No. 12-646

In the Supreme Court of the United States

FLORINE AND WALTER NELSON,
JILL CERMAK AND BRUCE HENRY,
PETITIONERS
v.
THE CITY OF ROCHESTER, NEW YORK,
RESPONDENT

On Petition for a Writ of Certiorari
to the New York State Supreme Court,
Appellate Division, Fourth Judicial Department

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NEW YORK STATE COALITION OF PROPERTY OWNERS AND BUSINESSES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE IN SUPPORT OF PETITIONERS*

Pursuant to Supreme Court Rule 37.2(b), the New York State Coalition of Property Owners and Businesses ("Coalition") respectfully moves for leave to file the attached brief as amicus curiae in support of Petitioners. Amicus respectfully submit that this brief will be useful to the Court in determining whether the "inspection warrants" issued by the New York courts are inconsistent with the original meaning of the Fourth Amendment and the history of its enactment.

The interest of the amicus in these cases is more fully set forth in the accompanying brief.

All parties were provided with timely notice of the Coalition's intent to file this brief as required under Rule 37.2(a). Counsel for the Petitioners consented to this filing. Counsel for Respondent, however, withheld consent, stating in an email to amicus' counsel that "[t]he City of Rochester does not consent to the filing of any *amicus* briefs in this matter."

Respectfully submitted,

_____

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INTRODUCTION AND INTEREST OF THE AMICUS CURIAE

The New York State Coalition of Property Owners & Businesses, Inc. ("Coalition"), as Amicus Curiae, respectfully submits this brief in support of the Petition for a writ of Certiorari. The Petition seeks review the judgments of the Supreme Court of the State of New York, Appellate Division, Fourth Department, upholding the validity of search warrants against the home of Walter and Florine Nelson at 187 Clifton Street, and the home of Jill Cermak and her family at 449 Cedarwood Terrace, both in Rochester, New York. *In Re City of Rochester*, 90 A.D.3d 1480 (N.Y. App. Div. 2012); *see also* 90 A.D.3d 1483; 90 A.D.3d 1485; and 90 A.D.3d 1486.[1]

The New York courts broadly declared "that inspection warrants do not violate the Fourth Amendment." Record on Appeal in *In re Application of the City of Rochester for an Inspection Warrant to Inspect 187 Clifton Street* (hereafter "Nelson R.") p. 9; Record on Appeal in *In re Application of the City of Rochester for an Inspection Warrant to Inspect 449 Cedarwood Terrace* (hereafter "Cermak R.") p. 10.

The Coalition is a nonprofit, non-partisan organization with over 150 active supporters dedicated to preserving the civil liberties and individual property ownership rights of all New York residents embodied in the United States Constitution. The Coalition submitted a brief to the Appellate

[1] No attorney for any party has authored any portion of this brief, nor has such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

Division of the New York State Supreme Court in these consolidated cases.

The Coalition has a tangible interest in this matter. Since the City of Rochester enacted its first local law authorizing its officers to apply to the courts for "administrative" search warrants, the City has obtained forty-nine such warrants. While Coalition members own less than ten percent of the rental properties in Rochester, upon information and belief, forty-eight of those forty-nine warrants have targeted properties owned or managed by Coalition members. The owners of each of the properties involved herein were members of the Coalition at the time the warrants were issued. The Coalition is thus acutely aware of the extent to which Rochester's negation of the requirement of individualized suspicion has allowed its officers to target politically unpopular groups for searches under "administrative" warrants.

The Coalition has a history of involvement in litigation in support of constitutional rights involving searches and seizures conducted in contravention to the Fourth Amendment of the United States Constitution. The Coalition submits this brief in support of the Petitioners' request that this Court review the question of whether tenants in the City of Rochester may be subjected to searches under general warrants solely because they do not own real estate.

SUMMARY OF THE ARGUMENT

Justice Holmes wrote that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). So it is here.

Forty-five years ago, this Court held that a person cannot constitutionally be convicted for declining to consent to a warrantless search of his home. *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967). But, while *Camara* did not involve a search warrant, the Court went on to write that an "area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment", and "probable cause" for such blanket searches "must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538. The Court even suggested that this new "probable cause" might periodically spring into existence based on nothing more than "the passage of time" since a prior suspicionless search. 387 U.S. at 538.

The *Camara* Court rejected the contention that allowing local legislative bodies to dictate the "standards" for probable cause would "authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the Fourth Amendment." 387 U.S. at 538.

This Court has never considered a case in which an "administrative" search warrant has been issued against a private home based solely on the occupant's lack of property ownership.

The Amicus respectfully submit that the *Camara* Court's broad statements regarding search warrants are inconsistent with the meaning of the Fourth Amendment as understood by the Framers.

> "It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods."

United States v. Chadwick, 433 U.S. 1, 7-8 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991).

If writs of assistance, authorizing area searches for "administrative" violations of English tax laws were considered unlawful in 1791, then "inspection warrants" authorizing suspicionless area searches of private homes for "administrative" violations of local property codes must be considered unlawful today. *See*, *Virginia v. Moore*, 553 U.S. 164, 169 (2008) ("founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.")

The New York court held that "administrative" search warrants may issue without any individualized factual showing of cause or any limitation on the places to be searched or the things to be seized. This holding is contrary to the text of the Fourth Amendment and the history of its enactment. As one commentator has written:

> administrative searches were the violations with which the Framers were intimately familiar and primarily concerned at the time of the drafting. Intrusions by King George's roving patrols, authorized by writs of assistance to look for administrative violations of the tax and customs rules, were the very searches against which the colonists were reacting. It is, thus, most ironic that modern interpretation reduces fourth amendment protections in just the situation that we most clearly can trace back to its origin.

Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 Vand. L. Rev. 473, 507 n. 178 (1991).

This Court should grant certiorari to answer the important question of whether local legislative bodies may authorize the courts to issue general warrants against the homes of persons *not* suspected of any offense, precisely *because* the officers executing them are not "conducting criminal investigations". *Matter of the City of Rochester for a Warrant to Inspect 449 Cedarwood Terrace*, 90 A.D.3d 1480, 1481 n1 (N.Y. 4th Dep't 2011); *cf. Gerstein v. Pugh*, 420 U.S. 103, 125 n. 27 (1975) ("[t]he Fourth Amendment was tailored explicitly for the criminal justice system…"); *Frank v. Maryland*, 359 U.S. 360, 375 (1959) (Douglas, J., dissenting) ("[t]he knock on the door in any health inspection case may thus lay the groundwork for a criminal prosecution"); *Whren v. United States*, 517 U.S. 806, 817 ("[s]ubjective

intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

ARGUMENT

THE LOWER COURT'S DILUTION OF THE PROBABLE CAUSE AND PARTICULARITY REQUIREMENTS FOR SEARCH WARRANTS IS CONTRARY TO THE TEXT AND HISTORY OF THE FOURTH AMENDMENT

The *Camara* Court wrote that "reasonableness" of a search must be determined by "balancing the need to search against the invasion which the search entails." 387 U.S. at 536. This is axiomatic, but the Fourth Amendment's requirements for *warrants* are far more specific.

> The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are "unreasonable." What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use.

California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., dissenting).

In considering any practice under the Fourth Amendment, the Court must "inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). Any "balancing" between "an individual's privacy" and "promotion of legitimate governmental interests" is appropriate only where the historical

"inquiry yields no answer". *Id.* at 299-300; *see also Vernonia School District 47j v. Acton*, 515 U.S. 646, 652-53 (1995). "[I]n resolving those questions on which a clear answer already existed in 1791[,] …the balance has already been struck" by the Framers. *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting). Even where such balancing is appropriate, the balance must preserve "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Suspicionless government searches of homes were uniformly considered unreasonable in 1791. That fact cannot be changed by the fact that Rochester's City Council feels differently today.

> The purpose of the Fourth Amendment's requirement of reasonableness is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

Richards v. Wisconsin, 520 U.S. 385, 392 n. 4 (1997).

POINT 1

"INSPECTION WARRANTS" ARE NOT SUPPORTED BY COMMON LAW

The Framers of the Fourth Amendment were intimately acquainted with two types of warrants: 1) common-law warrants, which were typically, if not

exclusively, used to locate stolen property; and 2) statutory warrants, which were used to locate evidence of seditious libel or to uncover untaxed goods. The precise origin of common-law warrants is unknown; Lord Camden wrote that they "crept into the law by imperceptible practice". *Entick v. Carrington*, 19 How. St. Tr. 1029, 1067 (1765).

Common-law warrants provided essentially the same protections required by the Fourth Amendment: probable cause, oath, and particularity. Statutory warrants, in contrast, required no showing of cause or suspicion, and permitted general searches of homes and the arrests of unnamed persons.

The colonists accepted the validity of common-law warrants. Colonial resentment of statutory warrants, in contrast, was "one of the potent causes of the Revolution". *United States v. Rabiniowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). Thus, "the Framers adopted constitutional search and seizure provisions with the precise aim of ensuring the protection of person and house by prohibiting legislative approval of general warrants." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 590 (1999) ("Davies").

A. ENGLISH COMMON LAW PRECEDING THE AMERICAN REVOLUTION

The protections of the Fourth Amendment largely originated in the cases of *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763), *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763), *Wilkes v. Halifax*, 19 How. St. Tr. 1401 (1769), and *Entick v. Carrington and Three Other King's Messengers,* 19 How. St. Tr.

1029 (1765). These cases were "undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law". *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (internal quotation marks omitted).

"[T]he tyrannical invasions described and assailed in *Entick, Huckle,* and *Wilkes,* practices which also were endured by the colonists, have been recognized as the primary abuses which ensured the Warrant Clause a prominent place in our Bill of Rights." *United States v. United States District Court*, 407 U.S. 297, 328-329 (1972). The Fourth Amendment was written to declare for all posterity that in the United States, general warrants to search for evidence of minor offenses would never be tolerated.

Each of these English cases involved a common grievance: general warrants issued to authorize searches for evidence of seditious libel. And each decision stressed the protections that would later be embodied in the Fourth Amendment.

The English courts condemned warrants that would authorize the King's messengers to "force persons houses, break open escrutores, seize their papers, etc. upon a general warrant, where no inventory is made of the things thus taken away." *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763). Yet under the Rochester City Charter, warrants are authorized which require no inventory and no return to the court.

Lord Camden wrote that a law authorizing such searches "would destroy all the comforts of

society". *Entick v. Carrington and Three Other King's Messengers,* 19 How. St. Tr. 1029 (1765). So too, Lord Camden condemned general warrants under which "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger" *Id*, *cf.* Cermak R, 177-78, 635 (Rochester's officers inspect inside closets and cabinets seeking evidence of code violations and read personal papers of tenants seeking evidence of violations of Rochester's zoning code).

Lord Camden held that warrants could be valid only if they complied with the common-law requirements applicable to stolen-goods warrants:

> Observe too the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such place. *** And, lastly, the owner must abide the event at his peril; for if the goods are not found, he is a trespasser...".

Lord Camden's judgment specified the requisites of a valid warrant:

> The constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it. From whence it should seem that there ought to [be] a reasonable ground shown for it: otherwise it would be immaterial whether such information were given to

> the constable or not, as to the point of his justification. And it was formerly supposed to be necessary that there should have been a felony committed in fact, of which the constable must have been ascertained at his peril.

These requirements of *reasonableness, grounds* of *suspicion*, and evidence of a *felony committed in fact* should sound familiar to us today. They would not be lost on the Framers of the Fourth Amendment.

B. The American Experience with General Warrants

Parliament enacted the first law authorizing the issuance of writs of assistance to customs officials to search for uncustomed goods in 1660, 12 Car. 2 c. 19. The law required that oath be made that specific goods would be found in a particular place. But in 1662, Parliament enacted the first law expressly permitting the Court of Exchequer to issue general warrants, 14 Car. 2 c. 11, § 5. *Taylor, Two Studies in Constitutional Interpretation*, 35 & n. 22 (1969) ("*Taylor*").

With the death of Charles II in October, 1760, the writs issued under his reign expired, and Charles Paxton, a colonial customs official in the Massachusetts Bay Colony, made application for a new writ. The then Advocate General of Massachusetts, James Otis, resigned his office that he might appear on behalf of Boston merchants opposing the writ.

Otis denounced the writs as "the worst instrument of arbitrary power, the most destructive of

English liberty, and the fundamental principles of law, that ever was found in an English law book." *See*, *Boyd v. United States*, 116 U.S. 616, 625 (1886). Otis argued that "the writ prayed for in this petition, being general, is illegal. It is a power that places the liberty of every man in the hands of every petty officer." William Tudor, *Life of James Otis* (1823), p. 66.

A young attorney in Otis' audience, by the name of John Adams, would later characterize the events of February 24, 1761: "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *See*, *Boyd v. United States*, 116 U.S. 616, 625 (1886).

But Otis conceded that

> "special writs, directed to special officers, and to search certain houses, &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search."

2 *Works of John Adams* 524 (Boston: Little & Brown 1850). These common-law requirements were not lost on the young attorney in Otis' audience.

Otis did not attack the writs based on any subjective requirement of "reasonableness"; he argued that, to be legal, a writ must incorporate the common-law requirements of probable cause, oath and

particularity. Many *searches* – from border searches to luggage searches at airports to metal detectors in courthouses – may be "reasonable" in the absence of probable cause, oath, particularity or individualized suspicion. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). But no *warrant* may issue without these prerequisites.

The writs of assistance "received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution". Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 53-54 (1937). Until now, no such warrant has been permitted in the United States. *Cf. United States v. Holland*, 552 F.2d 667, 675 (5th Cir. 1977) ("Nothing need be done by the person who is the cause or object of the search.") But under the Rochester City Charter, not only are code enforcement officials permitted to enter our homes; failure to assist the officers has been made a punishable offense. Rochester Municipal Code ("RMC") § 90-25 (authorizing the City of Rochester to initiate proceedings for "contempt" of an "inspection warrant," seeking "fine or imprisonment, or both").

Like the Petitioners herein, Otis lost his case. Yet this Court has described Otis' argument of Paxton's case as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). Our history should not be lightly brushed aside to allow searches of homes for evidence of petty offenses.

C. EARLY STATE CONSTITUTIONS: TEMPLATES FOR THE FOURTH AMENDMENT

The lessons of these cases found expression in the State Constitutions that served as the prototypes for the Fourth Amendment. *See e.g. Marshall v. Barlows, Inc.*, 436 U.S. 307, 311 (1978); *Harris v. United States*, 331 U.S. 145, 158-59 (1947); *Henry v. United States*, 361 U.S. 98, 100-01 (1959).

Virginia adopted its Declaration of Rights in the late spring of 1776, just prior to the Declaration of Independence. Article X provided:

> That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

North Carolina copied the Virginia provision in 1776 as section 20 of its Declaration of rights, except that North Carolina required that warrants be based upon "evidence of the act committed". These requirements follow Lord Camden's requirement that an officer seeking a warrant must demonstrate a "felony committed in fact". And these state constitutional provisions required that warrants be based on *evidence*, not merely the existence of an authorizing statute. This Court would soon follow that requirement. *Ex Parte Bollmand and Startwout*, 8 U.S. 75, 125 (1807) (probable cause to arrest for a

crime is lacking where "it manifestly appears that no such crime has been committed").

"Evidence of a fact committed" and "probable cause, supported by oath or affirmation" are synonymous. Both require evidence of a *known* crime. No warrant may issue "to ascertain whether there exist violations" (Nelson R. 16; Cermak R. 17). And "the Fourth Amendment does require that a search warrant recite the offense in relation to which the search is conducted." *Gilluly v. Commonwealth*, 267 S.E.2d 105, 107 (Va. 1980).

Maryland adopted a similar constitutional provision in 1776:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

Again, general warrants were prohibited. And "area" searches were prohibited, since only "suspected places" could be searched. Under the Maryland provision, a "reviewing court necessarily must relate the information known to the officer to the elements of the offense that the officer believed was being or had been committed." *State v. Wallace*, 812 A.2d 291, 298 (Md. Ct. App. 2002).

In 1780, the same young attorney who had been so inspired by Otis' argument 19 years earlier,

penned Article 14 of the Massachusetts Declaration of Rights:

> Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Adams' innovations served as the closest model for the Fourth Amendment. First, it recognized "the right to be secure" – a right not just of privacy, but of property. Unique among the early state constitutions, it proscribed "unreasonable searches and seizures" with or without a warrant. And, heeding Lord Camden's judgment, Article 14 required the common-law protections of "cause or foundation", oath and specificity.

D. THE ENACTMENT OF THE FOURTH AMENDMENT

The United States Constitution was enacted without a Bill of Rights. Federalists argued that a

Bill of Rights would be dangerous, since it would imply that the United States would have the power to deny rights not enumerated. The Federalist No. 84, pp. 573-74 (Ford ed. 1898) (A. Hamilton). But the Framers were concerned that Congress, under the ominous "necessary and proper" clause, might authorize general warrants to enforce the revenue laws. *See e.g.* 5 Writings of James Madison 320 (Gaillard Hunt, ed. 1904) (letter to George Eve dated January 2, 1789).

James Madison, who had served on the committee that drafted the Virginia Declaration of rights, drafted the original version of the Fourth Amendment:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Annals of Cong., 1st Cong., 1st sess., p. 452; See, Payton v. New York, 445 U.S. 573, 584 n. 22 (1980). Madison proposed that this ban on general warrants "be added to Article I's limitations on Congressional power rather than be stated in a supplemental bill of rights. The proposed placement strongly suggests that Madison conceived his proposal as a deprivation of Congress's power to authorize use of general warrants". *Davies*, 98 Mich. L. Rev. 547, 701 (1999).

Like the State Constitutional provisions that preceded it, Madison's proposal attacked the Framers' perceived evil: general warrants. But the House of Representatives changed "by warrants issuing" to "and no warrant shall issue". Annals of Cong., 1st Cong., 1st Sess. at 783.

The change was momentous. First, it expressly required that *all* searches must not be "unreasonable". *Payton v. New York*, 445 U.S. 573, 584-585 & n. 23 (1980); *Oliver v. United States*, 466 U.S. 170, 177 (1984). But more critically, the Fourth Amendment we know today states unequivocally that "no warrants shall issue" without probable cause, oath and particularity. The Amendment not only forbids the search; it forbids the very issuance of general warrants. *Davies*, 98 Mich. L. Rev. 547, 719-22.

The Framers were clearly aware of Lord Camden's pronouncements on the requirements of probable cause, including "a full charge upon oath of a theft committed." *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). At common law, warrants "were not to be granted" unless "the party complaining hath probable cause to suspect they are in such a house or place, and do shew the reasons of such suspicion." 2 Sir Mathew Hale, *The History of the Pleas of the Crown* 79 (Sollom Emlyn ed., 1800) 150.

Blackstone too wrote that it is fitting for the magistrate

> to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as

> also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed.

4 William Blackstone, *Commentaries on the Laws of England* 287 (1769).

In 1791, probable cause required inculpatory facts. "Probable cause as used in the Fourth Amendment is a substantive concept of law. Its meaning embraces not merely a certain quantum of evidence, but a certain quantum of evidence *related to one and only one specific thing*—the commission of a crime." *Schneyder v. Smith,* 2011 U.S. App. LEXIS 15831 (3rd Cir. 2011) (emphasis in original); *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) (probable cause requires "a probability or substantial chance of criminal activity"). Is this requirement negated upon invocation of the talismanic term "administrative"?

So too, the Fourth Amendment prohibits all warrants except those "particularly describing ... the persons or things to be seized."

> These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant.

Stanford v. Texas, 379 U.S. 476, 481 (1965).

Whether this requirement is negated by the government's naked admission that its officers are not

investigating a specific offense is a question worthy of this Court's review.

E. THE LESSONS OF HISTORY

The Framers were intimately familiar with the evils of general warrants, and the primary intent of the Fourth Amendment was to prohibit such warrants in America. By requiring probable cause and particularity to obtain a warrant, the Framers preserved the requirement of a "felony in fact," limited warrants to "suspected places," and prohibited suspicionless "area" searches. In America, warrants were to be used to solve known crimes, not to seek evidence of unknown offenses.

The Framers rebelled against general warrants issued to search for unknown violations of tax regulations. They would have rebelled just as strongly against the issuance of general warrants without individualized suspicion to search for evidence of unknown zoning and property code violations. Warrants authorizing suspicionless searches were unlawful at common law at the time of the framing. This Court should grant certiorari to determine whether such warrants were rendered lawful one hundred and seventy-six years later by part II of this Court's decision in *Camara v. Municipal Court*, 387 U.S. 523 (1967).

IMPORTANCE OF THE ISSUES

The judgment of the lower court will subject thousands of tenants in Rochester to general searches of their homes under "inspection warrants" issued without any individualized showing of cause or any limitation on the scope of the search. Since the

judgment is binding on all trial level courts in New York, it can hardly be doubted that other New York municipalities will seek such "inspection warrants" as well. And, while local governments may target any unpopular group for these searches, the searches clearly are no longer limited to the urban citizen. *See e.g. Matter of Brockport-Sweden Property Owners Ass'n v. Village of Brockport*, 81 A.D.3d 1416, 1418 (N.Y. App Div. 2011).

"[A]dministrative searches of the kind in issue here are significant intrusions upon the interests protected by the Fourth Amendment, [and] such searches when authorized and conducted without a warrant lack the traditional safeguards which the Fourth Amendment guarantees to the individual". *Camara v. Municipal Court of the City of San Francisco*, 387, 534 U.S. 523, 534 (1967). The question presented by the petition herein is whether an "administrative" search warrant must provide the "traditional safeguards" of the common law.

The briefs to the Supreme Court in *Camara* are included in the Record. Cermak R. 415-557. Neither party in *Camara* advanced the proposition that search warrants might issue for property inspections. Even the Appellee argued that "a 'search warrant' is totally inappropriate to a health inspection where there is never anything to be seized, nor anything to describe with particularity." Cermak R. 455.

> [I]f the Court allows the warrant to be issued without probable cause or particularly describing places to be searched or things to be seized, the warrant is perfunctory and impotent.

> Such a warrant only serves to legitimize the search in the eyes of the courts and in reality provides none of the protections prescribed by the Fourth Amendment.

Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying To Avoid?*, 5 Regent L. Rev. 215, 239 (1995).

The warrants challenged here, "issued on a make-believe version of probable cause," improperly "conflate[e] Fourth Amendment reasonableness with the Warrant Clause's requirements". Arcila, *The Death of Suspicion*, 51 Wm. & Mary L. Rev. 1275, 1290 (2010). Such warrants have been described as "freakish even by the standards of search-and-seizure jurisprudence." Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1813 (2000).

In *Crawford v. Washington*, 541 U.S. 36, 61 (2004), this Court wrote that, while the ultimate goal of the Sixth Amendment "is to ensure reliability of evidence," the original meaning of the Amendment provides a "procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." So too, the Fourth Amendment was written to ensure that *searches* must not be "unreasonable", but the Amendment provides specific procedural requirements for the issuance of search *warrants*: probable cause, oath and particularity. Just as amorphous notions of reliability cannot be substituted for the specific commands of the

Sixth Amendment, amorphous notions of reasonableness must not be substituted for the detailed procedural commands of the Fourth Amendment.

CONCLUSION

This Court should grant a writ of certiorari to decide whether the dicta in *Camera* permitting administrative warrants without a particularized finding of probable cause, based on a "balancing" of "the of need to search against the invasion which the search entails," 387 U.S. at 537, is inconsistent with the language and original meaning of the Fourth Amendment, made applicable to the States by the Fourteenth Amendment.

Respectfully submitted,

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