No. 22-

In the Supreme Court of the United States

JACKIE JACKSON,

Petitioner,

v.

OHIO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where one police officer opens the door of a car, and another officer looks through the open door for contraband, have the police conducted a "search" of the car within the meaning of the Fourth Amendment?

RELATED PROCEEDINGS

Supreme Court of Ohio:

State v. Jackson, No. 2021-0452 (Dec. 8, 2022)

Court of Appeals of Ohio:

State v. Jackson, No. C-190676 (Feb. 26, 2021)

Hamilton County (Ohio) Court of Common Pleas:

State v. Jackson, No. B-1901479 (Nov. 7, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

OTHER AUTHORITY

PETITION FOR A WRIT OF CERTIORARI

Jackie Jackson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is published at --- N.E.3d ---, 2022-Ohio-4365 (Ohio 2022), and is available at 2022 WL 17491047. The opinion of the Court of Appeals of Ohio is unpublished and is available at 2021 WL 753635 (Ohio Ct. App. 2021).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on December 8, 2022. On January 26, 2023, Justice Kavanaugh extended the time to file a certiorari petition to April 7, 2023. No. 22A671. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution 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."

STATEMENT

In the decision below, the Ohio Supreme Court invented a new method of deciding whether a "search" has occurred within the meaning of the Fourth Amendment, a method that is contrary to this

Court's decisions, to the decisions of other lower courts, and to the plain meaning of the word "search."

Police officers often work in teams. In determining whether a "search" has taken place, courts have traditionally analyzed the team's conduct collectively. A search is still a search even if different parts of the search are carried out by different officers.

Below, the Ohio Supreme Court held otherwise. Where one police officer opened the door of a car and another officer looked inside for contraband, the court decided that no search had occurred, because the officer who opened the door did not intend to look inside, and the officer who looked inside did not open the door. The court acknowledged that if a single officer had opened the door *and* looked inside, that would have been a search, but the court held that no search took place because the officers divided the tasks between them.

The decision below is impossible to square with the ordinary meaning of the word "search," now and at the Founding. It is contrary to this Court's decisions and to decisions of other lower courts. And it invites the police to play games to shield their searches from Fourth Amendment scrutiny. In Ohio, each department now needs only to designate one officer as the "door opener," an employee instructed merely to open doors without looking inside for contraband, and the police will have carte blanche to look inside any car or any home.

1. Petitioner Jackie Jackson is a Black man in his thirties. He was driving alone on a residential street in Cincinnati in the daytime when two police officers

stopped his car. App. 3a, 34a. As the two officers converged on his car, six more officers arrived on bicycles. *Id.* at 19a. Jackson rolled down his window. An officer advised him that he had been stopped because the tint of his windows was too dark. *Id.* at 3a. Jackson was skeptical that this was the true reason he had been stopped. He asked: "All these police for window tint?" He took out his phone to film the encounter for his own safety. *Id.* at 3a-4a, 17a-18a.

Jackson's skepticism proved to be justified. None of the eight police officers at the scene had a window tint meter, the small handheld device that measures the degree of tint. *Id.* at 14a.[1]

As Jackson took out his phone to turn on its camera, the first officer asked him for his driver's license and proof of insurance. *Id.* at 3a. Jackson's proof of insurance was on his phone, so he began to look for it. *Id.* at 17a-18a. Within seconds, the first officer opened the car door and ordered Jackson to step out of the car. *Id.* at 4a, 17a. Jackson complied. *Id.* at 4a. Another officer walked Jackson to the back of the car, while the first officer reached into the car through the open door, removed the keys from the ignition, and placed them on the roof. *Id.* at 4a, 18a. The officer left the door open, hanging into the roadway. *Id.* at 18a. Jackson had no opportunity to

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[1] "[I]t is no secret that people of color are disproportionate victims of this type of scrutiny," *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting), both as pedestrians and as drivers. *See, e.g.*, Pradhi Aggarwal et al., *High-Frequency Location Data Shows That Race Affects the Likelihood of Being Stopped and Fined for Speeding* (Univ. of Chicago Becker Friedman Institute for Economics, Working Paper 2022-160, https://ssrn.com/abstract=4298671).

close the door. He was at the back of the car, surrounded by officers who were subjecting him to a pat-down search. *Id.* at 4a, 18a. All the while, Jackson was explaining that his window tint was lawful and that he was using his phone to access his insurance information and to film the police. *Id.* at 18a.

While the police were conducting the pat-down search of Jackson at the back of the car, one of the officers walked to the still-open driver's-side door. *Id.* at 4a, 18a. He pulled out a flashlight and leaned into the car. *Id.* He shined the flashlight down into the gap between the seat and the door sill, where he saw a marijuana cigarette on the floor beneath the seat. *Id.* at 4a, 18a-19a. It is undisputed that the marijuana cigarette would not have been visible to the police had the car door been closed. *Id.* at 13a, 25a.

The discovery of the marijuana cigarette led the police to conduct a search of the entire car. *Id.* at 4a. In the back seat, in a basket of laundry, the police found a pistol. *Id.* at 4a, 19a. Jackson was charged with three offenses based on his possession of the pistol—having a weapon while under disability, carrying a concealed weapon, and improperly handling a firearm in a motor vehicle. *Id.* at 4a.

Jackson moved to suppress evidence of the pistol on the ground that the police obtained it by a search in violation of the Fourth Amendment. *Id.* The trial court denied the motion to suppress. *Id.* at 5a. Jackson pleaded no contest, was sentenced, and appealed. *Id.*

2. The Ohio Court of Appeals affirmed. *Id.* at 33a-39a. The Court of Appeals reasoned that the first officer acted lawfully in ordering Jackson to get out of

the car. *Id.* at 36a-37a. Once the door was open, the Court of Appeals concluded, the marijuana cigarette was in plain view, so the second officer did not violate the Fourth Amendment by looking inside the car and finding it. *Id.* at 37a-38a. The Court of Appeals added that once the police had found the marijuana cigarette, they had probable cause to believe the car contained contraband, so they could conduct a warrantless search of the car. *Id.* at 39a.

3. The Ohio Supreme Court affirmed by a vote of 5-2. *Id.* at 2a-32a.

The majority began by explaining that under the Fourth Amendment, a search takes place when, with the intent to obtain information, the police either physically intrude in a constitutionally protected area or interfere with a person's reasonable expectation of privacy. *Id.* at 7a. The majority then analyzed the conduct of each police officer separately and concluded that neither officer—neither the one who opened the door nor the one who looked inside with a flashlight for contraband—performed a search of Jackson's car. *Id.* at 7a-13a.

The majority held that the first officer, the one who opened the door of Jackson's car and ordered him to step out, did not perform a search, because he "acted with the intent to secure Jackson and not with the intent to obtain information." *Id.* at 8a (internal quotation marks omitted). The majority acknowledged that "if an officer opened a car door without the owner's permission for the purpose of ascertaining what was inside the car, such conduct might well constitute a search—it would be a physical trespass conjoined with an attempt to find some-

thing." *Id.* (internal quotation marks omitted). But because "nothing in the record indicates that the officer opened the door for any reason other than to get Jackson out of the car," *id.*, the majority concluded that the first officer did not perform a search.

The majority then considered the conduct of the second officer, the one who peered through the open door with a flashlight. This officer, the majority acknowledged, "acted with an intent to obtain information when he looked into the car. He had no other reason to walk over and peer into the car." *Id.* at 12a. The second officer "lingered over the driver's compartment, indicating that he was taking a long investigative look." *Id.*

But the majority concluded that the second officer did not perform a search either, because he neither committed a physical trespass nor interfered with Jackson's legitimate expectation of privacy. *Id.* at 12a-13a. He did not commit a trespass because "[a]ll the second officer did was look through an already open door. He did not open the door himself." *Id.* at 12a. And he did not interfere with Jackson's legitimate expectation of privacy because "[a] person does not have a legitimate expectation of privacy in an object that is in plain view." *Id.*

The majority rejected Jackson's argument that the conduct of both officers should be considered together, not separately—that they performed a search together, by opening the door of the car and looking inside for contraband. *Id.* at 13a. The majority noted that "Jackson attempts to conflate the actions of the two officers, contending that but for the first officer opening the car door, the marijuana cigarette would not have been in plain view and would not have been

noticed by the second officer." *Id.* The majority concluded: "That may be true, but it does not make for a Fourth Amendment violation," because "[n]either officer conducted a search under the facts of this case." *Id.*

Justice Brunner, joined by Justice Stewart, dissented. *Id.* at 14a-32a.

Justice Brunner explained that "[t]he majority opinion improperly isolates the actions of each officer involved in the stop." *Id.* at 15a. "The majority opinion does not take into consideration that these two officers were working together," Justice Brunner continued. *Id.* "Considered as a whole, this course of conduct was not only a search, it was a fishing expedition and not a constitutional law-enforcement technique." *Id.*

In contrast to the majority, Justice Brunner analyzed the conduct of the officers as a team. She concluded that a search took place when the first officer opened the car door, because "[t]he action of the officer in opening the door before ordering Jackson from the car was a physical trespass into Jackson's private property." *Id.* at 25a. Once the first officer had opened the door, "[a]nother officer then took advantage of the open interior of the car to observe what, with the door closed, could not have been seen." *Id.* Justice Brunner emphasized that "[t]he officer who opened the door did not open it and leave it open in a one-on-one stop." *Id.* at 30a-31a. Rather, he opened the door "while accompanied by seven other police officers, thus allowing one of those officers the opportunity to peer into a hard-to-view space." *Id.* at 31a.

Justice Brunner concluded that the correct way to examine the officers' conduct was as a team, not as individuals. She noted: "Eight officers—not one of whom had a tint meter—stopped Jackson for an alleged tint violation, opened his door, moved him to the rear of his car, patted him down, left the door open in moving traffic, and then invaded the otherwise private space of his car." *Id.* The officers thus conducted a "search for evidence of a crime." *Id.*

REASONS FOR GRANTING THE WRIT

Until this case, as far as we are aware, no American court had ever held that the police can shield their searches from constitutional scrutiny by dividing the work between two officers, one who opens the door and another who looks inside. If it were that easy to get away with an unconstitutional search, police departments all over the country would have adopted this tactic long ago.

The decision below is impossible to square with the plain meaning of the word "search." In ordinary English, a search can be carried out by two or more people who divide the work between them. This was just as true when the Fourth Amendment was ratified as it is today.

The decision below also creates a conflict among the lower courts. Other courts hold that a search takes place when a police officer opens the door of a car and the police find contraband, even if the officer who opens the door has a purpose other than looking around inside.

The Court should grant certiorari and reverse.

I. The decision below creates a conflict among the lower courts.

Until the decision below, the lower courts had developed a bright line rule: If a police officer opens the door of a car, and the police find contraband inside, that is a search, regardless of the officer's purpose in opening the door.

For example, in *United States v. Ngumezi*, 980 F.3d 1285, 1286 (9th Cir. 2020), a police officer opened the door of a car—not to look for contraband, but to ask the driver for his license and registration. The police later found an unlawfully possessed handgun in the car. *Id.* at 1287. The Ninth Circuit observed: "We therefore must consider whether police officers who have reasonable suspicion sufficient to justify a traffic stop—but who lack probable cause or any other particularized justification, such as a reasonable belief that the driver poses a danger—may open the door to a vehicle and lean inside. We conclude they may not." *Id.* at 1288. The court noted that "[a]lthough the intrusion here may have been modest, the Supreme Court has never suggested that the magnitude of a physical intrusion is relevant to the Fourth Amendment analysis." *Id.* at 1289. "Instead, we apply a bright-line rule that opening a door and entering the interior space of a vehicle constitutes a Fourth Amendment search." *Id.*

The Ninth Circuit recognized that under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the police may order the driver of a lawfully stopped car to exit the vehicle. *Ngumezi*, 980 F.3d at 1289. But the court held that *Mimms* does not authorize the police to open the car door. *Id.* "[E]ven if opening a door and leaning into the car is a lesser intrusion

on the driver's liberty" than being ordered out of the car, the Ninth Circuit observed, "it is a greater intrusion on the driver's privacy interest in the car's interior." *Id.* The court thus concluded that "[t]he rule in *Mimms* does not support [the officer's] action here." *Id.*

Several other lower courts have reached the same conclusion.

In *United States v. Meredith*, 480 F.3d 366, 367 (5th Cir. 2007), the police opened a car door—not to look for contraband, but to get a better view of a passenger who was too disabled to comply with an order to exit the vehicle. They saw that the passenger possessed a handgun, which turned out to be unlawfully possessed. *Id.* The Fifth Circuit applied the same bright line rule as the Ninth Circuit: "Opening a vehicle's door or piercing the interior airspace constitutes a search." *Id.* at 369.

Likewise, in *McHam v. State*, 746 S.E.2d 41, 44 (S.C. 2013), *partially overruled on other grounds*, *Smalls v. State*, 810 S.E.2d 836 (S.C. 2018), the police opened a car door—not to look for contraband, but because it was dark and the officer was concerned for his own safety. They spotted a bag of crack. *Id.* The South Carolina Supreme Court applied the same bright line rule: "[T]he officer's opening of the door of an occupied vehicle constituted a search." *Id.* at 48.

Likewise, in *State v. Malloy*, 498 P.3d 358, 359 (Utah 2021), the police opened a car door—not to look for contraband, but because the driver was asleep. They saw drug paraphernalia. *Id.* "If a police officer opens a car door, he has at least arguably physically intruded on a protected area," the Utah

Supreme Court explained. *Id.* at 363. "And he has done so in a manner that may reveal evidence or information about this protected area." *Id.* The court noted that "[t]he encounter is different where the car door is opened by an occupant of a vehicle at an officer's request" pursuant to *Mimms*. *Id.* A search takes place where the officer opens the door, but not where an occupant opens the door, because the latter situation "is constitutionally distinct from the act of an officer in opening a car door in a manner that *physically* intrudes on the interior of a vehicle." *Id.* at 364.

Indeed, other lower courts have held that merely touching a car's tire is a search—again, where the officer touching the tire has a purpose other than finding out what is inside the car. *United States v. Richmond*, 915 F.3d 352, 358 (5th Cir. 2019); *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019).

The decision below disrupts this consensus. The Ohio Supreme Court held that the officer's opening of the car door did not constitute a search "because he did not act with the purpose of finding out what was inside the car." App. 8a. But neither did the officers in *Ngumezi*, *Meredith*, *McHam*, or *Malloy*. They did not act with the purpose of finding out what was inside the car. Yet these other courts held that the act of opening the door was nevertheless a search, because it was a trespass on the driver's property and an interference with the driver's reasonable expectation of privacy. In these courts, whether a search has taken place is determined by a simple bright line rule. In Ohio, by contrast, whether

a search has taken place depends on the officer's subjective state of mind.[2]

II. The decision below is wrong.

There is a good reason why no other court has reached the conclusion the Ohio Supreme Court reached below: That conclusion is wrong. The decision below cannot be reconciled with the plain meaning of the Fourth Amendment or with this Court's precedent.

A. The decision below is contrary to the plain meaning of the word "search."

In interpreting the Constitution, "the plain meaning of a provision, not contradicted by any other provision in the same instrument, [cannot] be disregarded, [unless] we believe the framers of that instrument could not intend what they say." *Sturges v. Crowninshield*, 17 U.S. 122, 202-03 (1819). There is no reason to believe that the word "search" in the Fourth Amendment means something different from what it means to ordinary English speakers.

Where one officer opens the door of a car and another officer looks inside for contraband, ordinary

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[2] Courts in a few other jurisdictions have held that an officer may open the door of a car where he reasonably fears for his safety because he cannot see inside the car to determine whether the occupants are armed. *New Jersey v. Mai*, 993 A.2d 1216, 1224 (N.J. 2010); *United States v. Stanfield*, 109 F.3d 976, 978 (4th Cir. 1997); *State v. Ferrise*, 269 N.W.2d 888, 890 (Minn. 1978). Neither *Mai* nor *Ferrise* considered whether the opening of the door constitutes a search. *Stanfield* referred to the opening of the door as a "limited search." *Stanfield*, 109 F.3d at 983.

English speakers would say that a "search" has taken place. They might say that "the police" conducted the search, or they might say that one or both of the officers conducted the search, but either way, it would be a search. A search does not turn into something else if the actions that constitute the search are divided between two people.

In this respect a search is just like other things that are products of teamwork. A song, for example, usually consists of lyrics and a melody. When John writes lyrics and Paul writes a melody, a song has been created through their collective efforts, even if neither the lyrics by themselves, nor the melody by itself, would be classified as a song. If John Lennon wrote the lyrics to "Hey Jude" and Paul McCartney wrote the melody, "Hey Jude" would still be a song, even if neither musician wrote a song individually.

Same for searches. If Officer A opens the door of a car, and Officer B peers inside with a flashlight, any ordinary English speaker would say that the police have conducted a search. This would be the case even if neither Officer A nor Officer B had conducted a search by himself. It would still be a search.

This conclusion is reinforced by the text of the Fourth Amendment, which is in the passive voice. It refers to a right that "shall not be violated," but it does not say *who* is prohibited from violating the right. The implication is that the Fourth Amendment is violated by any unreasonable searches, regardless of whether they are conducted by one officer or by multiple officers. *Cf. Bartenwefer v. Buckley*, 143 S. Ct. 665, 672 (2023) (concluding from Congress's use of the passive voice that "[t]he debt must result from someone's fraud, but Congress was ag-

nostic about who committed it") (brackets and internal quotation marks omitted).

This Court's cases are consistent with the plain meaning of the word "search." On many occasions the Court has referred to searches conducted by "officers" or by "the police" without regard to the specific tasks performed by each individual officer. *See, e.g. Carroll v. Carman*, 574 U.S. 13, 15 (2014) ("officers"); *Michigan v. Bryant*, 562 U.S. 344, 374 (2011) ("police"); *Arizona v. Gant*, 556 U.S. 332, 335 (2009) ("officers"); *Pearson v. Callahan*, 555 U.S. 223, 228 (2009) ("officers"); *Brendlin v. California*, 551 U.S. 249, 252 (2007) ("police"); *Illinois v. Caballes*, 543 U.S. 405, 406 (2005) ("officers"); *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 360 (1998) ("officers"); *Pennsylvania v. Labron*, 518 U.S. 938, 939 (1996) ("police"). The Court's cases reflect ordinary English usage: A search is a search, no matter how many officers are involved.

In this regard, the meaning of "search" has not changed since the Fourth Amendment was ratified. Founding-era dictionaries define "search" without any restriction as to the number of people involved or the division of their responsibilities. *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) (no pagination) ("Inquiry; examination; act of seeking"); Noah Webster, *A Dictionary of the English Language* 283 (1817) ("the act of seeking, a quest"). Two centuries ago, a search was still a search where multiple people took part, regardless of the specific tasks performed by each person. *See, e.g.*, *Smith v. Steinbach*, 2 Cai. Cas. 158, 173 (N.Y. 1805) (referring to a search by "agents"); *Boswell v. Dingley*, 4 Mass. 411, 412 (1808) (refer-

ring to a search by "sheriffs"); *Ward v. Ames*, 9 Johns. 138, 138 (N.Y. Sup. Ct. 1812) (referring to a search by "seamen").

The decision below, by contrast, is impossible to reconcile with the plain meaning of "search." The Ohio Supreme Court asked whether the first officer conducted a search by himself. The court then asked whether the second officer conducted a search by himself. But the court failed to ask whether a search took place by virtue of the actions of the two officers together. Ordinary English speakers would never make this mistake. They would say that the Cincinnati police performed a "search" of Jackie Jackson's car regardless of whether any individual officer personally undertook all the tasks that make up a search. If this was not a search, then "Hey Jude" is not a song.

B. The decision below is inconsistent with this Court's precedent.

Nor can the decision below be reconciled with this Court's precedent, which makes clear that the police conducted a search of Jackson's car when one officer opened the door and another officer looked inside for contraband. Each officer conducted a search on his own, and the two officers conducted a search together.

1. The first officer conducted a search when he opened the door of Jackson's car. Opening the door of someone else's car without permission is a trespass to the driver's personal property, just as surely as attaching a GPS device to the car. *Cf. United States v. Jones*, 565 U.S. 400 (2012). Opening the door of

someone else's car—and deliberately leaving it open, for others to peer into—is also an interference with the driver's reasonable expectation of privacy. *New York v. Class*, 475 U.S. 106, 114-15 (1986). On both scores, the first officer conducted a search when he opened the door of Jackson's car and exposed the inside of the car to the police's view.

The Ohio Supreme Court thought otherwise, on the theory that under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the officer was permitted to order Jackson out of the car. App. 10a. But *Mimms* has nothing to do with the definition of a search. *Mimms* merely holds that an officer who lawfully stops a car by the side of the road may order the driver out of the car to protect the officer's own safety. *Mimms*, 434 U.S. at 110. In *Mimms*, the officer never touched the car; the driver complied with the officer's order by opening the door himself and alighting. *Id.* at 107. The Court's opinion in *Mimms* does not suggest that the police ever even looked inside the car. The Court had no occasion in *Mimms* to discuss whether a search takes place when a police officer opens a car door without permission.

The Ohio Supreme Court compounded this error by reasoning that since Jackson was getting out of the car anyway, "[t]he issue of who opened the door is irrelevant." App. 10a. In fact, when it comes to searches, the identity of the door-opener makes all the difference. No search takes place where a homeowner opens the door and invites the police in, but a search *does* take place where a police officer opens the door against the homeowner's wishes. When a car is stopped by the side of the road, no search takes place where the driver opens the door and ex-

its the car. But a search *does* take place where a police officer opens the car door against the driver's wishes—especially when the officer leaves the door open and prevents the driver from closing it.

The Ohio Supreme Court also erred in suggesting that no search took place because the first officer intended to evict Jackson from the car rather than to find out what was inside the car. *Id.* at 8a. Whether a search has occurred is an objective inquiry that depends on the officer's actions, not on his subjective motivation. *Torres v. Madrid*, 141 S. Ct. 989, 998 (2021) ("[W]e rarely probe the subjective motivations of police officers in the Fourth Amendment context."); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation").

This case is a good example of why the existence of a search does not depend on an officer's subjective intent. Ultimately, subjective intent is unknowable. Officers have a strong incentive to claim, after the fact, a motivation that will legitimate a search that in truth was undertaken for an impermissible motive or for a combination of permissible and impermissible motives. Perhaps it is true that the officer opened Jackson's door and left it open (and prevented Jackson from closing it) without giving any thought to the fact that his fellow officers were thereby enabled to peer into the car. Perhaps it is true that the officer had no inkling that one of his

fellow officers would soon shine a flashlight through the open door for precisely this purpose. Or perhaps the officer knew exactly what he was doing. "Judges are not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.). We will probably never know the truth for certain. This is why the Court's Fourth Amendment decisions do not require judges to probe the inner recesses of a police officer's mind.

2. The second officer also conducted a search when he leaned into the car, shined a flashlight all around, and looked for contraband.

The Ohio Supreme Court thought otherwise, on the theory that because the car's door was open, the interior of the car was in plain view. App. 12a. But the door was open only because the first officer opened it and left it open in violation of the Fourth Amendment. The "plain view" doctrine presupposes that the police did not acquire the view by initiating an unconstitutional search. *Horton v. California*, 496 U.S. 128, 137 (1990) ("It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."); *Texas v. Brown*, 460 U.S. 730, 737 n.3 (1983) (plurality opinion) ("[I]n order for the plain view doctrine to apply, a police officer must be engaged in a lawful intrusion or must otherwise legitimately occupy the position affording him a 'plain view.'"). Unless the "police are lawfully in a position to observe an item

first-hand," the item is not in plain view. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

Here again, when it comes to searches, the identity of the door-opener makes all the difference. If a driver opens his own door and leaves it open, he exposes the interior of his car to public viewing. Anything that can be seen through the open door is in plain view. But if a police officer opens the car door and leaves it open against the driver's wishes, items inside are not in plain view, because the police had no right to open the door in the first place. If the police could manufacture plain view simply by opening doors, the Fourth Amendment would be meaningless.

3. Finally, even if neither the first officer nor the second officer conducted a search by himself, the two officers together conducted a search when the first officer opened the door and the second officer looked inside the car for contraband.

The Fourth Amendment is a restriction on the abuse of government power, so in determining whether the Fourth Amendment has been violated, the Court looks to the collective conduct of the government rather than to the individual conduct of any particular officer.

For example, in determining whether information possessed by the police amounts to probable cause, the Court looks to the cumulative knowledge of all the officers involved, rather than to whether any particular officer individually possessed the required amount of knowledge. *United States v. Hensley*, 469 U.S. 221, 230-32 (1985); *Whiteley v. Warden*, 401 U.S. 560 (1971).

Likewise, in determining whether surveillance constitutes a search, the Court looks to the cumulative surveillance conducted by all the officers involved, rather than looking separately at the individual acts of surveillance conducted by each separate officer. *United States v. Jones*, 565 U.S. 400, 430-31 (2012) (Alito, J., concurring in the judgment); *id.* at 415-16 (Sotomayor, J., concurring).

For this reason, whether a search has taken place depends on the conduct of *the government*, not on the conduct of individual officers considered separately. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (describing a search as where "*the Government* obtains information by physically intruding on persons, houses, papers, or effects") (emphasis added; internal quotation marks omitted); *Jones*, 565 U.S. at 407 n.3 ("Where, as here, *the Government* obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.") (emphasis added); *Grady v. North Carolina*, 575 U.S. 306, 309 (2015) (per curiam) ("*[A] State* also conducts a search when it attaches a device to a person's body.") (emphasis added); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (The Fourth Amendment applies "to all invasions on the part of *the government and its employes* of the sanctity of a man's home and the privacies of life.") (emphasis added).

Here, the conduct of the government encompassed the actions of both officers, the one who opened the door of Jackson's car and the one who looked around inside for contraband. That was a search.

III. The decision below invites the police to play games to shield their searches from constitutional scrutiny.

If the police can turn a search into a non-search simply by dividing their work between two officers, it is not hard to predict the consequences. In each pair of officers, one will be assigned to open the door. He will be instructed not to look inside or even to intend to look inside. The other officer will be assigned to look through the door his partner has just opened in the hope of finding contraband. According to the decision below, this tactic is not subject to judicial scrutiny under the Fourth Amendment, because no "search" took place. Pairs of officers could open the doors of every car they see and inspect the interiors.

This trick would also work for houses. By the Ohio Supreme Court's reasoning, the officer who opens the front door of a home would not be conducting a search, even if he trespasses on the home's curtilage, because he would not have the purpose to look inside the home for information. Neither would the officer who looks through the open door, so long as he stays on the sidewalk. Pairs of officers could look inside any apartment or any house not surrounded by extensive grounds.

It bears remembering that while Fourth Amendment cases involve people who turned out to be guilty, these cases are just the tip of an iceberg. An unknown but doubtless very large number of police interactions are with innocent people. When the police conduct unlawful searches, law-abiding people are subjected to indignity, to delay, and to the invasion of their privacy. Then they are sent on their

way. No litigation follows. The Fourth Amendment protects these people too. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). The decision below allows the police to open their doors as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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