No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES, *Petitioner*,

v.

JANICE MADRID, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents New Mexico State Police officers Janice Madrid and Richard Williamson shot Petitioner Roxanne Torres twice in the back as she drove away from what she thought was an attempted carjacking. Pet'r Br. 5. Although the police did not apprehend Torres immediately after they shot her, they did apprehend her later at a hospital where she was receiving medical attention for the serious wounds she suffered in the shooting. *Id.* at 6.

When Torres attempted to bring a civil action under 42 U.S.C. § 1983 alleging that the police officers had used excessive force against her, the district court

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

dismissed her case before it ever reached a jury on the ground that she had not been "seized" within the meaning of the Fourth Amendment. The court below affirmed that result, reasoning that because the police did not apprehend Torres immediately after they shot her, she was not "seized" by the shooting. Pet. App. 7a.

The decision of the court below is wrong. The Fourth Amendment regulates "seizures" of "persons," and such language was used interchangeably with the term "arrest" when the Amendment was drafted and ratified. At that time, moreover, the meaning of "arrest" under the common law was clear, long established, and widely known in both England and America. Under the common law rule, the application of physical force for the purpose of detaining someone constituted an arrest, whether or not the person eluded capture, as this Court has already recognized. *See California v. Hodari D.*, 499 U.S. 621, 624 (1991) ("an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him" (quoting *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862))). Given the persistence of this rule over time, and the fact that private citizens were heavily involved in law enforcement efforts in the eighteenth century, it would have been natural for the Fourth Amendment's drafters and ratifiers to understand that "seizures" of "persons" encompassed the expansive concept of an arrest that was recognized at common law.

Importantly, however, this Court should not suggest that the Fourth Amendment merely codifies the rules of law enforcement that were prescribed by the common law at the time of the Founding. The Fourth Amendment broadly protects a right to be secure from "unreasonable" searches and seizures, not merely a

right to be free from practices that were deemed illegal at common law in the Founding era. While firmly established and widely known common law rules may help give content to the meaning of the word "seizure" and other words in the Amendment, neither text nor history supports mechanically construing the Amendment as coextensive with the precise rules that common law judges and commentators had established in England at the time it was ratified. And this Court has not traditionally followed such an approach.

Notwithstanding that caveat, however, a variety of considerations all militate in favor of applying the common law's expansive definition of "arrest" to the Fourth Amendment's prohibition on unreasonable seizures of the person.

Perhaps most significant, this Court has already applied a different aspect of the very same common law rule in the course of *limiting* the scope of personal seizures under the Fourth Amendment. *See Hodari D.*, 499 U.S. at 625-27 & n.3 (relying on this rule to conclude that a "show of authority" seizure occurs only when the subject actually submits to the officer's authority). This Court cannot credibly apply one aspect of a common law rule to limit the meaning of "seizure" but then abandon the flip side of that same rule where it would expand the meaning of "seizure." The same analytical method employed in *Hodari D.* should therefore be employed here.

Drawing on the common law definition of an "arrest" is also supported by the constitutional text. The Fourth Amendment refers to "seizures" of "persons," and such language was used interchangeably with the term "arrest" at the Founding. These words, therefore, would naturally have been understood by those who ratified the Amendment as incorporating the concept of an arrest; then, as now, an arrest was "the

quintessential 'seizure of the person.'" *Id.* at 624. And the basic scope of an arrest under the common law was not a matter of arcane knowledge. During this era, law enforcement was largely an amateur affair carried out by ordinary members of the community, and the common law rule persisted unchanged over generations.

Application of the common law rule here also promotes the aims of the Fourth Amendment. By all accounts, the Amendment is designed to shield the "security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quotation marks omitted). But unless this Court applies the common law's broad definition of "arrest" here, law enforcement officers who lack a valid justification will be able to shoot or otherwise physically harm individuals with no constitutional accountability—so long as those individuals successfully escape the officers' violence. That result would significantly weaken the Amendment's value in protecting individual liberty from unjustified government intrusions.

Moreover, unlike in some instances, adapting the traditional common law rule to the contemporary policing context and the modern technological era does not distort the practical implications of that rule in a way that undermines its appropriateness and relevance. Adhering to that rule will also help avoid a disparity that might otherwise result between the Fourth Amendment's protections for property and its protections for a person's own body.

Finally, recognizing the existence of a "seizure" in cases like this one vindicates the Framers' understanding that individuals would be able to seek redress in actions for civil damages when government officers unreasonably intruded on their persons or property in violation of the Fourth Amendment. Taking their cue

from the seminal English decisions that inspired the Amendment, the Framers anticipated that freedom from unreasonable searches and seizures would be preserved through tort actions against the offending officers and that the ability to take such cases to a jury was an essential safeguard against government oppression. But unless this Court adheres to the common law's broad definition of "arrest," officers who physically harm suspects without sufficient legal justification will be exempt from liability whenever the subject of their efforts manages to elude them, even temporarily. That arbitrary result cannot be squared with the text, history, or purpose of the Fourth Amendment.

In sum, the Framers adopted the Fourth Amendment in part to protect the American people from unreasonable applications of physical force by government officers seeking to detain them, and the Framers viewed the ability to vindicate that right in court as a key safeguard against the type of abusive government practices against which they revolted at the Founding. Applying the common law's traditional definition of "arrest" to seizures of the person under the Fourth Amendment will simply facilitate the ability of people like Torres to present their claims in court, where the reasonableness of police officers' decision to shoot them may be assessed. This Court should reverse the decision below and allow this case to proceed.

ARGUMENT

I. The Common Law's Expansive Definition of "Arrest" Should Inform the Meaning of "Seizure" Under the Fourth Amendment.

In *California v. Hodari D.*, this Court addressed the scope of the term "seizure" under the Fourth Amendment as it applies to "persons," and it

interpreted that term by reference to the traditional common law definition of "arrest." 499 U.S. at 624-27. A common law arrest, this Court explained, could take place either through "a show of authority" followed by "*submission* to the assertion of authority," or by "application of physical force . . . even though the subject does not yield." *Id.* at 626. The latter type of arrest, this Court also explained, could be "effected by the slightest application of physical force, despite the arrestee's escape." *Id.* at 625. Torres now asks this Court to do nothing more than confirm what it said in *Hodari D.*—and hold that a Fourth Amendment seizure, just like a common law arrest, is completed by "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." *Id.* at 624.

This Court should do so. A variety of considerations all weigh in favor of applying the common law's broad definition of "arrest" to the seizure of persons under the Fourth Amendment. At the same time, however, this Court should take care not to suggest that the Fourth Amendment merely codifies the rules of law enforcement conduct that were prescribed by the common law at the time of the Founding.

A. In evaluating the scope of the Fourth Amendment's protections, this Court has said that it "inquire[s] first whether the action was regarded as an unlawful search or seizure under common law when the Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The Court has used that approach in assessing whether a search or seizure is "unreasonable," *see Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (based on common law principles, unannounced police entry into a home can be reasonable when there are valid law enforcement interests), and also in answering the prior question of whether a Fourth

Amendment "search" or "seizure" occurred in the first place, *see Hodari D.*, 499 U.S. at 624-27.

This approach is novel. Indeed, not until the 1990s, two centuries after the Fourth Amendment's ratification, did this Court squarely embrace it. Before then, this Court's decisions only occasionally relied on Founding-era common law rules. And when they did, they described the significance of those rules as "shed[ding] light on . . . what the Framers of the Amendment might have thought to be reasonable," a question that itself was "relevant" but not "dispositive." *Payton v. New York*, 445 U.S. 573, 591 (1980); *see Carroll v. United States*, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, *and* in a manner which will conserve public interests as well as the interests and rights of individual citizens." (emphasis added)).

Thus, established common law rules were sometimes taken into consideration alongside other factors bearing on the reasonableness of a given practice, but they were not mechanically incorporated into the Fourth Amendment. *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 421 (1976) (adhering to traditional rule where "[t]he balance struck by the common law" had consistently prevailed in the states and in federal legislation since the early 1790s); *Gerstein v. Pugh*, 420 U.S. 103, 115-16 (1975) (relying on common law practice that "furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment," in light of "indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure").

To be sure, history has always been central to Fourth Amendment analysis. But this Court has traditionally viewed the most relevant history to be the

controversies that prompted the Amendment's adoption—in particular, the revolt against general warrants and writs of assistance on both sides of the Atlantic—and the Court has used that history to identify the chief harms at which the Amendment was directed. *See, e.g.*, *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); *Riley v. California*, 573 U.S. 373, 403 (2014). This Court has also repeatedly consulted early federal *statutes* authorizing searches and seizures around the time of the Amendment's ratification as a means of gauging what was deemed an unreasonable search and seizure when it was adopted. *See, e.g.*, *Carroll*, 267 U.S. at 150-53; *Watson*, 423 U.S. at 420-21; *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977). Until recently, the Court did not typically evaluate the Fourth Amendment legitimacy of a government practice based on whether or not English common law permitted it.

This Court should not reflexively construe the Fourth Amendment to match the precise contours of Founding-era common law. Doing so would be at odds with the Amendment's plain text. "By its terms the Fourth Amendment does not prohibit searches and seizures 'illegal at common law;' it prohibits searches and seizures that are 'unreasonable.'" David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1774 (2000). The common law backdrop may help "to give content to this term" by revealing "the meaning ascribed to it by the Framers of the Amendment," *Wilson*, 514 U.S. at 931, and so too for other terms in the Amendment like "seizure." But the Amendment's text and history do not support mechanically grafting onto it the intricacies of the rules that English judges and commentators had developed in the common law by the Founding era. Given the Amendment's broad prohibition against

"unreasonable" practices, and its robust safeguarding of a right to personal security, its Framers and ratifiers did not understand it to freeze "into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S. at 591 n.33.

Had this Court blindly followed that approach in the past, then today it would be constitutionally permissible for police officers to shoot dead an unarmed, non-dangerous felony suspect to prevent his escape. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985). The common law, after all, "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon." *Id.* at 12. But that rule "arose at a time when virtually all felonies were punishable by death" and when technology made it difficult "to use deadly force from a distance as a means of apprehension," given the "rudimentary" state of weapons—as a result of which "[d]eadly force could be inflicted almost solely in a hand-to-hand struggle." *Id.* at 13-15. In light of those realities, this Court refused to impose the common law's rule on the Fourth Amendment. *Id.*

As recognized in *Garner*, reflexively applying common law rules from the Founding era—even if it were otherwise defensible as an interpretive matter—will often subvert "the purposes of a historical inquiry" because of "sweeping change in the legal and technological context." *Id.* at 13; *see Payton*, 445 U.S. at 591 n.33 (noting that when common law seizure rules were developed, "the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime"). Such an approach can result in arbitrarily limiting the scope and protections of the Amendment, in contravention of its text and original meaning. Indeed, in such cases this approach would not even "assure . . . preservation of

that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

Therefore, this Court should be careful not to suggest that the protections of the Fourth Amendment—ratified by the American public with broad and flexible language as a bulwark against unjustified government intrusions on persons and property—are simply coextensive with the judge-made rules inherited from English common law.

B. Notwithstanding that important caveat, a variety of diverse considerations all militate in favor of applying the common law's expansive definition of "arrest" to the Fourth Amendment's prohibition on unreasonable seizures of the person.

To start, this Court has *already* applied a different aspect of the common law's definition of "arrest" in the course of construing—and limiting—the scope of personal seizures under the Fourth Amendment. In *Hodari D.*, this Court applied that common law rule in a manner that narrowed the meaning of "seizure" and hence limited the breadth of the Amendment. It would be inconsistent for this Court to depart from that approach here, where application of the common law rule expands the Amendment's scope and protections.

Before *Hodari D.*, this Court had established that a seizure could occur "by means of physical force or show of authority," *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), but it did not sharply distinguish these two methods as separate forms of seizure governed by different standards. That distinction was, at most, implicit in some holdings. *See Hodari D.*, 499 U.S. at 628 (noting two examples). Instead, this Court held that a seizure occurred only if, "in view of all of the circumstances

surrounding the incident, a reasonable person would have believed that he was not free to leave," and that "circumstances that might indicate a seizure" included "the threatening presence of several officers, the display of a weapon by an officer, *some physical touching of the person of the citizen*, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (emphasis added).

In *Hodari D.*, however, this Court drew a line of cleavage between situations involving physical force and those involving a show of authority. And it held that where the police do not physically touch a suspect, there is an additional requirement to establish that a seizure occurred: the suspect must have actually submitted to the officers' show of authority. *See* 499 U.S. at 625-29. That decision was largely based on the common law standards governing "arrests." *See id.* at 627 n.3 (confirming that the Court's rationale was that "the common law of arrest . . . . defines the limits of a seizure of the person" (emphasis omitted)). And that decision limited the breadth of the Fourth Amendment's safeguards. *See id.* at 643-48 (Stevens, J., dissenting) (describing new opportunities for police misconduct made possible by the holding).

This narrowing of the Fourth Amendment's scope based on the common law had an important flipside, however: where physical contact was involved, "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." *Id.* at 624 (majority opinion). In that situation, "a seizure occurs even though the subject does not yield." *Id.* at 626.

"Thus, in deciding the question presented today," this Court will "write upon a slate that is far from

clean." *Minnesota v. Carter*, 525 U.S. 83, 96 (1998). Whatever else might be said about the relevance of the common law to the Fourth Amendment, this much should be clear: the Court cannot credibly apply one aspect of a common law rule to limit the meaning of "seizure" but then abandon another aspect of that same rule which would expand the meaning of "seizure." Torres simply asks this Court to apply the same analytical method it employed in *Hodari D.* There is no principled basis for refusing.

Applying the common law definition of "arrest" here is also supported by the constitutional text. The Fourth Amendment regulates "seizures" of "persons," and such language was used interchangeably with the term "arrest" at the Founding. *See* 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining the noun "arrest" as including "any . . . seizure of the person"); *id.* (defining the verb "arrest" as including "[t]o seize any thing by law," "[t]o seize by a mandate from a court or officer of justice," and "to seize; to lay hands on; to detain by power"); 1 Noah Webster, *An American Dictionary of the English Language* (1828) (defining the noun "arrest" as including "[a]ny seizure, or taking by power"); *id.* (defining the verb "arrest" as including "[t]o take, seize or apprehend by virtue of a warrant from authority") (spelling modernized in all). As Webster explained in defining the verb "seize": "We say, to *arrest* a person, to *seize* goods." 2 Webster, *supra*. Thus, it would have been natural for the Fourth Amendment's drafters and ratifiers to understand that "seizures" of "persons" encompassed the legal concept of an arrest.

Moreover, the legal rules establishing when an arrest was complete were not a matter of "arcane knowledge." *Hodari D.*, 499 U.S. at 626 n.2. To the contrary, those rules persisted in a stable form over

long periods of time. *See infra* Part II. And because law enforcement responsibility in the eighteenth century largely rested with civilians, rather than professional police officers, *see infra* at 18-19, the basic ins and outs of what constituted an arrest would not have been a mystery. Even Webster's general-purpose dictionary noted that an arrest could be made simply by "touching the body." 1 Webster, *supra* (defining the noun "arrest"); *see United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539 (1944) ("Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written.").

In short, when the Fourth Amendment was adopted, as now, an arrest was "the quintessential 'seizure of the person.'" *Hodari D.*, 499 U.S. at 624. And the common law rules that defined what constituted an arrest were crystal clear and widely known.

Application of the common law rule here also promotes the aims of the Fourth Amendment. "The basic purpose of this Amendment," this Court has recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter*, 138 S. Ct. at 2213 (quotation marks omitted). But unless this Court applies the common law rule of arrest here, law enforcement officers who lack a valid justification will be able to shoot or otherwise physically harm individuals with no constitutional accountability—so long as those individuals successfully escape the officers' violence, as Torres did.

That result would facilitate the "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals" that the Amendment is designed to prevent. *United States v.*

Martinez-Fuerte, 428 U.S. 543, 554 (1976); *see also infra* Part III (discussing how application of the common law's expansive definition of "arrest" will vindicate the Framers' understanding that civil damages actions would serve as a deterrent against unreasonable government intrusions on persons and property). So while there are times when applying a common law rule will conflict with the goals of the Fourth Amendment, *e.g.*, *Garner*, 471 U.S. at 13, this is not one of them—quite the opposite.

Importantly, applying the common law rule of "arrests" to the contemporary policing context does not distort the practical implications of that rule in the way this Court discussed in *Garner*. On the contrary, the greater pervasiveness of police forces today, relative to the eighteenth century, and the increased capacity of sophisticated firearms to deliver life-threatening injuries from a distance make it *more* important to establish that any application of force in an attempt to capture a suspect constitutes a seizure.

Finally, refusing to apply the common law rule here would also create a strange disparity between seizures of persons and seizures of property. "[A] seizure of property occurs . . . when there is *some meaningful interference* with an individual's possessory interests in that property." *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012) (emphasis added) (citation and quotation marks omitted); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (same). A complete and permanent deprivation of one's possessory interests is not required. Thus, "briefly detain[ing] luggage for limited investigatory purposes" will suffice, *United States v. Place*, 462 U.S. 696, 705 (1983), even though the interference is only temporary, and destroying a small quantity of a person's property will also suffice,

Jacobsen, 466 U.S. at 124, even though most of the property remains unharmed.

Here, where officers shot bullets into Torres's body, leaving her partly paralyzed and requiring hospitalization, *see* Pet'r Br. 2, there has clearly been some meaningful interference with her possessory interest in her own body. *See Horton v. California*, 496 U.S. 128, 133 (1990) ("a seizure deprives the individual of dominion over his or her person or property"). To hold that no seizure occurred simply because the shooting did not *completely* debilitate her would be tantamount to giving greater Fourth Amendment protection to one's "effects" than to one's "person." That cannot be right, especially given "the unique, significantly heightened protection afforded against searches of one's person." *Houghton*, 526 U.S. at 303.

For all these reasons, applying the common law's expansive definition of "arrest" to seizures of the person under the Fourth Amendment is not only appropriate but vital to vindicate the Amendment's text and purpose.

II. In Founding-Era Common Law, An Arrest Included Any Use of Physical Force to Subdue or Detain, Whether or Not the Subject Was Ultimately Captured.

By the time the Fourth Amendment was drafted and ratified, it was well established in the common law that an arrest was complete as soon as a person applied physical force to another person with the intent to detain them, even if this application of physical force did not immediately secure control over the other person.

For example, in *Genner v. Sparkes*, 1 Salk. 79 (1704), a bailiff found a person he was attempting to arrest in that person's yard. The bailiff declared that

he was carrying out an arrest, but the subject held him off by brandishing a fork and retreated into his home. The court ruled that no arrest had occurred because the bailiff never touched the individual. The court explained, however, that if "the bailiff had touched him, that had been an arrest," which would have then entitled the bailiff to pursue the individual into his home. *Id.*; *see* 1 Matthew Hale, *The History of the Pleas of the Crown* 459 (1736) (explaining that law enforcement officers could break open doors to enter a home and pursue an arrestee "[i]f the sheriff or bailiff have once laid hands upon the prisoner").

Over a century later, the same rule remained in place. Thus, in *Nicholl v. Darley*, 2 Y. & J. 399 (1828), a sheriff similarly went to the house of a suspect to arrest him. The suspect rushed out of the house past the sheriff, and while the sheriff initially caught the suspect around the waist, the suspect broke free and successfully fled. The court concluded that the brief hold around the suspect's waist was an arrest. *See* Richard Clarke Sewell, *A Treatise on the Law of Sherriff, with Practical Forms and Precedents* 321 (1845); 4 W.N. Welsby & Edward Beavan, *Chitty's Collection of Statutes 1225–1864 with Notes Thereon* 208 n.(a) (3d ed. 1865).

Genner, *Nicholl*, and similar cases were cited for the proposition that for an arrest, "there must be an actual seizure *or touch with intention to arrest*, and bare words are not sufficient." *Id.* (emphasis added). As long as someone had the intent to arrest, "laying hold of" the subject effectuated the arrest, even if the subject was not captured. 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* § 87, at 324 (1803); *see Williams v. Jones,* 95 Eng. Rep. 193 (K.B. 1736) (an arrest is complete where a person "gently laid his hands in order to arrest" another person); *id.* ("to be

sure . . . there was no arrest, [where] the party was *neither* touched *nor* confined" (emphasis added)), *reprinted in* Charles M. Hepburn, *Cases on the Law of Torts* 241-42 (1915).

Given that most states "adopted in some measure the common law of England" after Independence, Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 784 (2004), it is not surprising that the same rule was well established in America. *See United States v. Benner*, 24 F. Cas. 1084, 1086-87 (C.C.E.D. Pa. 1830) ("An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest."); *see also* Pet'r Br. 18-24 (citing additional English and American cases and commentary).

Indeed, this rule has been remarkably persistent over the centuries. *See Black's Law Dictionary* 88 (2d ed. 1910) (defining "arrest" as including "the act of laying hands upon a person for the purpose of taking his body into custody of the law"); Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 206 (1940) ("There can be no arrest without *either* touching *or* submission." (emphasis added)); *id.* ("[T]ouching for the manifested purpose of arrest by one having lawful authority completes the apprehension, 'although he does not succeed in stopping or holding him even for an instant.'" (quoting *State ex rel. Sadler v. Dist. Court of Eighth Judicial Dist.*, 225 P. 1000, 1002 (Mont. 1924))).

In response to this Court's embrace of the common law rule in *Hodari D.*, Respondents have argued that "there is no such thing as an 'attempted seizure'" or a "'continuing seizure' under the Fourth Amendment." BIO 13. But the common law principles governing arrests make clear why these objections miss the mark.

As explained above, the application of physical force to effect a capture was not viewed as an "attempted" arrest—it was an arrest. And the fact that the common law viewed "arrests" in this broad fashion does not mean it endorsed the concept of a "continuing arrest." Just the opposite. The common law was clear that an arrest effected by physical force was ended by the suspect's escape, and significant legal consequences ensued.

The very notion of arrest as the mere application of physical force was a result of the common law's "preoccup[ation] with the danger of escape." Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 Am. Crim. L. Rev. 603, 639 (1982). In the Founding era, law enforcement was handled largely by private citizens: it was "a business of amateurs." Lawrence M. Friedman, *Crime and Punishment in American History* 27 (1993). While most localities had sheriffs to perform the executive functions of law enforcement, "ordinary citizens who were employed in other trades . . . took turns serving as constables during the day or watchmen during the night." Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 830 (1994).

Thus, private citizens with no particular policing expertise "carried the main burden of law enforcement," *id.* (quoting David R. Johnson, *Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800–1887*, at 7 (1979)), and "escape" was an offense committed by these amateur law enforcement officers when they let a suspect get away after arresting him. *See* 1 Hale, *supra*, at 590-600; Perkins, *supra*, at 204 ("The early authorities used 'escape' primarily to represent the crime of one who voluntarily or negligently permitted his prisoner to depart otherwise than by due course of law.").

Therefore, when a law enforcement officer allowed someone he had arrested to go free before that person was brought before a court, he did so "at his peril, if in truth there were a felony committed, and the party be guilty." 1 Hale, *supra*, at 592.

Given the amateur nature of Founding-era policing, the law was concerned with providing incentives for law enforcement officers to successfully detain suspects, and it attached penalties to "escape" in order to deter arresters from failing in their duties. It also sought to deter the suspects themselves from resisting arrest, by making them liable for the crime of "escape." By defining an "arrest" as occurring the moment an officer laid hands on an arrestee with intent to detain him, the common law ensured that people could be punished criminally for escaping even early on in an encounter with an ill-equipped citizen police officer. Moreover, by defining an arrest as occurring at an early stage of the encounter between amateur officers and an arrestee, courts could ensure that those private citizens would be held accountable for simply abandoning attempts at effective law enforcement once they had initiated contact. As commentators explained, an "officer . . . should as soon as he conveniently can . . . actually *arrest* the party, not only in order to secure him, but also to subject him and all other persons to the consequences of escape, or rescue." 1 Welsby & Beavan, *supra*, at 32 n.(e), (f). If a law enforcement officer willfully or negligently failed to detain a suspect, "he w[ould] be punishable for his disobedience or neglect." 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 206, at 123 (1872) (internal citations and quotation marks omitted).

Thus, if the subject of an arrest was not apprehended or subsequently broke away, that was an

"escape," but it did not change the fact that an "arrest" had occurred. *See, e.g.*, 1 East, *supra*, § 67, at 298 (describing what measures may appropriately be taken to recapture a "felon [who] after arrest break[s] away"); 1 Johnson, *A Dictionary of the English Language*, *supra* (explaining that "escape," in law, includes "[f]or example, if the sheriff . . . takes a person and endeavors to carry him to jail, and he in the way, either by violence or by flight, breaks from him, this is called an *escape*" (spelling modernized)).

This Court was right on the mark, therefore, when it observed in *Hodari D.* that applying the common law's definition of "arrest" does not require embracing the concept of a continuing arrest or seizure: "To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity." 499 U.S. at 625. Not only would that "hardly be realistic" in a practical sense, *id.*, but it would also be at odds with the common law rule itself. Respondents' objection is therefore meritless. This Court should stay true to its analysis in *Hodari D.* by applying the common law's expansive definition of "arrest" to seizures of the person under the Fourth Amendment.

When that rule is applied here, the result is obvious. Respondents acknowledge that they shot Torres in an attempt to stop her flight, claiming to have believed that she attempted to run them over. BIO 2. No one disputes that the bullets hit Torres as intended. The officers therefore applied physical force in an attempt to detain her. Torres's subsequent flight is analogous to "escape" at common law: although she avoided detention, she was nevertheless "arrested" the moment the physical force was used against her. She was therefore "seized" under the Fourth Amendment.

In sum, English and American common law—before, during, and after the Founding era—consistently regarded an arrest as having occurred when physical force was used to capture a person, even if that force did not result in the person's apprehension. The Fourth Amendment, at a minimum, should "preserve[] for our citizens the traditional protections against unlawful arrest afforded by the common law." *City of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting). When the Framers added a Bill of Rights the Constitution, they "secur[ed] to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures." *Weeks v. United States*, 232 U.S. 383, 390 (1914).

III. Applying the Common Law Rule Will Also Vindicate the Framers' Understanding that Civil Damages Actions Would Be a Key Deterrent Against Unreasonable Intrusions on Persons and Property.

As explained above, "seizures" under the Fourth Amendment should include all deliberate applications of physical force by government officers that are intended to secure a person's capture. In addition to its other merits, this rule helps vindicate the Framers' understanding that freedom from unreasonable searches and seizures would be preserved through civil damages actions against the offending officers, and that the ability to take such cases to a jury was an essential safeguard against government oppression.

The Framers "crafted the Fourth Amendment as a response to the reviled general warrants and writs of assistance of the colonial era." *Carpenter*, 138 S. Ct. at 2213 (quoting *Riley*, 573 U.S. at 403 (quotation marks omitted)). A string of prominent English decisions in the 1760s, involving overbroad warrants issued to

squelch criticism of the government, put center stage the jury's role in combatting abuses of power, with juries awarding sizeable tort damages to several individuals whose homes and papers were seized by the King's officers. *See, e.g.*, *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765).

Coming on the heels of bitter disputes over writs of assistance in the colonies, these cases were widely covered in American newspapers, where the reaction "was intense, prolonged, and overwhelmingly sympathetic." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 538 (2009). Indeed, "every American statesman, during our revolutionary period and formative period as a nation, was undoubtedly familiar" with these "landmarks of English liberty," which had a powerful effect on the framing of the Fourth Amendment. *Boyd*, 116 U.S. at 626.

These Americans "enthusiastically embraced the role of the civil jury in government search and seizure cases." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 776 (1994). As one commentator put it in 1787, if a federal constable searching for stolen goods "pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same." *Id.* (quoting *Essay of A Democratic Federalist*, *reprinted in* 3 *The Complete Anti-Federalist* 58, 61 (Herbert J. Storing ed., 1981)); *see Essays by A Farmer (I)*, Baltimore Md. Gazette, Feb. 15, 1788, *reprinted in* 5 *The Complete Anti-Federalist*, *supra*, at 14 ("[N]o remedy has yet been found equal to the task of dete[r]ring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English

juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression . . . .").

Thus, the Founding generation expected courts to be an "impenetrable bulwark against every assumption of power in the legislative or executive" and to "resist every encroachment upon rights" protected by the Bill of Rights. 1 Annals of Cong. 457 (1789) (Madison). Consistent with that expectation, Americans in the early Republic went to court to vindicate their rights against unreasonable seizures through common law tort actions, including suits for trespass and malicious prosecution. *See, e.g.*, *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); *Burlingham v. Wylee*, 2 Root 152 (Conn. Super. Ct. 1794); *Smith v. McGuire*, 15 Ky. (5 Litt.) 302 (1824); *Barrett v. Copeland*, 18 Vt. 67 (1844).

"The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass," to which the legality and constitutionality of the officers' conduct was pleaded as a defense. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 399 (1987); *see Utah v. Strieff*, 136 S. Ct. 2056, 2060-61 (2016). After the Civil War, in the wake of the Southern states' rampant refusal to protect individual rights, the nation adopted the Fourteenth Amendment to apply the Fourth Amendment and the rest of the Bill of Rights to the states. *McDonald v. City of Chicago*, 561 U.S. 742, 762 (2010). And when state recalcitrance continued, Congress enacted a landmark civil rights statute providing a federal forum in which injured individuals could sue state officers directly for violations of the Fourth Amendment and other constitutional provisions that took place

under color of state law. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, § 1, 17 Stat. 13, 13 (1871), *codified at* 42 U.S.C. § 1983.

If this Court refuses to recognize that Fourth Amendment "seizures" include common law arrests, it will create a loophole in the system of accountability and deterrence established by the political branches and the American public. State and federal officers who shoot suspects, tase them, ram them with vehicles, or physically harm them in other ways without sufficient legal justification will be exempt from liability for constitutional violations whenever the subject of their efforts manages to elude them, even temporarily. Victims of these unreasonable measures will be barred from presenting their cases to juries based on the happenstance that the officers failed to immediately subdue them. That arbitrary result cannot be squared with the text, history, or purpose of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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