No. 24-5381

# In the Supreme Court of the United States

NATHAN COOPER,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

## SUMMARY OF ARGUMENT

*Terry* frisks are anti-originalist. A *Terry* stop-and-frisk is a seizure and search within the original meaning of the Fourth Amendment. However, *Terry* did away with the common law's crucial probable cause requirement. Restoring that standard would

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

help the public perceive the Court's originalist turn as more consistent and so more legitimate.

## ARGUMENT

### I. A *TERRY* STOP-AND-FRISK IS A SEIZURE AND SEARCH WITHIN THE ORIGINAL MEANING OF THE FOURTH AMENDMENT.

The seizure and search of Petitioner falls within the ambit and original meaning of the Fourth Amendment for the simple reason that a *Terry* stop-and-frisk is "a governmental termination of freedom of movement."[2] The Fourth Amendment protects people's right to be secure against unreasonable seizures.[3] In interpreting the scope of that right, the Court has looked to common law at the time of the framing.[4] Those protections centered on freedom of movement.

The common law protected personal liberty, which Blackstone identified with "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due

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[2] *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989).

[3] U.S. CONST. amend. IV.

[4] *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *cf. United States v. Jones*, 565 U.S. 400, 411 (2012) ("What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at a *minimum* the degree of protection it afforded when it was adopted."); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Customary law regarding seizures largely remained in place after Independence. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, 750 (2009).

course of law."[5] He considered this right to be natural and foundational to every other legal right.[6] This Court has likewise characterized the common law as holding freedom of movement—the right "to be let alone"—to be both "sacred" and "carefully guarded."[7]

Interference with this freedom qualified as a seizure.[8] The common law defined "seizure" as "taking possession."[9] It expanded on this notion in the tort of false imprisonment, which concerned arrests made without probable cause.[10] Common law false imprisonment had as elements "the detention of another against his will, depriving him of the power of locomotion."[11]

*Terry* recognized that a stop-and-frisk meets that definition: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

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[5] 1 WILLIAM BLACKSTONE, COMMENTARIES, *130.

[6] *Id.* at *131.

[7] *Union P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (citation omitted).

[8] *See* 1 BLACKSTONE, *supra*, at *132 ("THE confinement of the person, in any wise, is an imprisonment.").

[9] *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citations omitted).

[10] *See Torres v. Madrid*, 592 U.S. 306, 311–14, 319–21 (2021). Both civil and criminal common law authority regarding these is constitutionally relevant. *Id.* at 1001.

[11] *United States v. Benner*, 24 F. Cas. 1084, 1087 (C.C.E.D. Pa. 1830); *see also* Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 203 (1940).

*Terry v. Ohio*, 392 U.S. 1, 16 (1968). But *Terry* then invented what one scholar has called an "amphibian event"—a kind of seizure that is not an arrest, a kind of search that cannot be authorized by warrant.[12] But *Terry* frisks plainly are seizures and searches within the original meaning of the Fourth Amendment.

## II. SEIZURES AND SEARCHES REQUIRED PROBABLE CAUSE AT COMMON LAW.

The common law limited seizures and searches by requiring probable cause—a crucial protection greatly curtailed by *Terry*. The opinion recognized that it would be "sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing" is not a search. *Id.* at 16. It further cautioned that a frisk is "a severe . . . intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24–25. Nevertheless, the majority effectively abrogated the ancient requirement of probable cause in that setting. *Id.* at 37 (Douglas, J., dissenting); *Henry v. United States*, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history."). Probable cause—enshrined in the Constitution as a mighty protection for privacy and the presumption of innocence, *Brinegar v. United States*, 338 U.S. 160, 176 (1949)—was undercut.

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[12] George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1495 (2005).

There was no authority at common law for *Terry* frisks. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) ("I am unaware . . . of any precedent for a physical search of a person thus temporarily detained for questioning.").[13] Justice Scalia wrote that if a "detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect." *Id.*

He was right.[14] *See* 4 BLACKSTONE, *supra*, at 289–92; 2 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWNS 72–120 (E. Rider, 1800)[15]; MICHAEL DALTON, THE COUNTRY JUSTICE 308 (Societie of Stationers, 1622).[16] By the time of Independence, "body searches

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[13] *See also* Sophie J. Hart & Dennis M. Martin, *Judge Gorsuch and the Fourth Amendment*, 69 STAN. L. REV. ONLINE 132, 136 (2017) ("Scholars and judges seeking a historical hook for *Terry* have uncovered little evidence linking *Terry*'s stop and frisks to police actions at common law."). A mid-twentieth century survey found just one 1908 California intermediate appellate case letting an officer search a suspect as part of questioning. Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 327 (1942).

[14] Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 217 (2007) ("In 1968, the Warren Court drew upon the modern reasonableness standard to create an entirely new doctrine of constitutional 'detentions' and 'frisks' in *Terry v. Ohio*. . . . [A]ny interference with a person's liberty had been regarded as 'arrest' and 'imprisonment' at common law[.]").

[15] Available at https://tinyurl.com/5a5ear96.

[16] Available through ProQuest.

were derivatives of the arrest process, and Americans had little recent experience with personal searches apart from that process."[17] One early writer characterized searches of travelers' personal effects as lawless, thereby clearly implying that personal searches should require a warrant.[18]

Professor Lawrence Rosenthal, who defends *Terry*, has nevertheless conceded that Founding Era authorities refer only to warrantless arrests and not a lesser category of investigative detentions and frisks.[19] He called *Terry* frisks an "innovation."[20] He also found no pertinent legal developments up through Reconstruction and the Fourteenth Amendment.[21] As late as 1963, just five years before *Terry*, another scholar wrote that warrantless searches required probable cause in the only two settings where they

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[17] CUDDIHY, *supra*, at 752.

[18] *Id.* (citation omitted).

[19] Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH. L. REV. 299, 330 (2010).

[20] *Id.* at 332; *see also id.* at 332 ("Perhaps even more important, there is reason to doubt that framing-era officers would have used the somewhat-elusive standard of suspicion under the nightwalker statutes anywhere near as aggressively as *Terry* permits. Framing-era officers acting without a warrant faced personal liability in tort if they made an arrest under circumstances that a jury might later deem inadequate.").

[21] *Id.* at 334–35.

were lawful: automobile searches and searches incident to arrest.[22]

In a 1923 New York Court of Appeals opinion, Judge Cardozo followed common law and held that a search was illegal if its purpose was to find a reason to arrest someone.[23] Judge Cardozo even anticipatorily rejected *Terry* frisks by negative implication: "The peace officer *empowered to arrest* must be empowered to disarm. *If* he may disarm, he may search, lest a weapon be concealed."[24]

After *Terry*, this Court recognized that its holding and rationale in that case had veered far from the common law. The Court in *Dunaway v. New York*, 442 U.S. 200, 207–08 (1979), noted that, until *Terry*, the Fourth Amendment "was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause." Probable cause was an "absolute" requirement. *Id.* at 208.[25] This rule "represented the

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[22] Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 393, 401 (1963).

[23] *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1923).

[24] *Id.* (emphasis added). Sam B. Warner may have overlooked this case in writing that "practically all" precedent concerned personal searches for "contraband other than firearms." Warner, *supra*, at 327 n.23.

[25] *See also* Thomas, *supra*, at 1496 ("As Justice Douglas pointed out . . . 'Had a warrant been sought, a magistrate would . . . have been unauthorized to issue one, for he can act only if there is a showing of 'probable cause.'" Isn't that an odd way to read the Fourth Amendment? Well, it is if one seeks an authentic Fourth

accumulated wisdom of precedent and experience" and obviated any basis for the ad hoc interest balancing conducted by *Terry*. *Id.*; *see also id.* at 214 (calling *Terry* an exception to the general Fourth Amendment rule that "the requisite 'balancing' has been performed in centuries of precedent"); *cf. District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach . . . . Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

*Terry*'s counter-originalism was as unprecedented as its holding. The absence of common law authority for a search could be dispositive in earlier Fourth Amendment jurisprudence: "If no . . . excuse can be found or produced, the silence of the books is an authority . . . [I]t is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass." *Boyd v. United States*, 116 U.S. 616, 631 (1886) (quoting *Entick v. Carrington*, 95 Eng. Rep. 807 (C. P. 1765), which this Court has described as authoritative[26]). The absence of common law authority for a seizure or search was "an undeniable

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Amendment with its abhorrence of general warrants based on loose suspicion." (citation omitted)).

[26] *Jones*, 565 U.S. at 400 (cleaned up and citation omitted).

argument against the legality of the thing." *Id.* at 628 (quoting *Entick*, 95 Eng. Rep. at 807). The Court condemned how doctrinal innovations "crept into the law by imperceptible practice," despite being "never yet allowed from all antiquity." *Id.* (quoting *Entick*, 95 Eng. Rep. at 807). It did not matter that an innovation could seem minor—"illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Id.* at 635. The Court's duty was not to innovate, but to stand guard. *Id.*; *see also Jones*, 565 U.S. at 411 ("What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at *a minimum* the degree of protection it afforded when it was adopted."); *accord Kyllo v. United States*, 533 U.S. 27, 34 (2001); *United States v. Weeks*, 232 U.S. 383, 392 (1914); *Bram v. United States*, 168 U.S. 532, 544 (1897).

*Terry* strayed from Fourth Amendment precedent. *Dunaway*, 442 U.S. at 209. It abrogated the venerable, and constitutionally essential, probable cause requirement—substituting the Court's preferred policy.

## III. *STARE DECISIS* SHOULD NOT PREVENT THIS COURT FROM REVISITING *TERRY*.

*Stare decisis* is no bar to making the overdue course correction urged by Petitioner and Amicus. As Amicus and others have noted, public confidence in the Court

has ebbed.[27] The way to restore it is not by unquestioningly following erroneous precedent, but rather "deciding by [the Court's] best lights" what the law requires. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 291 (2022) (citation omitted); *see also Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944), another case that denied Americans their constitutional rights).

This Court has not hesitated to revisit even longstanding precedent when it determines that the original meaning of the Constitution requires a different approach. *See*, *e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 252 (2023) (Thomas, J., concurring) (noting that the Court followed originalism rather than twentieth-century precedent); *id.* at 318–19 (Sotomayor, J., dissenting) (accusing the Court of doing so); *Dobbs*, 597 U.S. at 231 ("*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority."); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (rejecting reliance on an "ambitious, abstract, and ahistorical approach to the Establishment Clause") (cleaned up).

The Court's originalism can be principled. Keith Whittington, *Is Originalism Too Conservative?*, 34

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[27] *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), available at https://tinyurl.com/ys39nyme.

HARV. J.L. & PUB. POL'Y 29, 30 (2011); *see also Hewitt v. Helix Energy Sols. Grp.*, 15 F.4th 289, 304 (5th Cir. 2021) (en banc) (Ho, J., concurring) ("Justice Scalia once wrote: '[S]uch questions as "Who wins?" "Will this decision help future plaintiffs?" "Will it help future defendants?" "Is this decision good for the 'little guy'?" "Is it good for business?" . . . Questions like these are appropriately asked by those who write the laws, but not by those who apply them.'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 352–53 (2012) (emphasis added))).

One way of showing this would be ending *Terry* frisks and thereby underscoring that the Court's originalism is politically evenhanded. *See* William H. Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L.J. F. 173, 175 (2017) (writing of the Court's analysis of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004)): "Seven Justices joined that opinion, surely one of the most overtly originalist opinions in the last two decades, and it strengthened the case for originalism as a legitimate method of constitutional adjudication."). By contrast, a selective approach as to which anti-originalist precedent merits revisiting and which escapes historical scrutiny—"originalism for me, but not for thee"—may well deepen the crisis of public legitimacy. *Hewitt*, 15 F.4th at 304 (Ho, J., concurring) (citation omitted).

## CONCLUSION

Dissenting in *Terry*, Justice Douglas ruled:

> [I]f the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

392 U.S. at 39. Half a century later, this Court similarly emphasized that it lacks "the authority" to rewrite the law "from the ground up." *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023).

*Terry*—"thoroughly functional and ahistoric"—disregarded these limits in authorizing frisks based on less than probable cause.[28] The "fiercely proud men who adopted our Fourth Amendment would [not] have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity." *Dickerson*, 508 U.S. at 381 (Scalia, J., concurring).

The Court should grant the petition and reverse the judgment below.

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[28] David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1762 (2000).

Respectfully submitted,

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