No. A23-0459

State of Minnesota

In Supreme Court

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In the Matter of the Welfare of: C.T.B.

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA AND THE MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Teresa Nelson (#0269736)
Alicia Granse (#0400771)
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
P.O. Box 14720
Minneapolis, MN 55414
Tel.: (651) 645-4097

Shauna Kieffer (#389362)
MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
310 South 4th Ave. Suite 1050
Minneapolis, MN 55415
Tel.: (612) 418-3398

Attorneys for Amici Curiae

Sara Martin (#0397312)
Assistant State Public Defender
OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER
540 Fairview Avenue North, Suite 300
St. Paul, MN 55104
Telephone: (651) 219-4444

Attorney for Appellant

Keith Ellison
OFFICE OF ATTORNEY GENERAL
1800 Bremer Tower
445 Minnesota Street, Ste. 1400
St. Paul, MN 55101

Mary Moriarty
HENNEPIN COUNTY ATTORNEY
Adam Petras
Assistant Hennepin County Attorney
Hennepin County Government Center
300 South 6th St,
Minneapolis, MN 55487
Telephone: (612) 348-5550

Attorneys for Respondent

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INTEREST OF AMICI CURIAE[1]

The ACLU-MN, the state affiliate of the ACLU, is a private, nonprofit, nonpartisan organization supported by more than 25,000 individuals in the State of Minnesota. It is dedicated to the principles of liberty and equality and its purpose is to protect the rights and liberties guaranteed to all people in Minnesota by the United States and Minnesota Constitutions and laws. The ACLU-MN has a longstanding interest in preserving and extending strong constitutional protections for criminal defendants, including the right to be free from unreasonable searches and seizures embodied in the U.S. and Minnesota constitutions.

The MACDL is a non-profit, state-wide organization of defense lawyers seeking to uphold Constitutional rights and ensure justice for all, particularly from unchecked power of the government against the rights of individuals. The MACDL is the Minnesota Chapter of the National Association of Criminal Defense Lawyers (NACDL), the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. The National Association of Criminal Defense Lawyers, founded in 1958, has more than 10,400 direct members – and 80 state and local affiliate organizations with another 28,000

[1] Pursuant to Rule of Appellate Procedure 129.03, *amici* state that no counsel for a party authored the brief in whole or in part and no other person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

members – which includes private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

INTRODUCTION

Both the U.S. and Minnesota Constitutions prohibit generalized searches and seizures for a reason: to put an end to the State's unfettered discretion—granted by the King's writs of assistance—to search and seize anyone or any place. *Stanford v. Texas*, 379 U.S. 476, 481 (1965); *Payton v. New York*, 445 U.S. 573, 583 (1980). To conduct a search, law enforcement officers must either have a warrant supported by probable cause or an exception to the warrant requirement that meets the reasonableness test. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). This Court has held that "mere proximity" to suspected criminal behavior is not a reasonable exception to the warrant requirement. *State v. Diede,* 795 N.W.2d 836, 844 (Minn. 2011); *State v. Lemert*, 843 N.W.2d 227, 231 (Minn. 2014).

This Court should not, as the decisions below seem to suggest, differentiate between what is reasonable articulable suspicion for evidence of drug activity and reasonable articulable suspicion of possession of a weapon. The reasons to do so may seem legitimate: officers are concerned for their safety and the safety of the community. But a "gun exception" to the Constitution's particularity requirement would not advance those goals. Rather, generalized policing tactics—which often lead to discriminatory outcomes—are (1) ineffective at detecting criminal activity, including weapons possession, and (2) cause more harm than they prevent.

Here, four Black boys were at the Little Caesar's on Lake Street in Minneapolis, looking out the window as police officers arrived in the parking lot. The officers were there

to arrest a 47-year-old Somali man, Eligah Tiney, who had allegedly pointed a gun at someone at the light rail station a block away. After calling Tiney outside and arresting him, officers did not find a gun. Instead of asking any questions or investigating further, the officers frisked the four boys who had been looking out the window. Appellant's Br. 7. The only basis to seize and search all four boys was their proximity to the arrestee. The officers had no reason to believe that the boys were in any way related to Mr. Tiney or otherwise associated with him. The district court and the court of appeals both upheld the frisk of the four boys, relying upon officer testimony that in their "training and experience, weapons can often be passed off to another person in a group to evade detection."

Where, as here, the only basis to stop and frisk someone is officer testimony about their proximity to an arrest, this Court must require more, as officer training and experience is nothing more than a "hunch." Officers across Minnesota stop, cite, arrest and search people of color more often than white people for the same offenses and under the same circumstances. Findings by two civil rights agencies that have investigated police practices in Minneapolis suggest that Minneapolis police officers often do not use objective and reliable criteria when making policing decisions. And when officers frisk and search people of color, they find contraband less frequently than when they search white people. Even at their most "successful," officers find contraband in less than half of the searches they perform.

The unequal treatment of people of color demonstrates that the criteria police officers actually use to stop and search people is not only unreasonable and ineffective, it

is also against the law. The U.S. and Minnesota Constitutions and the Minnesota Human Rights Act prohibit unequal treatment by agents of the State. *See* U.S. Const. amend. XIV; Minn. Const. art. 1, § 2; Minn. Stat. § 363A.02, subd. 1(4). Discriminatory and ineffective policing reduces public perceptions of justice and their trust in law enforcement. A "gun exception" to the constitution's requirements will place an even greater burden on the "over-policed and under-protected" communities like the area of Minneapolis involved in this case.

Amici urge this Court to reverse the decision below and suppress the evidence obtained when officers unlawfully seized and searched C.T.B.

ARGUMENT

I. This Court's Precedents Protect Against Unreasonable Searches and Seizures Based Solely on an Officer's Non-Particularized Assertions of Their Training and Experience Regarding Proximity.

The prohibition against unreasonable searches and seizures has its roots in the American colonists' abhorrence of general warrants, which "specified only an offense—typically seditious libel—and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched." *Steagald v. United States*, 451 U.S. 204, 220 (1981). To combat this evil, the constitution requires that warrants be supported by "probable cause, … particularly describing the place to be searched and the person or things to be seized." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Searches and seizures without a warrant are *per se* unreasonable unless a specific

exception applies. *State v. Malecha*, No. A22-1314, 2024 WL 949625, at *4 (Minn. Mar. 6, 2024). The specific exception at issue here is the so-called *Terry* stop, which allows an officer to briefly detain and investigate a person when the officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

This Court has a "responsibility to 'safeguard for the people of Minnesota the protections embodied in our constitution.'" *State v. Leonard*, 943 N.W.2d 149, 155 (Minn. 2020) (quoting *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979)). It is axiomatic that the Minnesota Constitution "provides greater protection against suspicionless law enforcement conduct than the Fourth Amendment." *Leonard*, 943 N.W.2d at 156. Our Constitution, therefore, is "the first line of defense for individual liberties." *Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993).

There is a difference, this Court has repeatedly held, between "mere proximity" to criminal activity and being involved in that activity. *Diede*, 795 N.W.2d at 844; *Lemert*, 843 N.W.2d at 232 (declining to adopt the automatic-companion rule articulated by the Ninth Circuit). *See also State v. Eggersgluess*, 483 N.W.2d 94, 96 (Minn. Ct. App. 1992) (the [c]onduct of third parties cannot provide probable cause to search a person unless the person's actions afford independent suspicion"); *State v. Ingram*, 570 N.W.2d 173, 177 (Minn. Ct. App. 1997) (holding that standing next to a suspect of a crime at a public bus stop and speaking softly was not reasonable articulable suspicion).

This Court has similarly disapproved of police action based solely on a person's presence in a high crime area. *See State v. Dickerson*, 481 N.W.2d 840, 842–43 (Minn. 1992) (while "merely being in a high-crime area will not justify a stop," coming out of a well-known 'crack house' in tandem with evasive conduct after eye contact reached the level of reasonable articulable suspicion); *In re E.D.J.*, 502 N.W.2d at 783 (being in an "area of heavy trafficking in crack cocaine" and walking away from officers is not sufficient to stop and search); *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (where there were no furtive movements or evasive conduct, being in a "high crime area known for drug trafficking, violence, and weapons" is insufficient to justify an expansion of a traffic stop). This Court's rules prevent Minnesotans from being subject to the "hated" writs of assistance that "had so bedeviled the colonists." *Stanford*, 379 U.S. at 481. The decision below disregards that history and puts "the liberty of every [person back] in the hands of every petty officer." *Id*.

This case would significantly narrow the Article 1, Section 10 protections this Court articulated in *Diede*. In that case, Ms. Diede was driving a car with plates that did not match its registration. *Diede*, 795 N.W.2d at 841. There was a passenger in the car that officers had probable cause to arrest for narcotics sale. *Id.* Officers arrested the passenger, who they saw toss something back into the car after he saw the officers approach. *Id*. They then asked Ms. Diede to remain with the car, asked her questions, and noticed she was nervous. *Id*. This Court declined to uphold the seizure, reasoning that "mere proximity to, or association with, a person who may have previously engaged in criminal activity is not enough to

support reasonable suspicion of possession of a controlled substance." *Id*. at 844. In so doing, this Court disagreed with the State's proposition "that drug dealers do not usually include innocent persons in their activity and that a passenger is often engaged in a common enterprise with the driver." *Id*. (distinguishing *Maryland v. Pringle*, 540 U.S. 366 (2003) and *Wyoming v. Houghton*, 526 U.S. 295 (1999)).

Here, officers had even fewer grounds to establish a basis to seize and search C.T.B. than officers in *any* of the previously cited cases. The boys in the Little Caesar's were not in a car with someone officers suspected of a crime, they were in a public restaurant. *Contra Diede*, 795 N.W.2d at 841; *Lemert*, 843 N.W.2d at 232. They did not exchange an item with Tiney or touch him. They may not have even spoken with Tiney.[2] They did not walk away from or make and break eye contact with officers. *Contra Dickerson*, 481 N.W.2d at 843. They did not make furtive movements. *Contra State v. Flowers*, 734 N.W.2d 239, 252 (Minn. 2007). They did not throw or drop anything as they watched officers approach.

In other words, officers did not have particularized suspicion that *C.T.B.* (1) possessed evidence of criminal activity—namely, the gun allegedly waved around by Tiney—or (2) posed a threat to officer safety—again, purportedly because he possessed Tiney's gun. The officer testimony that "weapons can often be passed off to another person in a group to evade detection" is no more reasonable than the State's propositions in

[2] BWC footage of the event shows Tiney moving towards the boys to look out the window as officers approached—not, as the district court found, conversing with the boys. Appellant's brief at 6, 12.

Diede—that "[gun possessors] do not usually include innocent persons in their activity and a [person in a group of people looking out the window of a store] is often engaged in a common enterprise with [a person who also walked into the store after allegedly waving a handgun at a location a block away]." Even though the "reasonable-suspicion standard is 'not high,'" *Diede*, 795 N.W.2d at 843, it must still be meaningful. Upholding the seizure and search of C.T.B. would render the particularity requirement of Article 1, Section 10 meaningless.

II. When the Sole Basis for a Search Is an Officer's Assertion of Training and Experience Regarding Proximity, the Court Should Consider Whether That Assertion Is Objectively Reliable Enough to Be Reasonable.

Terry and its progeny allow officers to "stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous." *Flowers*, 734 N.W.2d at 250. The *Terry* exception to the warrant requirement is premised on the idea that officers may need to take "necessarily swift action predicated upon the[ir] on-the-spot observations." *Terry*, 392 U.S. at 20. While the Minnesota Constitution permits warrantless police action under fewer circumstances than the Fourth Amendment, officers still retain a great deal of discretion to make reasonable decisions. *Compare*, *e.g.*, *Flowers*, 734 N.W.2d at 258 *with Atwater v. City of Lago Vista*, 532 U.S. 318 (2001),[3] In evaluating warrantless

[3] Minnesota law prefers citations to arrest when possible. Officers in Minnesota may *only* arrest for misdemeanors without a warrant if "(1) the person must be detained to prevent

searches and seizures, the question is not whether the officer's suspicion was genuine but whether the suspicion was objectively reasonable. *State v. Britton*, 604 N.W.2d 84, 88 (Minn. 2000). Courts must ask whether the "facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate." *Askerooth*, 681 N.W.2d at 364 (quoting *Terry*, 392 U.S. at 21). Officers cannot seize or search someone based on "a hunch, without additional objectively articulable facts." *Diede*, 795 N.W.2d at 845. Officer training and experience is often no more than a hunch.

A. Minneapolis officer training and experience regarding whether a person is involved in criminal activity and a threat is so unreliable both the Department of Justice and the Minnesota Department of Human Rights found it was unlawful.

According to both the Minnesota Department of Human Rights and the United States Department of Justice, officers from the largest police force in the State of Minnesota use discriminatory and non-particularized criteria when deciding to search and seize. And while the instant case involves an arrest by Metro Transit Police Department, the comprehensive investigations are illustrative examples that should inform the Court's decision here. After a years-long investigation, the Minnesota Department of Human Rights found that between 2017 and 2020, 54% of MPD officer-initiated traffic stops

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bodily injury to that person or another; (2) further criminal conduct will occur; or (3) a substantial likelihood exists that the person will not respond to a citation." Minn. R. Crim. Pro. 6.01, subd. 1(a). Officers have authority to cite without arresting for gross misdemeanors and felonies. *Id.* at subd. 2.

involved Black people despite their being approximately 19% of the population. MINN. DEP'T HUM. RTS., INVESTIGATION INTO THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 20 (Apr. 27, 2022). Only 33% of stops involved white people, despite being nearly 63% of the Minneapolis population. *Id.* When MPD officers are more likely to see the race of a vehicle's occupants, like during daylight hours, they more frequently stop vehicles with people of color. *Id*.

The United States Department of Justice also found striking racial disparities in MPD's searches resulting from those traffic stops, "suggesting that MPD applies a different, lower standard when searching Black and Native American people." U.S. DEP'T OF JUST. CIV. RTS. DIV. & U.S. ATTY'S OFFICE DIST. OF MINN., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 37 (June 16, 2023). The Department of Justice found these disparities "even when controlling for similar types of stops, at similar times, involving similar behavior." *Id*. at 38.

Similar rates of arrest of people of color and white people after searches might indicate that officers are using reasonable, objective criteria to frisk and search. But from June 2019 through May 2020, only 26% of searches of Black and East African drivers by MPD resulted in arrest compared to 41% of searches of white drivers. Andy Mannix, *Black Drivers Make Up Majority of Minneapolis Police Searches During Routine Traffic Stops*, Star Trib. (Aug. 7, 2020).[4] Phrased another way, if MPD frisked/searched 100 Black

[4] https://www.startribune.com/black-drivers-make-up-majority-of-minneapolis-police-searches-duringroutine-traffic-stops/572029792

people, only 26 would have contraband compared with 41 white people. But even the "success" rate for frisks and searches of white drivers is not very high. Out of 100 Minnesotans searched by police, 59 would have no evidence of contraband. Officer training and experience that results in the discovery of contraband in less than half of searches is no better than a hunch.

Officer training and experience regarding when a person is a threat to their safety is similarly unreliable. The Department of Justice also found that Minneapolis Police officers "routinely use excessive force, often when no force is necessary." U.S. DEP'T OF JUST. at 10–11. Officers discharged firearms at people "without assessing whether the person presents any threat." *Id*. at 11. They "used neck restraints on people who were not a threat to the officer or anyone else." *Id*. at 14. The officers "aggressively confront people suspected of a low-level offense—or no offense at all— and use force if the person does not obey immediately." *Id*. at 18. Overall, MPD officers "are quick to use force on unarmed people, even without reasonable suspicion that they are involved in a crime or are a threat." *Id*. at 20. The Department also found that officers used force against Black people at 9 times and Native American people at 13.9 times the rate they used force against white people, given their shares of the population. *Id*. at 38. These disparities were worse when the Department controlled for similar behavior patterns leading up to the use of force. *Id*. at 40. Minneapolis Police officers are not using objective, reasonable, or particularized criteria to determine if someone is a threat to the officer or the public. Upholding the decision below will only exacerbate these figures.

B. Disparate treatment of people of color across the state demonstrates that officer training and experience is not only unreliable and unreasonable in Minneapolis.

Data from other Minnesota law enforcement agencies show racial disparities are pervasive across the state. Before the possession of marijuana became legal in Minnesota, for example, law enforcement agencies arrested Black people up to 11.19 times more frequently than white Minnesotans for possession, despite the same rates of use. *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (Apr. 17, 2020).[5] The Metro Transit Police Department—the law enforcement agency involved in this case—historically cites and arrests more people of color for infractions than white people for the same behavior. METRO TRANSIT RESEARCH AND ANALYTICS, ANALYSIS OF POLICE INCIDENTS BY RACE (Dec. 17, 2015).[6] In St. Paul, where law enforcement has been recording race data for traffic stops since 2001, Black people were frisked or searched more often than any other racial group during traffic stops throughout the city. Brandt Williams, *Blacks Most Likely to Be Frisked During St. Paul Cop Stops*, MPR NEWS (Dec. 14, 2016).[7] While the same detailed data analysis and interviews have not been done on other law

[5] https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform

[6] https://www.metrotransit.org/Data/Sites/1/media /blog/police_report-12-17-15.pdf

[7] https://www.mprnews.org/story/2016/12/14/blacks-most-likely-frisked-stpaul-cop-stops.

enforcement agencies, discriminatory application of search and seizure law is not only a Minneapolis problem.

III. The Proposed Legal Standard (Or Lack Thereof) Perpetuates Racial Disparities and Alienates Residents Without Fulfilling Its Stated Goal to Increase Public and Officer Safety.

The State of Minnesota's interest in community safety is of vital import. But this Court must ensure that the purported benefits of a governmental intrusion outweigh the harms it imposes. *See Askerooth*, 681 N.W.2d at 365 ("The test for appropriateness, in turn, is based on a balancing of the government's need to search or seize 'and the individual's right to personal security free from arbitrary interference by law officers.'"). Here they do not. First, non-particularized policing practices like the officers used here have minimal if any specific or general deterrence effect while also reducing public perceptions of fairness and trust in the criminal legal system because of their disparate impacts on communities of color. Second, creating an exception to the particularity requirement when there have been allegations of gun possession will result in even more extremely disparate treatment of people of color by law enforcement and will discourage enjoyment of public accommodations. Third, this exception will have a chilling effect on those who would seek to observe or record officers engaged in their duties.

A. Police practices that do not meet the particularity requirement are ineffective and may actually reduce public safety by fostering mistrust in law enforcement and public perceptions that the criminal legal system is unfair.

Officers here stopped and frisked four Black boys with no basis but their proximity to Tiney. Proponents of this tactic assert that its widespread use "in specific high-crime

communities" deters people from carrying weapons or narcotics. Nancy G. La Vigne, et al., WASH., DC: OFF. OF COMMUNITY ORIENTED POLICING SRV'S, STOP AND FRISK: BALANCING CRIME CONTROL WITH COMMUNITY RELATIONS 2 (2014). The data show, however, that stop-and-frisk only "*may* have contributed to reductions in crime" when it was instituted in New York City in 2002. *Id*. (emphasis added).[8] And the Department of Justice reported that although MPD promoted traffic stops as a way to reduce violent crime "only a small percentage of MPD's traffic stops resulted in recovering guns." U.S. DEP'T OF JUST. at 35. In 2018, for example, MPD recovered only 97 guns from thousands of traffic stops—just 0.3% of stops. U.S. DEP'T OF JUST. at 35. These nominal benefits are far outweighed by the harms generalized and ineffective policing cause.

Residents of neighborhoods that are more heavily policed consistently feel more cynicism towards the legal system and the government. Amanda Geller & Jeffrey Fagan, *Police Contact and the Legal Socialization of Urban Teens*, 5 RUSSELL SAGE FOUNDATION J. SOC. SCI. 26, 27 (Jan. 2019). "Even low-level stops can be degrading to people and diminish their trust in law enforcement." U.S. DEP'T OF JUST. at 32. Residents of North Minneapolis reported feeling "criminalized by police or treated as though they 'were up to

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[8] Violent crime fell in most major cities and across the country beginning at the same time the official NYPD stop-and-frisk policy was implemented and fell at higher rates in cities that did not rely on stop and frisk abuses. STOP AND FRISK MYTHBUSTERS, NYCLU (Aug. 2012), https://www.nyclu.org/sites/default/files/Mythbusters_08.30.12.pdf. Before, during, and after the NYPD's official stop-and-frisk policy, the overwhelming majority of those stopped and frisked have been (1) people of color and (2) innocent—that is, officers had no basis to cite them. STOP-AND-FRISK DATA, NYCLU (Mar. 15, 2024) https://www.nyclu.org/en/stop-and-frisk-data.

no good.'" Michelle S. Phelps, et al., *Over-Policed and Under-Protected: Public Safety in North Minneapolis*, CURA Reporter (Nov. 17, 2020).[9] Residents reported being unwilling to call 911 or report crime. MPD 150, Enough Is Enough: A 150-Year Performance Review of the Minneapolis Police Department, 22-24 (2020); Phelps, *supra*. This in turn makes it more difficult for officers to solve crimes and assist those who need help. The use of stop, question, frisk, and search activities should protect the safety of the officer and the public." La Vigne, at 2 (emphasis added)—they do not.

B. Minnesota's strong protections against racial discrimination coupled with its long history of extreme racial disparities weigh heavily against condoning an exception to the particularity requirement.

Generalized policing disproportionately affects people of color, particularly those who live, work, and eat in "high crime areas." The Minnesota Human Rights Act, one of the most robust of its kind in the country, declares that the full and equal utilization of public accommodations and public services free from discrimination is a civil right. Minn. Stat. § 363A.02, subd. 2. Policing practices that result in discrimination, such as those employed in this case, "threaten the rights and privileges of the inhabitants of this state and menace[] the institutions and foundations of democracy." Minn. Stat. § 363A.02, subd. 1(b). This Court should refuse to condone such practices.

[9] https://www.cura.umn.edu/research/over-policed-and-under-protected-public-safety-north-minneapolis#Introduction.

Areas that are more heavily policed, which law enforcement often refer to as "high crime areas," have higher concentrations of people of color. OFFICE OF POLICY DEVELOPMENT & RESEARCH, U.S. DEPT. HOUSING & URBAN DEV., NEIGHBORHOODS AND VIOLENT CRIME (2016).[10] The Department of Justice found "even starker discrimination in certain parts of Minneapolis." U.S. DEP'T OF JUST. at 40. In the Third Precinct, "where many Native Americans live and where supervisors told us the 'cowboys' want to work," MPD used force 49% more often on Black people and 69% more often on Native American people than on white people during similar stops. *Id*. "Differences in people's behavior, the reason MPD documented for the stop, the offenses, the demographic makeup of the precinct, or even possible differences in policing strategies in different precincts" could not explain away the precinct-level disparities. *Id*. Black and Native American people in Minneapolis face a higher risk of having force used against them during stops throughout the City." *Id*. Illegitimate and racist policing harms people and reduces their ability to access law enforcement as a public service. People of color generally are less likely to report crimes, to call 911, and to provide information that would assist officers in solving crime. Emily Ekins, *Policing in America: Understanding Public Attitudes toward the Police* CATO Inst. (Dec. 7, 2016)[11] ("while 78% of white Americans say they would

[10] https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html

[11] https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national#consequences-of-the-confidence-gap

"definitely" report a violent crime they witnessed, considerably fewer African Americans (54%) and Hispanics (57%) feel as confident").

Discriminatory policing violates not only the right to equal access to public services, but it also prevents people who live in heavily policed areas from enjoying full and equal access to public accommodations. One Minneapolis resident described a night that

> everything was good. For once there was no fighting and no shooting after a party. It was so good. Then the police came and it was like me and seven other people standing on this gate that was in the alley. The police, we seen them riding through the alley where we were standing, but we thought they were just about to go past because we weren't doing nothing to anyone, no fights or nothing. Next thing you know they stop right at the beginning of the line of us. I was kind of in the middle. They stopped and next thing you know he started driving real fast. He rolled the window down and just maced all of us in a line.

MPD 150 at 24. The Little Caesar's Pizza in this case is in an area that has long been an area of high law enforcement presence—the Third Precinct where "the Cowboys want to work." U.S. DEP'T OF JUST. at 40. As the court of appeals in *Ingram* observed, "[w]hen two young minority males, talking at a public bus stop in Minneapolis, are observed lowering their voices when police officers approach, about the same earth-shattering inferences can be drawn as when two sixth graders, whispering to each other in side-by-side desks, lower their voices when they see the school teacher turn and look at them." *Ingram*, 570 N.W.2d at 177. But officers consistently treat minorities differently, particularly in areas with higher concentrations of people of color. People of color will worry that if officers are allowed to stop and frisk a bystander at a Little Caesar's, they can stop a person for having a conversation with someone in line at the grocery store or for sitting next to a stranger in a movie theater. This Court must prohibit the discriminatory policing practices that prevent

the full and equal access to public accommodations guaranteed by the Minnesota Human Rights Act.

C. The decision of the court of appeals will allow officers to seize people that pose no objectively reasonable threat in retaliation for observing their activities and will chill protected rights of expression and free assembly.

Regular retaliation against bystanders and protestors through arrest and excessive force illustrate that the "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant of Property*, 367 U.S. 717, 729 (1961). In its investigation, the Department of Justice found that the MPD violates people's first amendment rights by "retaliate[ing] against people who question or criticize them." U.S. DEP'T OF JUST. at 52. They also retaliate against those who observe and record their activities." *Id*. at 53. Here, the four boys' only offense was watching the officers as they pulled up to the Little Caesar's. If that alone is sufficient to establish reasonable suspicion, the Fourth Amendment and Article I, Section 10 would be rendered meaningless.

Other courts have championed the First Amendment while evaluating the reasonableness of arrests. *See Chestnut v. Wallace*, 947 F.3d 1085, 1091 (8th Cir. 2020) (holding that an officer had violated Chestnut's clearly established right to observe police-citizen interactions by detaining him); *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017) (noting the important perspectives bystander recordings of police action provide). And "every circuit court to have considered the question has held that a person has the right to record police activity in public." *Chestnut*, 947 F.3d at 1091 (citing *ACLU*

of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). While there is no evidence that officers seized and searched the boys in the instant case in retaliation for having observed the officers, the officers readily acknowledged that "bystanders often stop and watch when police are stopping or arresting people in populated areas." Appellant's Brief at 6. "Bystanders may just be curious about what is happening; they are not necessarily engaged in criminal activity." *Id*. The four boys here were, like "any two people of either gender or any race," *Ingram*, 570 N.W.2d at 177, observing the approach of police officers and then the arrest of Tiney. But officers did not treat them as such and will be able to stop and search any other bystander based solely on the proximity necessary for activity protected by the First Amendment if this Court does not reverse the decision of the court of appeals.

CONCLUSION

The prohibition against general warrants, "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," *Boyd v. United States*, 116 U.S. 616, 625 (1886), are at the very heart of the requirement that police action be reasonable and that it be particularized. Officer testimony about people "in a group" or in "proximity" to each other or in a "high crime area," without any other particularized and objective information, is insufficient to provide a reasonable basis to search or seize.

All Minnesotans deserve policing practices that are fair and effective, that keep people safe, and that uphold the values enshrined in the U.S. and Minnesota Constitutions and the Minnesota Human Rights Act. Here, officers subjected four boys to the humiliation and trauma of a pat frisk based on a hunch. And even more Minnesotans across the state will be subjected to the same treatment if this Court upholds the court of appeals' decision. Although C.T.B. "happened to have [a gun] on h[is] person, in other instances, similar mistake[s] [] result in the arrest and search of [] wholly innocent individual[s]." *Malecha*, No. A22-1314, 2024 WL 949625, at *10. This Court should reverse the court of appeals and suppress the evidence obtained to repair the "public perception of fairness in the judicial process." *Id*.

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Respectfully submitted,

/s/_____

Alicia Granse (#0400771)
Teresa Nelson (#0269736)
American Civil Liberties Union of Minnesota
P.O. Box 14720
Minneapolis, MN 55414
Tel.: (651) 645-4097

Shauna Kieffer (#0389362)
Minnesota Association of Criminal Defense Lawyers
310 4th Ave. South Suite 1050
Minneapolis, MN 55415
Tel. 612-418-3398

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 & 3, for a brief produced in a proportional font. By automatic word count, the length of this brief is 5076 words. This brief was prepared using Microsoft 365, Word Version 2308.

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/s/ Alicia L. Granse
Alicia Granse (#0400771)
American Civil Liberties Union of Minnesota
P.O. Box 14720
Minneapolis, MN 55414
Tel.: (651) 645-4097

Attorney for Amici Curiae