CASE NO. 23-13253

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ERIC ANDRÉ, *et al.*,
Plaintiffs-Appellants,

v.

CLAYTON COUNTY, GEORGIA, *et al.*,
Defendants-Appellees.

Appeal from a Judgment of the U.S. District Court for the
Northern District of Georgia, Case No. 1:22-CV-04065-MHC

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule No. 26.1(a)(6), *amicus* certifies that the following persons have an interest in the outcome:

1. Cato Institute, *amicus curiae*
2. Matthew P. Cavedon, counsel for *amicus curiae*

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Respectfully submitted,

Dated: January 19, 2024

/s/ Matthew P. Cavedon

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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*.

This case is of particular concern to Cato because the district court's order ignores vital constitutional protections in a way that would negatively affect the civil liberties of air-travel passengers.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court erred in granting Appellees' motion to dismiss because restricting Appellants' freedom of movement qualified as a seizure under the original meaning of the Fourth Amendment. As alleged in the complaint, Plaintiff Clayton English was walking into the jet bridge to board his flight when two police officers "cut off his path," "flashed their badges," and began interrogating him "about whether he was carrying illegal drugs."[2] After he answered that he was not, the officers "instructed Mr. English to step to the side of the jet bridge" and positioned themselves to both sides of him, then told Mr. English to give them his identification and boarding pass, which he did.[3] The officers held on to both items, continued the interrogation, and asked to search Mr. English's luggage—then did so.[4] Mr. English alleges that he believed "he had no choice" other than consenting to the search.[5] Only at the end of the encounter did the officers tell Mr. English that he was free to leave.[6]

The complaint also alleged a similar experience on the part of Plaintiff Eric André. Like Mr. English, Mr. André was on the jet bridge when officers "obstructed

[2] 1st Amend. Compl. ¶¶ 31, 33.

[3] *Id.* ¶¶ 35–37.

[4] *Id.* ¶¶ 41–42.

[5] *Id.* ¶ 41.

[6] *Id.* ¶ 44.

his path," "flashed their badges," and interrogated him about illegal drugs.[7] They told Mr. André to "hand over his ticket and government ID."[8] He complied as well, as he did not think "he could say no."[9] Not until the end of the encounter did officers tell Mr. André he was free to leave.[10]

The district court found that both encounters were consensual and therefore not seizures within the meaning of the U.S. Constitution.[11] This was error. Under the Fourth Amendment's original meaning, people are seized when officers restrict their freedom of movement. The district court ignored this.

ARGUMENT

Both Plaintiffs were seized within the original meaning of the Fourth Amendment for the simple and ineluctable reason that there was "a governmental termination of [their] freedom of movement."[12] The Fourth Amendment protects the "right of the people to be secure in their persons" against unreasonable seizures.[13] In interpreting the right's scope, the Supreme Court has "looked to the traditional

[7] *Id.* at ¶¶ 51–53.

[8] *Id.* ¶ 55.

[9] *Id.*

[10] *Id.* ¶ 58.

[11] *See id.* at 21, 29.

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

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

protections against unreasonable searches and seizures afforded by the common law at the time of the framing."[14] Those protections centered on freedom of movement.

The common law protected "the personal liberty of individuals," 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 course of law."[15] He considered this right to be "strictly natural" and warned that its loss would lead to "an end of all other rights and immunities."[16] The Supreme Court has likewise characterized the common law as deeming freedom of movement—the right "to be let alone"—both "sacred" and "carefully guarded."[17]

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[14] *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). This is partly because "American legislation had ignored those topics before 1791," leaving "customary practices" largely unaffected after Independence. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, 750 (2009).

[15] 1 WILLIAM BLACKSTONE, COMMENTARIES, *130.

[16] *Id.* at *131.

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

A restriction on this freedom qualified as a seizure.[18] The common law defined "seizure" as "taking possession."[19] It expanded on this notion in two related lines of precedent: the tort of false imprisonment, which concerned arrests made without probable cause, and cases more straightforwardly concerning lawful arrests.[20] Both sets of authorities show that the Plaintiffs here were seized.

Common law false imprisonment had as elements "the detention of another against his will, depriving him of the power of locomotion."[21] According to an 1871 decision, there was false imprisonment where the imprisoner told the detainee, "I want you to go along with me"; it was also an imprisonment "if a man comes to you in any other way and uses words, or accompanies them with such an appearance that would lead you to be in fear of him, or make you comply with his demand."[22]

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[18] *See* 1 BLACKSTONE, *supra*, at *132 ("THE confinement of the person, in any wise, is an imprisonment."); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 169 (Callaghan & Co., 1879) ("False imprisonment . . . consists in imposing, by force or threats, of an unlawful restraint upon a man's freedom of locomotion. *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment . . . ."), *available at* https://repository.law.umich.edu/books/11/.

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

[20] *See Torres v. Madrid*, 141 S. Ct. 989, 995–96, 1000 (2021). Both civil and criminal common law authority regarding these is constitutionally relevant. *Id.* at 1001.

[21] *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).

[22] *Brushaber v. Stegemann*, 22 Mich. 266, 268 (1871).

It was enough for someone to be compelled to go for a short distance with a public officer. For example, in one case, an official unlawfully told someone to come with him to see a magistrate.[23] The detainee submitted, and the two traveled together for a mere half a block before he was released by the officer.[24] Nevertheless, the officer was held liable for false imprisonment.[25]

Similar factors were present in this case. Officers directed Mr. English to move and obstructed both his path and that of Mr. André; officers further required both of the Plaintiffs to submit to interrogations and searches. The officers' appearances and acts led both men to fear the consequences of non-compliance, a fear that was objectively reasonable—two officers were present for each encounter, they flashed their badges, and they interrogated the men about suspected crimes.

Additionally, the Plaintiffs were detained on jet bridges. False imprisonment at common law included forcible detentions in the public streets.[26] Jet bridges are even more confining. Judge Cooley noted that telling someone "on a ferry that he shall not leave it until a certain demand is paid, is an imprisonment if one submits

[23] Perkins, *supra*, at 203 (discussing *Gold v. Bissell*, 1 Wend. 210, 215 (N.Y. 1828)).

[24] *Id.*

[25] *Id.*

[26] *Floyd v. State*, 12 Ark. 43, 47 (1851); *see also* 1 BLACKSTONE, *supra*, at *132.

through fear."[27] So was stopping Mr. English and Mr. André from boarding their flights. With officers obstructing their paths, and even standing on either side of Mr. English, the only choice Mr. English and Mr. André had was "to elect the manner in which to be skewered upon Morton's Fork."[28] Either they were going to "'voluntarily' acquiesce to the officers' request or to have any reaction to the officers' inquiries—regardless of how objectively benign—serve as the factual predicate" for their detention by the officers, or even—given that this stop took place at an airport—by any of the various federal agencies that work closely with local law enforcement in that setting.[29]

It does not matter that officers never told Mr. English and Mr. André that they were being detained, although it bears mentioning that officers did not tell the Plaintiffs they were free to leave until the end of the encounters. At common law, there was imprisonment "where the circumstances [we]re such as to make the intention to apprehend plain to the mind of him who is to be apprehended."[30] This was especially so if, as here, the imprisoners caused the detainee to be in fear of the

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[27] COOLEY, *supra*, 170.

[28] *United States v. Gross*, 784 F.3d 784, 791 (D.C. Cir. 2015) (Brown, J., concurring).

[29] *Id.*

[30] 1 JOEL PRENTISS BISHOP, ON THE LAW OF CRIMINAL PROCEDURE 93 (2d ed., Little, Brown, & Co.: 1872).

consequences of noncompliance.[31] For example, in one 1935 case, the detainee had been involved in a hit-and-run accident.[32] He recognized the sheriff and knew that he was acting in his official capacity when the two met in a public place.[33] All that the sheriff said was, "Let's get going," and that he had no need for a warrant.[34] The detainee went along.[35] The court held that this was a detention.[36]

The detainee in that case and the Plaintiffs here were in similar positions. Mr. English and Mr. André recognized that the officers were acting in official capacities. They knew the officers were investigating suspected criminal activity because of the officers' interrogations. The men complied. In doing so, they were subjected to common law imprisonments—seizures within the original meaning of the Fourth Amendment.

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[31] *See id.* at 269; COOLEY, *supra*, at 169 ("False imprisonment . . . consists in imposing, by force or threats, of an unlawful restraint upon a man's freedom of locomotion. *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment . . . .").

[32] *Martin v. Sanford*, 129 Neb. 212, 216 (1935).

[33] *Id.* at 222.

[34] *Id.* at 223.

[35] *Id.*

[36] *Id.* at 223–24 (rejecting challenge to the sheriff not producing the warrant at the time of the arrest).

Meanwhile, an arrest at common law was "the beginning of imprisonment," when a person was "restrained of liberty."[37] "Arrest" was "seizing a person . . . . for the purpose of further legal proceedings." 1 BISHOP, *supra*, at 92; *accord* Perkins, *supra*, at 203 ("Every intentional confinement, even detention in the public street, amounts to imprisonment *unless it is a very temporary confinement properly incident to the exercise of some privilege*.") (emphasis added); 4 WILLIAM BLACKSTONE, COMMENTARIES, *286 (defining "arrest" as "the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime."); *cf.* Perkins, *supra*, at 201 n.1 ("[I]f the other submitted to such an [unlawful] arrest without physical contact, the officer is liable for false imprisonment.").

While the Plaintiffs here were not arrested within the modern meaning of the term or subjected to further criminal proceedings, common law precedent regarding arrests is relevant to the original meaning of "seizure" under the Fourth Amendment. As the Supreme Court recently noted, at common law an arrest could be accomplished by either of two means, "the application of force" or "a show of authority" followed by submission.[38]

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[37] *Legrand v. Bedinger*, 20 Ky. 539, 540 (1827).

[38] *Torres*, 141 S. Ct. at 995; *see also id.* at 1001 ("[A] seizure by acquisition of control involves either voluntary submission to a show of authority or the

The second kind of seizure is at issue here. All that was required was that "the party be within the power of the officer and submit[]"—that is, "compulsory submission."[39] As an 1838 decision put it, "in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained."[40] For example, one 1852 decision considered that an officer with a court order against a defendant, "whom he meets in company, and goes up and shakes hands with him, without apprising him" of the court order might

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termination of freedom of movement."); *California v. Hodari D.*, 499 U.S. 621, 626 (1991); BISHOP, *supra*, at 92.

The Fourth Amendment "governs 'seizures' of the person" ending shy of common law arrests, such as cases like the present one where "a police officer accosts an individual and restrains his freedom to walk away." *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *accord Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *see also* Perkins, *supra*, at 207 (defining "arrest" narrowly to exclude temporary investigative detentions); *cf. Minnesota v. Dickerson*, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring) (equating *Terry* stops with those authorized by "night-walker statutes" and related common law). After all, "any curtailment of a person's liberty by the police" requires at least reasonable suspicion. *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam). Nonetheless, both Mr. English and Mr. André submitted to officers because they reasonably believed they were not free to refuse to do so. This aligns well with the common law definition of arrest and confirms that the Plaintiffs were seized within the original meaning of the Fourth Amendment.

[39] *Gold ads. Bissel*, 1 Wend. 210, 215 (N.Y. 1828); COOLEY, *supra*, at 170; *see also Richardson v. Rittenhouse*, 40 N.J.L. 230 (1878); *Mowry v. Chase*, 100 Mass. 79 (1868); *Field v. Ireland*, 21 Ala. 240 (1852); *accord Hollister v. Goodale*, 8 Conn. 332, 335 (1831) (defining an arrest as "a power of taking possession and the party's submission thereto"); Perkins, *supra*, at 203.

[40] *Pike v. Hanson*, 9 N.H. 491, 493 (1838).

have arrested the defendant if "so intended and understood by the parties."[41] That court held that there was a jury question regarding whether the defendant arrested the plaintiff when he "simply informed" of the defendant's having a court order "and directed him to come on to" another location.[42] It was enough that the defendant gestured at the existence of legal authority, then told the plaintiff to move. Just as the officers here flashed their badges, interrogated Mr. English and Mr. André, and told Mr. English to move.

CONCLUSION

Mr. English and Mr. André were seized under the original meaning of the Fourth Amendment when officers restricted their freedom of movement. Blackstone insisted that where the right to personal liberty was violated, another right arose: "that of applying to the courts of justice for redress of injuries."[43] This Court should redress the Plaintiffs' injuries by reversing the judgment below.

[41] *Jones v. Jones*, 35 N.C. 448, 448–49 (1852) (in obiter dicta).

[42] *Id.* at 449.

[43] 1 BLACKSTONE, *supra*, at 137.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,560 words, excluding the parts exempted by Fed. R. App. P. 32(f).
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/s/ Matthew P. Cavedon

Dated: January 19, 2024 *Counsel for Amicus Curiae Cato Institute*

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on, January 19, 2024, he electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the Eleventh Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Matthew P. Cavedon

Dated: January 19, 2024 *Counsel for Amicus Curiae Cato Institute*