No. 20-7612

IN THE

Supreme Court of the United States

MICHAEL D. JOHNSON,

Petitioner,

v.

INDIANA,

Respondent.

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

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

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QUESTION PRESENTED

Whether a *Terry* frisk where the frisking officer did not have actual suspicion that the detainee was armed and dangerous violates the Fourth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective 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.

This case is of central concern to Cato because the way in which lower courts have done away with an actual suspicion requirement in *Terry* frisk analyses eviscerates the fundamental and historical protections guaranteed by the Fourth Amendment. Resolving this circuit split would ensure Americans receive their promised protections from a search-first-justify-later policing regime.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The core of the Fourth Amendment…is neither a warrant nor probable cause, but reasonableness." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 801 (1994). Yet Mr.

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[1] Rule 37 statement: All parties were timely notified and consented to 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.

Johnson was detained and searched by two state casino agents after another casino patron told security that a black man offered to sell him cocaine. Pet. App. 38a & 35a. After taking Mr. Johnson into a small office space, Agent Wilkinson informed Mr. Johnson that he "needed to pat him down." Tr. At II:111. At no point during the suppression hearing or subsequent trial did Agent Wilkinson testify that he believed, feared, or suspected that Mr. Johnson was armed or dangerous. Pet. App. at 32a–52a. Nonetheless, Wilkinson removed from Mr. Johnson's front pocket a large ball of baking soda—a violation of a state law against possessing with intent to distribute a drug look-a-like. Ind. Code § 35-48-4-4.6.

Mr. Johnson's brief explains that during his suppression hearing the court ignored Agent Wilkinson's lack of actual suspicion that Johnson might be armed and dangerous. Instead, the court followed the Seventh and Tenth Circuits, which both refuse to consider the presence or absence of actual, subjective suspicion before the frisk. That approach is unreasonable.

But Cato writes separately to explain how the lower courts that do not require an actual suspicion analysis violate the original public meaning of the Fourth Amendment and disregard their duty to uphold the protections of the Constitution. Had Mr. Johnson's suppression hearing taken place in a jurisdiction that requires police to possess actual suspicion that a suspect is armed and dangerous before conducting a *Terry* frisk then the incriminating evidence would have been rightfully suppressed.

The specific language of the Fourth Amendment was largely a product of the colonists' experience with pernicious general warrants. Historically, general warrants—and specifically, writs of assistance—gave law enforcement broad discretion to search wherever and whatever they deemed necessary, without the need to establish specific probable cause before a judicial officer. Such broad discretion enabled abusive, selective enforcement, and the colonists' contempt for those arbitrary practices was a major cause of the Revolutionary War itself.

"The requirement of some level of individualized suspicion operates to limit the government's discretionary authority to search and seize." Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 485 (1994). This Court's doctrine says police officers may briefly detain a person when they have reasonable suspicion that the person committed an infraction of some kind, but without probable cause to actually effect an arrest, those officers cannot conduct a pat down or search one's belongings. The main exception to this rule is that officers can do a quick, safety pat down during a *Terry* stop if they think the suspect may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968). The scope of a "*Terry* frisk," as this type of search has come to be known, is limited. The officer must have reasonable suspicion that the person being searched is armed and poses a danger to the officer or others. *Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009).

Although the Court has insisted that the definition of reasonable suspicion is an objective one, beginning with *Terry* itself, the case law has created an

ambiguity as to whether reasonable suspicion incorporates any level of subjectivity. Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. Pa. J. Const. L. 751, 771 (2010). The *Terry* Court called the inquiry an "objective standard" and framed it in objective terms, asking "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 21–22, 27. Pages later, however, the Court used more subjective language in summarizing its opinion as "merely holding" that a frisk is permissible if "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." *Id.* at 30.

While this language mandates that the officer's belief must be objectively reasonable, it also seems to envision that circumstances must actually lead the particular officer to genuinely suspect that the suspect may be armed and dangerous. Kinports, *supra*, at 772. As the First Circuit has pointed out, "an officer cannot have a reasonable suspicion that a person is armed and dangerous when he in fact has no such suspicion." *United States v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989). Nevertheless, the contrary position is the prevailing view among a handful of lower courts, resulting in a deep circuit split.

ARGUMENT

I. THE ORIGINAL MEANING OF THE FOURTH AMENDMENT WOULD NOT HAVE SUPPORTED A WARRANT EXCEPTION WITHOUT AN ACTUAL SUSPICION STANDARD

A. The Early American Experience Emphasized Specificity in Searches

The original public meaning of the rights enshrined in the Constitution provides a critical standard for understanding the limits of government action. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1185 (2016). Perhaps this is nowhere more true than in regard to the Fourth Amendment. *Id.* British subjects in the colonies had lived with—and chaffed under—threats posed by general warrants. *Stanford v. Texas*, 379 U.S. 476, 481 (1965). These warrants gave government officers license to search wherever and whatever they pleased, no matter their reasons, with impunity. *Id.* Writs of assistance, specifically, provided customs agents authority to search private dwellings in order to look for goods that failed to meet customs requirements. Donohue, *supra*, at 1242. These "hated writs" were denounced by James Otis 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," because they placed "the liberty of every man in the hands of every petty officer." M.H. Smith, *The Writs of Assistance Case* 552 (1978) (reproducing the speech of Otis). "Then and there," wrote John Adams, "was the first scene of the act of opposition to

the arbitrary claims of Great Britain. Then and there the child of Independence was born." Letter from John Adams to William Tudor, Sr. (Mar. 29, 1817).

While the Founders' insistence on freedom from unreasonable searches and seizures as a fundamental right gained momentum in the colonies as a result of their experience, there was also a rich English experience to draw on. Most famous of the English cases was *Entick v. Carrington*. There, state officers had raided many homes in search of materials connected with John Wilkes' pamphlets attacking both governmental policies and the King himself. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807. Entick, an associate of Wilkes, sued after officers forcibly broke into his house, broke into desks and boxes, and seized charts and pamphlets. *Id.* The English court declared the warrant and the behavior it authorized to be subversive "of all the comforts of society," and the issue of a warrant for the seizure of all of person's papers rather than specific documents to be "contrary to the genius of the law of England." *Id.* The warrant was bad, besides its general character, because it was not issued upon the showing of probable cause. *Id.* *Entick v. Carrington* has since been called by this Court a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and a guide on understanding what the Framers meant in the Fourth Amendment. *Boyd v. United States*, 116 U.S. 616, 626–27 (1886).

Early state constitutions also addressed the use of promiscuous search and seizure, and they did so in three important ways. Donohue, *supra*, at 1264. First, they created a positive right to be secure in one's

person, house, papers, and effects against unreasonable searches. *Id.* Second, particularized warrants were embraced as the only way in which government could breach the protective walls of the home. *Id.* Third, the fact that a warrant was specific was not enough. *Id.* States went to great lengths to outline precisely what information needed to be presented and what procedures had to be followed for a warrant to be valid. *Id.* State declarations of rights and constitutions entrenched these important legal changes before the Fourth Amendment cemented them into federal law. *Id.*

B. The Original Public Meaning of "Unreasonable" Is to Be Outside the Boundaries of Settled Common Law

The Massachusetts Constitution adopted language similar to that which James Madison used in what became the Fourth Amendment. Authored by John Adams, the Massachusetts Constitution gives insight into the original meaning of the text. Donohue, *supra*, at 1269. Adams' choice of words reflected the "legal legacy" he inherited and the contemporary understandings of the requirements of specificity. *Id.*

Adams began by articulating the underlying right: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions." Mass. Const. (1780) art. XV. The use of the word "unreasonable" conveyed a particular meaning at the time: against the reason of common law. Donohue, *supra*, at 1270. The basic idea was that the principles inherent in the common law had legal force, so that

which was consistent with the common law was reasonable—and therefore, legal. This understanding reflected the approach embraced by English scholars, and Adams had read Coke, Hawkins' Pleas of the Crown, and other English treatises. Brian J. Moline, *Early American Legal Education*, 42 Washburn L.J. 775, 783 (2002). In 1610, Coke asserted that a statute was void if it was "against common right and reason." *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646, 652–53. Locke, referring back to Coke, replaced "against reason" with "unreasonable." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 689, 689 n.398 (1999). Blackstone, too, converted Coke's phrase to "unreasonable." *Id.* at 689.

Legal tracts of the time also linked unreasonableness with illegality. In 1751, A New Law-Dictionary explained that the common law is founded "upon reason." Giles Jacob, *A New Law-Dictionary* at "Common Law" (7th ed. 1751). Anything contrary to reason was unlawful. *Id.* at "Reason." Legal tracts also recognized general warrants as being unreasonable as a violation of the common law. For example, *The Law of Arrests*, published in 1742, highlighted the unreasonableness of general warrants. Attorney at Law, *The Law of Arrests in Both Civil and Criminal Cases* 174 (1742). The pull of the reason of common law was so strong that statutes at the Founding had to be read in a manner consistent with it. Donohue, *supra*, at 1273. In a 1774 dispute over access to a river, a court in Maryland cited Coke and asserted that the "surest construction of a statute is by the rule and reason of the common law." *Harrison v. Sterett*, 4 H. & McH. 540, 545 (Md. 1774). The Supreme Court of Appeals of Virginia also ruled

that statutes must be interpreted as closely to the "reason of the common law" as possible. *Chichester v. Vass*, 5 Va. (1 Call) 83, 102 (1797).

The meaning of "unreasonable" at the time of the Founding thus carried a different meaning than our modern, relativistic understanding of the word today. We now understand "unreasonable" to mean that the behavior is inappropriate under the circumstances. Donohue, *supra*, at 1274. The 18th-century construction is much more formalistic. *Id.* "Unreasonable" carried a quality that meant outside the boundaries of a settled rule. *Id.* at 1275. It was not a matter of degree—it was whether or not the behavior met the standards. *Id.* The Massachusetts Constitution explicitly defined what behavior would fall outside those acceptable boundaries:

> 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 persons or objects of search, arrest, or seizure.

Mass. Const. (1780) art. XIV. Warrants lacking such specificity fell outside the settled, common-law limits. By placing the rule in the written constitution, Adams secured not only the right against warrantless searches and seizures, but also the right against a search or seizure with a warrant lacking the required particularity. Donohue, *supra*, at 1276. The Founding Fathers did the same on the federal level:

> 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*.

U.S. Const. amend. IV (emphasis added). By requiring specificity as to the places to be searched and the property to be seized, the Fourth Amendment limits the discretion of government officers acting under the authority of warrants, providing general assurances that officers or their agents cannot engage in general searches according to their whims. David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. Rev. 425, 464 (2016).

C. Warrant Exceptions at the Founding Were Limited

All this is not to say there were no exceptions to the warrant requirement at the time of the Founding. For eighteenth-century English subjects, the home served as a barrier to government intrusion. Donohue, *supra*, at 1221. But an ancient exception to this rule was the known-felon exception. *Id.* Agents of the crown had the authority to arrest individuals caught in a criminal act. *Id.* at 1222. Four conditions were required for this exception to be lawful. The arrest had to be directed toward a specific individual, for a specific crime, that was serious in nature, and the agent needed to have witnessed the felony. *Id.* at 1223. The person effecting arrest under this exception was liable for trespass, assault, or murder in the

event they were wrong in their belief that the target had committed the felony. Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev 541, 563 (1924).

The second exception to the warrant requirement was—and is—a search incident to a lawful arrest. The purpose of such search was to secure the safety of those effecting the arrest. Donohue, *supra*, at 1223. English law permitted two kinds of searches related to arrest. First, of the person arrested. *Id.* at 1230. Second, of the surrounding area where the felon was located. *Id.* At the time the Fourth Amendment was adopted, a warrantless search incident to a *valid* arrest was acceptable policing practice in the United States. Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 223 (5th ed. 1996) (emphasis added). But because of the narrow scope of legal, warrantless arrests, as a practical matter, Founding Era authorities had relatively little occasion to conduct searches incident to arrest. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 Yale L. & Pol'y Rev. 381, 386 (2001). Even when invoked, the scope of the search was limited. Apart from the acknowledged authority of arresting officers to seize weapons, due to the limited forensic capabilities of the time, the primary type of evidence seized upon arrest was stolen property. John Gardner Hawley, *The Law of Arrest on Criminal Charges* 47 (1889) (acknowledging common law rule that an arresting officer is entitled to seize weapons and "has a right to search for the purpose of finding on [the arrestee] stolen money or other stolen property").

II. A FOURTH AMENDMENT EXCEPTION THAT DOES NOT REQUIRE ACTUAL SUSPICION IS AN ABDICATION OF COURTS' DUTY TO ENFORCE CONSTITUTIONAL LIMITS ON GOVERNMENT POWER

A. The Judiciary Is Uniquely Equipped to Find the Truth

Among the judiciary's key functions is to be a forum in which outcomes depend upon the result dictated by the application of the appropriate legal rule to a set of judicially determined facts. Clark M. Neily III, *(Don't) Assume an Honest Government*, 23 Tex. Rev. L. & Pol. 401, 418 (2019). To that end, lawyers have an ethical duty of candor towards the tribunal; witnesses take an oath to tell the truth in court; and judges correctly emphasize that their job is to determine the legally correct result regardless of their personal feelings. *Id.* at 419. In many cases the most important question before a court will be why the relevant actor did what he or she did. Why did the defendant shoot the victim—in self-defense, in a sudden passion, or to claim the victim's life-insurance proceeds? *Id*. at 403. The same is true in corporate cases: why did a solvent company convey its assets to spin-off corporations? *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich. 1988) (it did so to defraud its creditors). And for government entities: why did Texas prohibit people who perform interior design services from referring to themselves as "interior designers"? Neily, *supra*, at 403. (citing *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009)).

But not all Fourth Amendment suppression hearings are genuinely truth-seeking proceedings. *Id.* at 406. A dichotomy has arisen between subjective and objective standards for police behaviors, and it often arises in a particular subset of cases—namely, those where the defendant can make a persuasive case that the officer who performed a *Terry* frisk did not actually think the defendant might be armed and dangerous, but performed the frisk anyway and found something that the government now wants to use as evidence against the defendant. In that case, the only way for the prosecution to avoid the fruit-of-the-poisonous-tree problem is to reverse-engineer a justification for the officer to have performed a suspicionless—and therefore presumptively unlawful—*Terry* frisk.

Now no longer behind a veil of ignorance about what a defendant could be holding, the reviewing court faces a strong temptation to engage in motivated reasoning. Thus, instead of looking at the totality of circumstances to identify the reasons why the officer's suspicions were not aroused—which might include any number of both articulable and difficult-to-articulate elements such as the presence or absence of other police officers, the size differential between the officer and the suspect, the suspect's demeanor, the time of day or night, and even such potentially fraught characteristics as the suspect's age, gender, ethnicity, gang- or ideological-affiliation, etc.—there is a very real risk that the judge will simply look at the totality of circumstances and cherry-pick the potentially-suspicion-arousing ones while minimizing the potentially-suspicion-dispelling ones. But of course, that kind of post hoc

rationalization is precisely what the Fourth Amendment seeks to protect us from by requiring that the reasonableness of a search be demonstrated *before* it is undertaken and *before* we find out whether it produced anything incriminating. *See United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011) ("[T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.").

B. Courts Often Attribute a Purpose, Motive, or End to Another Person

The choice of judges to engage in a genuinely truth-seeking process in some cases but not others is just that, a choice—and a troubling one. Neily, *supra*, at 411. Granted, it can be difficult to attribute a purpose, motive, or end to another person, but courts do so all the time. A prime example is in the context of employment discrimination under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e.

Title VII forbids discriminating against employees on the basis of race, color, religion, sex, or national origin. *Id.* at § 2000e(a)–(b). While employment at-will is the default arrangement in the United States, meaning an employer may fire an employee for no particular reason, employers cannot fire an employee for an improper reason. *Id.* at § 2000e-2(a). Like warrantless search cases arising under the Fourth Amendment, the case of firing an at-will employee may be lawful or unlawful depending on why it was done. Neily, *supra*, at 413. Of course, many of the same challenges that confront judges in determining the officers' motivation in Fourth Amendment cases are present in employment cases as well. *Id.* But

judges in Title VII cases do not simply give up the way they do in other settings. *See Whren v. U.S.*, 517 U.S. 806, 813 (1996). This Court has developed a complex set of formulas designed to facilitate a genuinely truth-seeking process to identify and assess an employer's motives. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Wallace v. Dunn Const. Co., Inc.*, 968 F.2d 1174, 1178 (11th Cir. 1992) (placing the burden of proof on the defendant to show "it would have made the same decision even if it had not taken the plaintiff's gender into account"). "Sorting out the true reasons for an adverse employment decision is often a hard business." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1744 (2020). Yet judges do so anyway, resisting the urge to create a post-hoc motivation which would make the firing legal—and the case easy. Neily, *supra*, at 413–14.

Another example of genuine truth-seeking can be found in the analysis of a self-defense claim. That claim is unavailable to a defendant who does not actually believe the victim constituted a threat—even if a reasonable person under the circumstances might have feared for his life. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(c), at 147–50 (2d ed. 2003). Without an actual fear of injury or death any harmful action taken in the name of "self-defense" is unlawful. *E.g., Hartman v. Summers*, 120 F.3d 157, 161 (9th Cir. 1997). Courts have no problem assessing the actual belief of a defendant in these circumstances. Given that the objective standards used in employment discrimination and self-defense cases are designed to deter undesirable behavior,

here, too, the police officer who does not actually suspect that a suspect is armed and dangerous should not be deemed to have actual suspicion necessary for a *Terry* frisk. Kinports, *supra*, at 778–79.

C. An Actual Suspicion Requirement for Searches Maintains Harmony Among Other Investigative Criminal Procedure Doctrines

Removing an actual suspicion requirement for a *Terry* frisk creates a tension between criminal-procedure doctrines. In the Fourth Amendment's warrant context, there is no constitutional leeway for an officer who submits a warrant application with "mere conclusory statements." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Doing so provides no adequate basis "for making a judgment regarding probable cause." *Id.* The Constitution, instead, demands that an officer seeking a warrant articulates the facts justifying the intrusion. *Id.* Unlike what some of the lower courts have done in the *Terry* frisk context, judges cannot comb through the evidence and fill in the blanks for an officer who failed to thoroughly articulate suspicion on a warrant application. "Such post hoc justifications are alien to the Fourth Amendment warrant and reasonableness requirements." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980). "Our constitutional guarantees would mean little if any search or seizure which produced evidence of criminal conduct was justified post hoc." *Wilson v. State*, 874 P.2d 215, 225 (Wyo. 1994).

Failing to require actual suspicion also creates an inconsistency with the Court's warnings that lower

courts should not substitute their judgment for that of a police officer. *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979). The reason for the warning is that trained officers can perceive threats from conduct that may appear innocent to the untrained observer. But when courts disregard an actual suspicion requirement in the *Terry* frisk context an opposite but equal danger arises: judges may conjure hidden threats that a trained, experienced police officer would not have felt. *See* Josh Bowers, *Annoy No Cop*, 166 U. Pa. L. Rev. 129, 136 (2017) (When an officer arrests or searches a person, he extends his power over the suspect. When a judge excuses the officer's actions, the court expands the officer's authority.)

CONCLUSION

The Court should grant certiorari to resolve the deep and acknowledged split among both state and federal courts over whether an officer's actual suspicion is relevant to a *Terry* frisk analysis. And ultimately, the Court should hold that a warrantless frisk must be justified by an officer's actual and objectively reasonable suspicion that a suspect is armed and dangerous. If officers are not truly concerned—in the moment—that a suspect represents a threat to their safety because he might be carrying a weapon, then they should not be conducting a *Terry* frisk. What some other hypothetical officer *might* have believed under the same circumstances is an exercise is pure speculation and one that, as noted above, ends up being undertaken on the wrong side of the veil of ignorance—*after* the government has discovered whether the suspect was in fact armed or carrying contraband.

Respectfully submitted,

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