No. 2023-10606

IN THE NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

IN THE MATTER OF SAPPHIRE W. (ANONYMOUS).

Administration for Children's Services,
Petitioner-Respondent;

Kenneth L. (Anonymous),
Respondent;

Sharneka W. (Anonymous),
Nonparty-Appellant.

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

Lee A. Steven
Ryan P. Mulvey
AMERICANS FOR PROSPERITY FOUNDATION
4201 WILSON Boulevard
Suite 1000
Arlington, VA 22203
571-329-1716
571-444-2841
lsteven@afphq.org
rmulvey@afphq.org

/s/ Michael S. O'Reilly
Michael S. O'Reilly
John A. Basinger
SAUL EWING LLP
1270 Avenue of the Americas
Suite 2800
New York, NY 10020
212-980-7226; 212-980-7231
michael.oreilly@saul.com
john.basinger@saul.com
Attorneys for Amicus Curiae

March 18, 2024

Kings County Family Court Clerk's Index No. NN-17879/23

PLEASE TAKE NOTICE, that on the attached affirmation of Michael S. O'Reilly, sworn to on March 18, 2024, and all exhibits attached thereto, including a copy of the Brief of *Amicus Curiae* Americans for Prosperity Foundation in Support of the Nonparty-Appellant, the undersigned will move this Court, at 45 Monroe Pl, Brooklyn, NY 11201, on April 1, 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* Americans For Prosperity Foundation in Support of the Nonparty-Appellant, in the above-captioned proceeding.

Dated: March 18, 2024
New York, NY

/s/ Michael S. O'Reilly

Michael S. O'Reilly
John A. Basinger
Counsel for *Amicus Curiae*
Americans for Prosperity Foundation
SAUL EWING ARNSTEIN & LEHR LLP
1270 Avenue of the Americas
Suite 2800
New York, NY 10020
212-980-7226; 212-980-7231
michael.oreilly@saul.com
john.basinger@saul.com

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

Kings County Family Court Clerk's Index No. NN-17879/23

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 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, AFPF regularly appears as *amicus curiae* before state and federal courts.

3. AFPF seeks leave to file the attached *amicus* 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 the police power against innocent residents of the United States. Both of these constitutional provisions apply directly to the order of the Kings County Family Court at issue here.

4. The Opening Brief of the Nonparty-Appellant was able to introduce and argue the basic meaning of the Fourth Amendment and its application to the present case, but because of space constraints, that

brief was unable to explore the necessary historical reasons behind 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 Kings Court Family Court cannot stand. AFPF's *amicus* 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, and again because of space constraints, the Nonparty-Appellant's Opening Brief was unable to address any of 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 made it clear that state constitutional law may and often does provide a greater

level of protection against unreasonable search and seizure 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).

6. The attached *amicus* brief helps situate relevant New York caselaw arising under the New York Constitution to show that, together with the U.S. Constitution, there simply is no justification for the order of the Kings County Family Court, which subjects the Nonparty-Appellant and her daughter, both of whom are 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* brief itself, AFPF respectfully requests leave of the Court to file the attached *amicus* brief.

I affirm this 19th day of March, 2024, 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 19, 2024
New York, NY

/s/ Michael S. O'Reilly

Michael S. O'Reilly
John A. Basinger
Counsel for *Amicus Curiae*
Americans for Prosperity Foundation
SAUL EWING ARNSTEIN & LEHR LLP
1270 Avenue of the Americas
Suite 2800
New York, NY 10020
212-980-7226; 212-980-7231
michael.oreilly@saul.com
john.basinger@saul.com

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Lee A. Steven
Ryan P. Mulvey
AMERICANS FOR PROSPERITY FOUNDATION
4201 WILSON Boulevard
Suite 1000
Arlington, VA 22203
571-329-1716
571-444-2841
lsteven@afphq.org
rmulvey@afphq.org

/s/ Michael S. O'Reilly
Michael S. O'Reilly
John A. Basinger
SAUL EWING LLP
1270 Avenue of the Americas
Suite 2800
New York, NY 10020
212-980-7226; 212-980-7231
michael.oreilly@saul.com
john.basinger@saul.com

Attorneys for Amicus Curiae

March 18, 2024

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BRIEF OF *AMICUS CURIAE*

Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Nonparty-Appellant Sharneka W. ("Ms. W.").[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 Kings County Family Court that subjects Ms. W. and her daughter to an ongoing, limitless search of home and person, in violation of the prohibition against

[1] Pursuant to the Rules of the Appellate Division, Second Department (22 NYCRR) § 670.4(c) and the Practice Rules of the Appellate Division (22 NYCRR) §1250.4(f), this brief is filed under cover of a Notice of Motion for Leave to File *Amicus Curiae* Brief in Support of the Nonparty-Appellant. 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.

The Family Court order was issued notwithstanding the lack of any probable cause that Ms. W. committed or is likely to commit a crime, or that she has acted inappropriately in any manner toward her daughter. Nor is the court order limited or constrained to any time, place, or manner. The order, in substance and form, is no different than a general warrant that has long been anathematized in both the English and American legal traditions and is 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 violates the constitutional rights of Ms. W. and her daughter and must be vacated.

ARGUMENT

I. Under both the U.S. and New York State Constitutions, the protection against unreasonable searches and seizures shields against the unbridled, arbitrary exercise of the police power.

The Fourth Amendment to the U.S. Constitution, applicable directly to the United States and 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. 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). New York jurisprudence reiterates this understanding of the Fourth Amendment. *See People v. Butler*, 2023 WL 8720178, *2 (N.Y. Dec. 19, 2023) ("The purpose of this prohibition is to safeguard the privacy and security rights of individuals against arbitrary invasions by the government.").

Article I, Section 12 of the New York Constitution mirrors the language of the Fourth Amendment, and it also serves the same purpose—with the additional caveat 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*.

> 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 allows in this case, in violation of Ms. W. and her daughter's federal and state constitutional rights.

II. The Fourth Amendment protects against physical invasions of people and property in addition to invasions of personal 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). In more recent years, however, the Supreme Court has emphasized that the proper means to vindicate the purposes of the Fourth Amendment is to return to first principles by focusing on the Amendment's foundation in property and trespass. As quoted above, 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 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 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).

And it is not only the physical intrusion of one's home but also the physical trespass of persons that is central to Fourth Amendment protections. As the New York Court of Appeals recently explained:

> The Fourth Amendment protects those important 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, 2023 WL 8720178 at *4 (citing cases).

Thus, where there is a physical trespass—on "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 trespass-based test contained in the express text of the Amendment, and the former is unnecessary to address when the search 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 v. Cook Cty*,

506 U.S. 56, 64 (1992); *United States v. Knotts*, 460 U.S. 276, 286 (1983) (Brennan, J., concurring).

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).

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 homes and persons—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. The 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 (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 (2003) ("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 writ, if it should be declared legal, would totally annihilate this privilege.").[3]

Understanding the context of *Entick* is instructive, as it parallels what the Family Court order accomplishes in the instant case. As one commentator has summarized the case:

> The defendants were four of the King's messengers who had acted pursuant to a warrant "to search for and seize the plaintiff and his books and papers" that was issued by Lord Halifax, who had recently been appointed secretary of state. The defendants broke into Entick's home "with force and arms" and then proceeded over the next four hours to break down doors and open locks in an effort to find evidence of seditious libel that could lead to a criminal prosecution.

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[2] Available at https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-otis-against-writs-of-assistance-february-24-1761 (last visited Mar. 11, 2024).

[3] *See People v. Robinson*, 97 N.Y.2d at 362 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*).

Richard A. Epstein, Entick v. Carrington *and* Boyd v. United States*: Keeping the Fourth and Fifth Amendments on Track*, 82 U. Chi. L. Rev. 27, 29 (2015).

In *Boyd v. United States*, the U.S. Supreme Court quoted the judgment of Lord Camden in *Entick* at length and characterized it "as one of the landmarks of English liberty." 116 U.S. 616, 626 (1886). It 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* Epstein, *supra,* at 32 ("The most obvious way to examine these clauses [*i.e.,* the Fourth and Fifth Amendments] is to note that they are clearly an effort to mimic in the Bill of Rights the protection that Lord Camden offered in *Entick* against 'a warrant to search and seize' the plaintiff's papers."); 3 Joseph Story, *Commentaries on the*

Constitution of the United States § 1902 (1833)[4] (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.").

In further explaining the relevance of *Entick* in the American context, the *Boyd* court stated that the violent manner in which the search took place was *not* the essence of the violation, but rather the trespass of an innocent man's security and 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.

[4] Available at https://lonang.com/library/reference/story-commentaries-us-constitution/sto-344/ (last visited Mar. 11, 2024).

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).

Thus, the meaning of *Entick,* and the numerous Supreme Court cases since 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,[5] or a properly particularized warrant,[6] it intrudes on an individual and his property in an attempt to find or secure evidence of some kind. *See Jones*, 565 U.S. at 408 n.5 ("[A] seizure of property occurs, not when there is a trespass, but when there is some meaningful interference with an individual's possessory interests in that property. Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that what was

[5] *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) ("There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.").

[6] *Hayden*, 387 U.S. at 309 ("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.").

present here: an attempt to find something or to obtain information.") (cleaned up); *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.").

To summarize: both the Fourth Amendment and Article I, § 12 of the New York Constitution are implicated whenever there is a trespass by the government on a person, or his house, papers, or effects, in an attempt to secure information not yet in its possession. In such circumstances, there is no need to assess whether a plaintiff's reasonable expectations of privacy have been violated because the constitutional protections are immediately applicable. And those protections preclude intrusion unless the government can justify its search with probable

cause and particularized descriptions of the persons, places, papers, and effects to be searched.

III. The Family Court order violates the rights of Ms. W. and her daughter 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 trespass of persons, houses, papers, and effects simply to determine if it might discover incriminating evidence, applies directly to the instant case.

The Family Court order at issue authorizes the search of the person of Ms. W.'s daughter and the search of their home. As a matter of New York law, the Family Court order stands in the place of a 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). But that warrant does not pass constitutional muster because it was not issued with probable cause or particularity.

It is undisputed that Ms. W. has done nothing wrong and has never been accused of abuse or neglect of her child. Ms. W. retains her right to raise and care for her daughter, has never lost that right, and has never

been accused of not being a fit parent. Indeed, she has done nothing to warrant *any* government oversight of her role as parent. Notwithstanding her innocence, the order grants government officials not only the right to search Ms. W.'s home and the person of her daughter, but to do so without limitation and at their discretion. That warrant must be rejected for failure to meet the particularity and probable cause requirement of the U.S. and New York Constitutions.

The best description of the Order used to justify the trespass and search of Ms. W.'s daughter and their home is that it operates as a general warrant allowing Child Services to go fishing for possible evidence of wrongdoing. But that kind of unbridled, general authority to search place and persons is not constitutional. As *Carpenter* explains, "The Court usually requires some quantum of individualized suspicion before a search or seizure takes place." 585 U.S. at 317 (cleaned up); *see 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."). There is no "individualized suspicion" here because the Family Court recognized that Ms. W. had never done anything wrong

and had never been adjudged inadequate to exercise full custody over her daughter. Indeed, as a non-party to the proceeding below, she is being punished by and subjected to the court order because of the wrongdoing of a third party who does not reside with Ms. W. or her daughter and who in fact has been excluded from that home by both Ms. W. and an order of protection.

Under the applicable common law principles of trespass, it cannot 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. W. and her daughter against unreasonable search and seizure have been infringed. The court order must be vacated.

CONCLUSION

For the foregoing reasons, the Court should vacate the Family Court order allowing for the unlimited invasion and search of Ms. W.'s home and the person of her daughter.

Respectfully submitted,

Lee A. Steven
Ryan P. Mulvey
AMERICANS FOR PROSPERITY FOUNDATION
4201 WILSON Boulevard
Suite 1000
Arlington, VA 22203
571-329-1716
571-444-2841
lsteven@afphq.org
rmulvey@afphq.org

/s/ Michael S. O'Reilly
Michael S. O'Reilly
John A. Basinger
SAUL EWING LLP
1270 Avenue of the Americas
Suite 2800
New York, NY 10020
212-980-7226; 212-980-7231
michael.oreilly@saul.com
john.basinger@saul.com

Attorneys for Amicus Curiae

March 18, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the printing specifications of Rule 1250.8 of the Practice Rules of the New York State Supreme Court, Appellate Division 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, exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, of 4,033.

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

Dated: March 19, 2024
New York, NY

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024, I electronically filed the above Notice of Motion for Leave to File *Amicus Curiae* Brief in Support of the Nonparty-Appellant, including the attached Brief of *Amicus Curiae* Americans for Prosperity Foundation in Support of the Nonparty-Appellant, with the Clerk of the Court. I further certify that I served a true copy of this filing by email on the following:

Christine Gottlieb
Nonparty-Appellant's Counsel
NYU School of Law Family Defense Clinic
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012
gottlieb@mercury.law.nyu.edu

David Shalleck-Klein
Nonparty-Appellant's Counsel
Family Justice Law Center
Urban Justice Center
40 Rector Street, 9th Floor
New York, NY 10006
dshalleckklein@urbanjustice.org

Naomi J. Scotten
Counsel to Family Justice Law Center
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
nscotten@orrick.com

Jessica Marcus
Respondent's Counsel
Brooklyn Defender Services
177 Livingston Street, Seventh Floor
Brooklyn, NY 11202
jmarcus@bds.org

Joshua Liebman
New York City Law Department
Petitioner-Respondent's Counsel
100 Church Street, 6th Floor
New York, NY 10007
jliebman@law.nyc.gov

Abigail Finkelman
Zoe Allen
Attorney for the Subject Child
The Legal Aid Society-JRP
111 Livingston Street, Eighth Floor
Brooklyn, NY 11201
afinkelman@legal-aid.org
zallen@legal-aid.org

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

Dated: March 18, 2024
New York, NY