

B. A physical intrusion without probable cause or a particularized warrant violates the Fourth Amendment.

To help make the point that the Fourth Amendment is rooted in the common law—and that it applies with especial force in the context of the physical search 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 Jones*, 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 allegations of seditious libel for advocating political views disfavored by the Crown. The U.S. Supreme 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 (1965); *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 (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."); *cf.* James Otis, *Against Writs of Assistance* (1761)[2] ("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

[2] *Available at* https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-otis-against-writs-of-assistance-february-24-1761 (last visited Feb. 25, 2025).

writ, if it should be declared legal, would totally annihilate this privilege."); *Robinson*, 97 N.Y.2d at 361 n.1 (Levine., J., dissenting) ("The arbitrariness of the writs of assistance was denounced in a famous prerevolutionary speech by Boston patriot James Otis, in that they placed 'the liberty of every man in the hands of every petty officer.'") (citing and quoting *Boyd v. United States* and *Payton v. New York*).

In *Boyd v. United States*, the U.S. Supreme 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 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)[3] (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."); *Riley v. California*, 573 U.S. 373, 403 (2014) ("Our cases have recognized that the Fourth Amendment was 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. Opposition to such searches was in fact one of the driving forces behind the Revolution[.]").

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 and had caused property

[3] *Available at* https://lonang.com/library/reference/story-commentaries-us-constitution/sto-344/ (last visited Feb. 25, 2025).

damage, that violence was *not* the essence of the violation. Rather, it was the physical intrusion of a person and property without proper warrant:

> 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).

In *Henry v. United States*, the U.S. Supreme Court articulated these same principles under the rubric of probable cause, explaining that a proper warrant to physically intrude on a person or his property requires more than mere or even strong suspicion.

> 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.

361 U.S. 98, 100–01 (1959) (footnotes omitted).

Thus, the meaning of *Entick* and the numerous Fourth Amendment cases that have followed in its line is that government acts illegitimately when, without a proper nexus to an actual crime or alleged wrongdoing (probable cause) or a properly particularized warrant, it intrudes on an individual or his property in an attempt to find or secure evidence of some kind. *See Henry*, 361 U.S. 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.").

Where a search of a person or home takes place without probable cause, then, there is no need to assess whether a plaintiff's reasonable expectations of privacy have been violated or whether any other

standards are applicable because the protections identified in the Constitution—the supreme law of this Republic—are immediately applicable. *Cf. id.* 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 grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.").

To summarize: the Fourth Amendment protections preclude any physical intrusion by the government without probable cause or by general warrant. Mere suspicion, even strong suspicion, is not enough and all warrants authorizing a search or seizure must issue with particularized descriptions of the persons, places, papers, and effects to be searched. The U.S. Supreme Court has reemphasized these requirements and principles on numerous occasions, including as follows 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 Family Court order violated the rights of Ms. K. and her son under the U.S. and New York Constitutions.

The above-described understanding of the Fourth Amendment of the U.S. Constitution and Article I, § 12 of the New York Constitution, both established to protect against the government's physical intrusion

of persons, houses, papers, and effects without probable cause or particularized warrants, applies directly to the instant case.

As a matter of New York law, a Family Court order stands in the place of a search warrant. *Shaheed v. Kroski*, 833 F. App'x 868, 870–71 (2d Cir. 2020); *Southerland v. City of New York*, 680 F.3d 127, 144 n.15 (2d Cir. 2012); *Nicholson v. Scoppetta*, 344 F.3d 154, 176 (2d Cir. 2003). Here, that warrant authorized the unlimited search of the person of Ms. K.'s son and the search of their home, which was carried out on a weekly or biweekly basis over many months. It is clear, however, that that warrant does not pass constitutional muster because it was not issued upon probable cause or with particularity.

It is undisputed that Ms. K. never did anything wrong in this matter and was never accused of abuse or neglect of her child. Ms. K. retained her right to raise and care for her son, never lost that right, and was never even accused of not being a fit parent. Indeed, she did nothing to warrant *any* government oversight of her role as parent. Notwithstanding her innocence, the Family Court order granted state officials not only the right to search Ms. K.'s home and the person of her son, but to do so without limitation and at their discretion. That warrant

must be rejected for failure to meet the particularity and probable cause requirements of the U.S. and New York Constitutions.

The best description of the order used to justify the physical invasion and search of Ms. K.'s son and their home is that it operated as a general warrant allowing Child Services to go fishing for possible evidence of wrongdoing. But, as the above analysis makes clear, that kind of unbridled, general authority to search place and persons is unconstitutional; it is the precise abuse prohibited by the unreasonable search and seizure provisions in both the U.S. and New York Constitutions. *Cf.* *Stanford*, 379 U.S. at 486 (protection against unreasonable searches and seizures means that "no official of the State shall ransack [a person's] home and seize his books and papers under the unbridled authority of a general warrant.").

Here, the Family Court recognized that Ms. K. had not done anything wrong, and neither it nor any other court had ever judged her inadequate to exercise full custody over her son. There were no grounds to suspect her of abuse, neglect, or any other wrongdoing, nor were there any exigent circumstances that might have justified the intrusions by Child Services. Indeed, as a non-party to the proceeding below, she was

punished by and subjected to the court order only because of the wrongdoing of a third party who did not reside with Ms. K. or her son and who, in fact, had been excluded from that home by both Ms. K. and an order of protection.

It cannot therefore be doubted that this case involves a court order that operates no differently than the general warrants and writs of assistance that the Fourth Amendment was specifically drafted to abolish. The constitutional rights of Ms. K. and her son against unreasonable search and seizure were violated.

CONCLUSION

For the foregoing reasons, the Court should declare the Family Court order allowing for the unlimited intrusion and search of Ms. K.'s home and the person of her son to be an unconstitutional violation of the right to be free of unreasonable searches and seizures under both the U.S. and New York Constitutions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the printing specifications of §1250.8(f) of the Practice Rules of the Appellate Division (22 NYCRR) because it is double-spaced and was prepared in a serifed, proportionally spaced typeface (14-point Century Schoolbook font) using Microsoft Word for Microsoft 365 and has a word count, excluding the table of contents, table of authorities, proof of service, and certificate of compliance, of 4627 words.

/s/ Michael S. O'Reilly
Michael S. O'Reilly

Dated: March 12, 2025
New York, NY

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2024, I electronically filed the above Notice of Motion by Americans for Prosperity Foundation for Leave To File *Amicus Curiae* Brief in Support of Nonparty-Appellant Kyon K., including the attached Brief of *Amicus Curiae* Americans for Prosperity Foundation in Support of Nonparty-Appellant Kyon K., with the Clerk of the Court. I further certify that I served a true copy of this filing by email on the following:

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