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 NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL SHERIFFS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

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The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants, serving cities, counties, towns, and regional entities. ICMA's mission is to advance

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission. The parties have consented in writing to the filing of this brief through blanket consent letters.

professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The National Sheriffs' Association, a 26 U.S.C. § 501(c)(4) non-profit organization, was formed in 1940 to promote the fair and efficient administration of criminal justice throughout the United States and to promote, protect, and preserve our nation's Departments/Offices of Sheriff. The Association has more than 14,000 members and is a strong advocate for more than 3,000 individual sheriffs located throughout the United States. More than 99% of our Nation's Departments/Offices of Sheriff are directly elected by the people in their local counties, cities, or parishes. The Association promotes the public interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

SUMMARY OF ARGUMENT

This case concerns whether a Fourth Amendment "seizure" occurs when police unsuccessfully attempt to restrain an individual by using physical force. The Tenth Circuit correctly concluded that an individual who flees from police in this circumstance has not been seized because

a Fourth Amendment "seizure" requires the acquisition of physical control over the suspect.

I. That interpretation follows from the plain meaning of the term "seizure," the structure of the Fourth Amendment, and principles of common sense. From the Founding to today, "seizure" has meant to "take possession"—thus encompassing an element of physical control. The Fourth Amendment's structure reinforces that plain-meaning understanding. The particularity requirement in the Warrant Clause corresponds to the Fourth Amendment's use of "seizure" by providing that a warrant must particularly describe "the persons or things to be *seized*." U.S. Const. amend. IV (emphasis added). The particularity requirement's reference to seizing persons or things necessarily contemplates the exercise of physical control over them. Because the same term in the same sentence of the same provision of the Constitution should carry the same meaning, "seizure" and "seized" should both be interpreted to require the acquisition of physical control.

Principles of common sense further confirm the point. Petitioner suggests that a seizure occurs based on "mere touch with the intent to restrain," even if no actual restraint occurs. Br. 15. But as a commonsense matter, a person who evades police capture cannot reasonably be described as having been "seized." And if a seizure is based on the mere fact of physical contact, that definition could produce absurd consequences in cases like this one, where bullets remain in an individual's body for hours or days, presumably perpetuating the "seizure" while the suspect remains at large. The Fourth Amendment does not require that counterintuitive result.

II. Petitioner's argument to the contrary hinges on her assertion that, at common law, "mere touch with the intent to restrain effected an arrest." Br. 19. But the rule actually

was far narrower: if a debtor was touched before retreating into his home, the touch provided legal authority to forcibly enter the home to seize him. That constructive-arrest concept was subsequently extended to assess when a bailiff who failed to adequately restrain a debtor could be held liable for resulting unpaid debts. In both contexts, the constructive arrest was not an actual seizure of the debtor, but rather a legal fiction meant to establish rules of liability in civil cases.

This Court has previously declined to interpret the Fourth Amendment to incorporate common-law doctrines that are historical relics ill-suited to modern search-and-seizure concepts. The "mere touch" rule should not define the meaning of a "seizure" here given that rule's origins, limited application, and recognized status as a legal fiction distinct from an actual seizure.

III. This Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991), does not mandate a ruling in petitioner's favor. Although *Hodari D.* described the common-law "mere touch" rule and assumed it would apply to an attempted seizure involving physical force, the Court had no need to definitively resolve that question because the asserted seizure in *Hodari D.* was based solely on a show of police authority rather than physical contact. The *Hodari D.* Court did not have adversarial briefing on the context and limits of the common-law "mere touch" rule, and its statements about that rule were not necessary to resolve the show-of-authority seizure question. The statements in *Hodari D.* accordingly should not foreclose this Court from considering whether an unsuccessful attempt to physically restrain a suspect constitutes a "seizure" under the Fourth Amendment—especially given the Court's observation in other cases that a seizure requires the "intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

IV. Petitioner's argument that "mere touch" alone effectuates a seizure would have detrimental consequences for the criminal justice system. Fleeing suspects place officers and the public at risk, and petitioner's proposed definition would increase incentives to flee. In response, officers may be chilled from using the force necessary to bring suspects under physical control for fear of facing unwarranted excessive-force claims. And permitting individuals who flee to bring a Fourth Amendment claim would not deter unlawful police conduct, given that officers will not know in advance whether suspects will resist and evade capture. Petitioner's rule would also create unwarranted disparities in the Fourth Amendment's application, and is unnecessary to provide redress for egregious uses of excessive force. These policy considerations further support interpreting the term "seizure" in accordance with plain meaning to require the acquisition of physical control.

ARGUMENT

I. A "SEIZURE" UNDER THE FOURTH AMENDMENT REQUIRES THE ACQUISITION OF PHYSICAL CONTROL

The Fourth Amendment protects against "unreasonable searches and seizures," and further provides that warrants shall not issue unless they "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The text and structure of that provision—as well as principles of common sense—dictate that the acquisition of physical control is necessary to effectuate a "seizure."

A. The Plain Meaning Of "Seizure" Requires An Element Of Physical Control

Dictionary definitions from the Founding through today reflect that the term "seize" has always meant to "take

possession"—and thereby exercise physical control. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (to seize is to "take possession of; to grasp; to lay hold on; to fasten on"; seizure is the "act of taking forcible possession"); 2 T. Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771) ("take possession"); 2 Noah Webster, *An American Dictionary of the English Language* 67 (1828) ("fall or rush upon suddenly and lay hold on," "take possession"); 2 John Bouvier, *A Law Dictionary* 510 (6th ed. 1856) ("taking possession," "seizure is complete as soon as the goods are within the power of the officer"); 2 Benj. Vaughan Abbott, *Dictionary of Terms and Phrases* 458 (1879) ("take a thing into custody," "actual control or custody"); *Webster's Third New International Dictionary* 2057 (1993) ("take possession of," "take hold of"); *Black's Law Dictionary* 1631 (11th ed. 2019) ("forcibly take possession (of a person or property)"). Indeed, this Court observed in *Hodari D.* that "[f]rom the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" 499 U.S. at 624.[2]

Similarly, an "arrest"—a seizure of a person—has long required an element of physical control. *See, e.g.*, 1 Cunningham, *supra* (arrest is "restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law"); 1 Bouvier, *supra*, at 121 ("[t]o stop; to seize; to deprive one of his liberty"); 1 Abbott, *supra*, at 84-85 ("taking, seizing, or detaining"; "restraint of the person," "actual custody"); *Webster's Third*, *supra*, at 121 ("take or keep in custody," "catch and hold");

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[2] Petitioner notes (Br. 26-27) that the *Hodari D.* Court observed that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." 499 U.S. at 626. But the Court further recognized that such a definition would "expand" the ordinary understanding of a "seizure" because "one would not normally think that the mere touching of a person would suffice." *Id.* at 626 n.2.

Black's Law Dictionary, *supra*, at 135 ("seizure or forcible restraint," "taking or keeping of a person in custody"); *see also* Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 541 (1924) ("The word *arrest* comes from the Latin through the French, and literally means to stop, stay or restrain.").

As this Court has recognized, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). The ordinary meaning of "seize" thus supports interpreting a Fourth Amendment "seizure" to require the acquisition of physical control.

B. The Reference To Seizure In The Warrant Clause Supports Interpreting That Term To Require The Acquisition Of Physical Control

The Warrant Clause's particularity requirement also refers to the act of seizing and uses the term there to mean obtaining physical control over persons and things. The Fourth Amendment's structure thus further supports interpreting "seizure" to require the acquisition of physical control.

The Warrant Clause tracks the Fourth Amendment's first reference to "*searches* and *seizures*" by providing that a warrant must "particularly describ[e] the place to be *searched*, and the persons or things to be *seized*." U.S. Const. amend. IV (emphasis added). The particularity requirement's reference to seizing persons or things necessarily contemplates the exercise of physical control over them; indeed, it would be nonsensical for a warrant to list persons or items to be touched but not brought under physical control. *See, e.g.*, *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) (to satisfy particularity requirement, a warrant must "suppl[y] enough information to guide and control the agent's judgment in selecting *what to take*")

(emphasis added). Instead, an arrest or seizure warrant provides authorization for officers to seize persons or things by bringing them within the officers' physical control.

This understanding of the meaning of seizure in the Warrant Clause is reinforced by its historical context. The particularity requirement was adopted to prevent "intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). Such seizures interfered with possessory interests: a suspect's personal items could be "carted away" and "taken out of his possession." *Id.* at 483-84 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)). The particularity requirement thus "prevents the seizure of one thing under a warrant describing another" and ensures that "[*a*]*s to what is to be taken*, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927) (emphasis added).

This Court has recognized that the same or similar words and phrases repeated in multiple provisions of the Constitution should carry the same meaning throughout, absent textual indications to the contrary. *See, e.g.*, *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-30 (1816) (interpreting "shall be vested" in Article III of the Constitution to carry the same meaning as when used in Articles I and II); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (interpreting "the people" in the Fourth Amendment to have the same meaning as the same and similar phrasing in the First, Second, Ninth, and Tenth Amendments); *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008) (construing "the people" in the Second Amendment in light of the "unambiguous[]" meaning of that phrase in other amendments). This structural method of interpretation is particularly sound when a word appears twice in the *same sentence* of the *same provision* of the Constitution. *Cf. Mills Music., Inc. v. Snyder*, 469 U.S. 153, 164-65 (1985) (observing in statutory interpretation case that "[i]t is logical to assume

that the same word has the same meaning when it is twice used earlier in the same sentence"). Thus, the Fourth Amendment's reference to "seizure," just like its reference to the "persons or things to be seized," is properly understood to encompass an element of physical control.

C. Principles Of Common Sense Confirm That A Person Who Has Never Come Within An Officer's Physical Control Has Not Been Seized

Interpreting the Fourth Amendment's reference to "seizures" to require the acquisition of physical control also accords with common sense. Petitioner urges the Court to rule that a seizure is "effected by mere touch with the intent to restrain," even if the touch is wholly ineffective, the suspect's movement is unimpeded, and no actual restraint occurs. Br. 15. But "[t]here is no war between the Constitution and common sense," *Mapp v. Ohio*, 367 U.S. 643, 657 (1961)—and petitioner's definition of a seizure stretches that concept beyond what a commonsense interpretation can bear.

This Court has repeatedly affirmed that principles of common sense inform the proper understanding of the Fourth Amendment. *See, e.g.*, *Texas v. Brown*, 460 U.S. 730, 742 (1983) (probable cause is governed by a "common-sense standard"); *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (interpreting the warrant requirement in a "commonsense" manner, although that was not the practice at common law); *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (adopting Fourth Amendment standards based on "common sense and ordinary human experience"). As a matter of common sense, a person who never submits to police authority and instead evades capture cannot reasonably be understood to have been "seized."

That point is particularly clear when considering the duration of the seizure petitioner proposes. If a seizure occurs when bullets strike an individual, even if they do not

cause her to submit to police authority, that seizure would presumably last as long as the bullets remain in her body. That result necessarily follows from defining a seizure based exclusively on the physical intrusion of the bullet, rather than on the suspect's response. *See* Pet. Br. 27 (suggesting a physical-intrusion standard). But that understanding of a seizure would produce absurd results, as the seizure could stretch on for hours or days while the suspect evades capture.

This case illustrates the point. Petitioner was shot in the early morning but immediately fled the scene and remained at large until the next day. *See* Pet. App. 2a. Throughout that time, the bullets appear to have remained in her body. *See* J.A. 30-31 (petitioner describing wounds for the two shots as "one by where my arm was and one by my back," with no indication in the record of exit wounds). During the day she evaded capture, petitioner abandoned one car, stole another car, spent time at a campground, and eventually sought care at a hospital 80 miles away from where she was shot. *See* J.A. 26-27, 30-32. No reasonable person would think petitioner was "seized" by police that whole time.

To give another example, Boston Marathon bomber Dzhokhar Tsarnaev sustained wounds in a shootout with police more than 18 hours before he was captured. Tsarnaev fled and remained at large until the following evening when he was found hiding in a boat in a suburban neighborhood. *See* Devlin Barrett et al., *Dzhokhar Tsarnaev Charged in Boston Marathon Attack*, Wall Street Journal (Apr. 22, 2013); Alexander Abad-Santos, *New Secrets of the Forgotten Watertown Shooting, Revealed*, The Atlantic (Apr. 23, 2013) ("The sun rose on a shaken Boston, with . . . [Tsarnaev] on the loose, and it began to set that way."). It would surely surprise Boston residents, who were subject to lockdown while police swarmed the neighborhood, to learn that Tsarnaev had actually already been "seized" for Fourth

Amendment purposes from the moment he was shot until the moment any embedded bullets were removed from his body.

To avoid such an anomalous result, petitioner takes no position on "whether the seizure continued beyond th[e] moment" she was shot, Br. 43, and the United States affirmatively argues that the seizure "lasted only for the brief period of the bullets' impact," U.S. Br. 8. But if the existence of a seizure turns on the mere fact of physical contact with the suspect—and not at all on the suspect's response—then surely the seizure must last as long as the physical contact itself. When police officers seize a suspect by physically grabbing his arm, for example, the length of the seizure must extend beyond the initial impact to the full duration of the grasp. So too here, petitioner and the United States offer no coherent interpretation of a seizure that would limit its duration to the initial moment the bullet *enters* the body, but not the moments that it *remains* in the body thereafter. The fact that petitioner and the United States seek to avoid the logical implications of their definition of a "seizure" demonstrates that their interpretation is at odds with plain meaning and common sense.[3]

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[3] Notably, although the United States embraces petitioner's definition of a "seizure" in this case, the United States previously took the position that a seizure requires "physical control over an individual." U.S. Br., *California v. Hodari D.*, No. 89-1632, at 4 (Nov. 15, 1990). The United States supported that position based on plain meaning, dictionary definitions, and common sense. *See id.* at 5-6, 10-13 & nn.3-6. The United States avoids discussing those interpretive aids now and instead relies entirely on *Hodari D.* But as described in Section III, *infra*, *Hodari D.* does not control the question presented here.

II. THE COMMON LAW DOES NOT REQUIRE PETITIONER'S "MERE TOUCH" DEFINITION OF A "SEIZURE"

To support her argument that a "seizure" is "effected by mere touch," petitioner leans heavily on "the common law of arrest," which she asserts must define the Fourth Amendment's scope. Br. 15, 17. But petitioner's reliance on the common law is misplaced because the doctrine she invokes concerned a narrow legal rule intended to govern liability in civil cases involving debtors. In that context, common-law courts recognized not an *actual seizure*, but a *constructive arrest*, which was a legal fiction that served purposes specific to its civil-liability origins. This Court has recognized "that the common-law rules of arrest developed in legal contexts that substantially differ" from modern circumstances, and that departures from common-law rules may be warranted when interpreting the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 591 (1980). Such a departure is warranted here.

A. Common-Law Constructive Arrest Was A Legal Fiction Adopted For Limited Purposes Involving Civil-Liability Determinations

1. Common-law courts originally adopted the constructive-arrest doctrine as part of an intricate web of rules concerning who could forcibly enter private dwellings to make an arrest. One rule was the bedrock principle that "the house of every one is to him as his castle and fortress," which justified the homeowner in using deadly force "in defence of himself and his house." *Semayne's Case* (1604) 77 Eng. Rep. 194, 195; *see also* Edward Hyde East, *Treatise of the Pleas of the Crown* 287, 321 (1806) (East Treatise). An official seeking to arrest a person at home accordingly could be exposed to serious danger, as well as liability as "a trespasser," absent legal authority to forcibly enter the dwelling. *Id.*

Although constables were authorized to force entry to arrest felons in criminal cases, *see Semayne's Case*, 77 Eng. Rep. at 196, the rules were different in civil actions. "In civil suits the officer c[ould not] justify breaking open an outward door or window to execute the process." East Treatise, *supra*, at 321; *see Semayne's Case*, 77 Eng. Rep. at 198 (finding it unlawful in "the suit of a common person, to break the defendant's house"). That rule was problematic because officers executing civil writs to arrest debtors could face personal liability if they failed to capture the debtor. John Frederick Archbold, *Chitty's Archbold's Practice of the Queen's Bench Division of the High Court of Justice, and on Appeal therefrom to the Court of Appeal and House of Lords, in Civil Proceedings* 889 (14th ed. 1885) (Archbold Treatise) (describing writ "command[ing] the sheriff to take the body of the defendant and him safely keep"); *Sherwood v. Benson*, (1812) 4 Taunt. 631 (holding sheriff responsible for discharge of arrestee).

Against this backdrop, common-law courts embraced the legal fiction of constructive arrest for the narrow purpose of enabling a constable to break and enter a debtor's home to capture him without facing liability. Under the constructive-arrest rule, "if a bailiff have a warrant against a person who is in a house, and lay hand upon him through the window, he may afterwards break the house to come to him." *Genner v. Sparks* (1704) 87 Eng. Rep. 928, 929. But that rule did not mean an actual seizure of the debtor occurred based on the touch; instead, the constructive-arrest doctrine provided legal authority for the bailiff to enter the debtor's house to actually seize him. Indeed, *Genner* makes that point explicit: if a bailiff "but touched the defendant even with the end of his finger, it had been *an arrest*, and [the bailiff] might have broke the house afterwards *to seize upon him*." *Id.* (second emphasis added). *Genner* accordingly makes clear that the proposed touch was not itself a seizure, but instead a legal justification for the bailiff to invade the

debtor's dwelling—and only then actually "seize upon him." *Id.*

The same distinction was recognized in *Anonymous* (1676) 86 Eng. Rep. 197, where the court ruled that, when "[a] bailiff caught one by the hand" through a window, that "was such a taking of him, *that the bailiff might justifie the breaking open of the house to carry him away*." *Id.* (emphasis added). In a second case, also captioned *Anonymous* (1702) 87 Eng. Rep. 1060, the court held that, "[i]f a window be open, and a bailiff put in his hand and touch one for whom he has a warrant, he is thereby his prisoner, *and may break open the door to come at him*." *Id.* (emphasis added). The bailiffs in the *Anonymous* cases did not actually "take" the debtors or make them "prisoners" by touching them; instead, the constructive arrest was a legal fiction that enabled the bailiffs to force entry and only then capture the debtors.

This constructive-arrest doctrine was restated again more than a century later in *Sandon v. Jervis & Dain* (1858) 120 Eng. Rep. 758, 760, which involved a sheriff's officer "touching the plaintiff" through a window. *Id.* Three judges agreed that the touch justified the sheriff's subsequent forced entry because, "the arrest having been lawfully made, the officer had a right to break open the outer door of the house *and complete the capture*." *Id.* (emphasis added). Petitioner emphasizes that the judges found a constructive arrest valid even if the officer could not acquire physical control over the debtor at the time of the touch. Br. 20-21. But that was only because the "arrest" from the touch was merely a legal fiction entitling the officer

to break the door of the dwelling and effect an actual seizure.[4]

2. Common-law courts also applied the constructive-arrest doctrine in other contexts designed to determine liability in civil actions involving debtors. There, too, the doctrine operated as a legal fiction distinct from actual seizures.

In common-law civil suits, a lawful arrest triggered doctrines assigning liability between the various parties. For example, a bailiff was required to maintain custody of a lawfully arrested debtor until "delivered by due course of law." Archbold Treatise, *supra*, at 896. If the sheriff allowed the debtor to "escape" or be "rescued" by third parties, the sheriff could be "obliged to pay the plaintiff the amount of his debt." *Id.* at 898-99. In this context, common-law courts applied the constructive-arrest doctrine as a legal fiction to fix liability in situations where officials had inadequately executed their duties to bring debtors within their physical control.

In *Nicholl v. Darley* (1828) 148 Eng. Rep. 974, for example, a sheriff initially "caught [a debtor] round the waist," but the debtor was able to run away. *Id.* at 974. The plaintiff sued the sheriff for the debt, arguing he was liable for allowing the "escape." *Id.* at 974-75. By a divided vote, the court found that the sheriff constructively arrested the debtor by touching him and was therefore liable for

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[4] Commentators summarizing the common-law rules have confirmed this distinction between an "actual" and a "constructive" seizure or detention. *See, e.g.*, Wilgus, *supra*, at 543. "Actual detention may be by physical control," including by "taking, seizing or putting hands on him subjecting him to actual control," or "may arise from a surrender or yielding upon demand." *Id.* at 553. A "constructive detention," on the other hand, occurs when "the party is never actually brought within the physical control of the party making an arrest." *Id.* at 556 (citing *Genner*, 87 Eng. Rep. at 929).

allowing the escape. *Id.* at 975-76. One judge recognized that, given *Genner*'s rule that a touch would "justify the officer in pursuing [the debtor], and breaking open a house," the same touch must also be "sufficient to render him liable in this form of action." *Id.* at 975. In other words, if the legal fiction helped an official in some instances, in fairness he must also accept the negative consequences. Another judge emphasized the need to incentivize sheriffs to pursue debtors with vigor. *Id.* at 976 ("[I]t was the duty of the Sheriff to see that the process of the law was carried into execution."). Notably, a judge voting against liability found that the sheriff did not have "actual custody" of the debtor. *Id.* at 975. But for purposes of assessing civil liability, the legal fiction stood.[5]

3. Petitioner cites a handful of additional common-law cases and early American cases, but none establishes that the constructive-arrest doctrine extended beyond its origins as a narrow rule intended to govern certain civil-liability determinations.

Several of petitioner's cases addressed situations where there was no touch, and therefore no constructive arrest. *See Simpson v. Hill* (1795) 170 Eng. Rep. 409, 409 (refusing to hold private defendant liable for false imprisonment when he sent for a constable but there was never "any taking possession of the [plaintiff]"); *McCracken v. Ansley*, 35 S.C.L. 1, 5 (1849) (observing that arrest can be effectuated through

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[5] Petitioner cites other cases in which courts resolved issues concerning whether officers or third parties could be liable for a debtor's escape or rescue. *See Hodges v. Marks* (1615) 79 Eng. Rep. 414, 414 (finding defendants liable for rescuing a debtor after he was lawfully arrested); *Moore v. Moore* (1858) 53 Eng. Rep. 538, 540 (finding sheriff liable for releasing debtor on bail); *Whithead v. Keyes*, 85 Mass. 495, 495 (1865) (considering sheriff's liability for debtor's escape). To the extent these cases endorsed the legal fiction of constructive arrest—an issue not directly presented in several of them—it was for the same limited purpose of determining who was liable for the debtor's unpaid debts.

submission to authority and not just by "some corporal seizing or touching of the body," and finding that a debtor was not arrested until he submitted by giving a bond). Other cases involved situations in which a defendant was actually seized, such that constructive-arrest principles were inapplicable. *See Williams v. Jones* (1736) 95 Eng. Rep. 193, 193-94 (declining to find that plaintiff who had been detained "in custody for six hours" could establish a battery by the mere fact of his arrest because "every laying on of hands is not a battery" and an arrest could also occur by submission to authority); *Pike v. Hanson*, 9 N.H. 491, 492, 494 (1838) (finding plaintiff was arrested when she submitted to debt collector's statement that he was arresting her); *United States v. Benner*, 24 F. Cas. 1084, 1085 (E.D. Pa. 1830) (constable "detained" foreign minister).[6]

Indeed, one of petitioner's cases illustrates the distinction between constructive arrest and an actual seizure. In *People v. McLean*, 68 Mich. 480 (1888), an officer "laid his hand on [the defendant's] shoulder," but the defendant was able to flee. *Id.* at 483. Petitioner wrongly asserts (Br. 22) that the court found that "[a]n arrest occurred," but the court instead found only that the officer had "*attempted* to make the arrest"—not that he had succeeded. *McLean*, 68 Mich. at 484 (emphasis added); *see*

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[6] Petitioner emphasizes the jury charge on arrest in *Benner*, but omits a part that is demonstrably incorrect, indicating that *Benner* does not correctly define "arrest." *See Benner*, 24 F. Cas. at 1086-87 ("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*.") (emphasis added); Br. 21 (omitting italicized portion of charge). Petitioner further misinterprets *Benner* in relying (Br. 22) on the court's statement that "[w]hether [the arrestee] submitted or consented to the arrest is not material." 24 F. Cas. at 1087. That statement concerned whether the foreign minister had waived diplomatic privilege; it did not involve whether there had been a lawful arrest. *Id.*

id. at 486 (sheriff "attempted to arrest" the defendant); *id.* at 480 (defendant convicted "for resisting an officer in attempting to serve a warrant upon him"). And "neither usage nor common-law tradition makes an *attempted* seizure a seizure." *Hodari D.*, 499 U.S. at 626 n.2.

In short, while petitioner's "mere touch" test constituted a constructive arrest in limited circumstances at common law, it was never more broadly applied in a manner that would illuminate the proper definition of a "seizure" here.

B. The Constructive-Arrest Doctrine Should Not Define The Scope Of A "Seizure" Under The Fourth Amendment

Petitioner is wrong to contend as a categorical matter that "the term 'seizure' is defined by the common law of arrest." Br. 17. This Court has previously cautioned against automatically incorporating common-law principles into Fourth Amendment jurisprudence—including common-law arrest rules. Given the constructive-arrest doctrine's origins and limited application, the "mere touch" rule should not define the meaning of a Fourth Amendment "seizure."

1. This Court has warned that "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law"—particularly when the validity of those distinctions "is largely historical." *Jones v. United States*, 362 U.S. 257, 266 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980); *see Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (holding "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control" a Fourth Amendment analysis). For example, at common law, officials could not search for mere evidence of a crime

and were instead permitted to seize only contraband and the fruits and instrumentalities of crime. *Payton*, 445 U.S. at 592 n.33. But this Court eventually rejected those common-law limits on the government's search-and-seizure authority, finding that they were based on historical "premises no longer accepted as rules governing the application of the Fourth Amendment," such as the "fiction" that the government must assert "some property interest in material it seizes." *Warden v. Hayden*, 387 U.S. 294, 300-01, 306 (1967); *see Payton*, 445 U.S. at 592 n.33 (citing this example as an "important difference[] between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions").

Most pertinently, this Court has recognized that "the common-law rules of arrest" do not always control the Fourth Amendment's scope because those rules "developed in legal contexts that substantially differ from" modern applications of the Fourth Amendment. *Payton*, 445 U.S. at 591. *Payton* concluded that the Fourth Amendment prohibits the warrantless entry of a home to make a routine felony arrest, notwithstanding common-law authority permitting such arrests in certain circumstances. *Id.* at 576. The Court explained that, "[a]t common law, the question whether an arrest was authorized typically arose in *civil damages actions* for trespass or false arrest, in which a constable's authority to make the arrest was a defense." *Id.* at 592 (emphasis added). Because the common-law rule developed in that "substantially differ[ent]" legal context, *id.* at 591, the Court declined to interpret the Fourth Amendment to incorporate the common-law arrest standard.

2. Applying that same analysis here, the Court should decline to define a Fourth Amendment "seizure" by

reference to the "mere touch" rule. That rule—which was adopted for the narrow purpose of resolving liability disputes in civil cases involving debtors—has no obvious application to mine-run Fourth Amendment cases today. Under modern Fourth Amendment jurisprudence, an officer surely could not justify forced entry of a person's home because he managed to briefly touch the person prior to entry. Nor would the officer be liable for the person's debts if the individual absconded after a brief touch. Even in its core applications, therefore, the "mere touch" rule does not correspond to Fourth Amendment standards.

Moreover, even at common law, the "mere touch" rule was recognized as a legal fiction distinct from actual seizure. "For most purposes at common law, the word ["seizure"] connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control." *Hodari D.*, 499 U.S. at 624. For example, "[a] ship still fleeing, even though under attack, would not be considered to have been seized as a war prize." *Id.* (citing *The Josefa Segunda*, 10 Wheat. 312, 325-26 (1825)). And "[a] res capable of manual delivery was not seized until 'tak[en] into custody.'" *Id.* (quoting *Pelham v. Rose*, 9 Wall. 103, 106 (1870)). These other common-law conceptions of a "seizure" are more aligned with the Fourth Amendment than the constructive-arrest standard that applied for limited purposes in civil-debtor actions. At the very least, petitioner's position that such constructive arrests must necessarily be viewed as "seizures" for all purposes—including those divorced from the narrow circumstances that prompted the "mere touch" rule—"is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted." *Payton*, 445 U.S. at 598. Thus, rather than incorporate the "mere touch" rule into the Fourth Amendment, the Court should adhere to the plain meaning of "seizure" as requiring the acquisition of physical control.

III. THIS COURT'S PRECEDENT DOES NOT REQUIRE PETITIONER'S "MERE TOUCH" DEFINITION OF A SEIZURE

Petitioner is wrong to assert that this Court's decision in *Hodari D.* "compel[s]" adopting a "mere touch" definition of "seizure." Br. 25.

1. In *Hodari D.*, an individual who ran from police and discarded drugs during the chase contended he had been seized based on a "show of authority" when the officers pursued him, even though he fled. 499 U.S. at 623-24. The Court concluded that a seizure effected by a show of authority required the suspect to submit to the officers' control. *Id.* at 626.

Although the *Hodari D.* Court recognized that the case did "not involve the application of any physical force" because the defendant "was untouched by [the officers] at the time he discarded the cocaine," *id.* at 625, the Court cited authorities restating the common-law "mere touch" rule and assumed that rule would apply to an attempted seizure using physical force, *id.* at 624-25. Thus, the Court said that at common law, "[t]o constitute an arrest, . . . 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. The Court observed that the individual in *Hodari D.* could not "suggest[] that [the officers'] uncomplied-with show of authority was a common-law arrest, and then appeal[] to the principle that all common-law arrests are seizures," because "[a]n arrest requires *either* physical force . . . *or,* where that is absent, *submission* to the assertion of authority." *Id.* at 626.

Petitioner and her *amici* suggest that "no sound basis exists for disregarding [*Hodari D.*'s] explication of the requirements for a physical-force seizure." U.S. Br. 15; *see* Pet. Br. 25. But those statements in *Hodari D.* were made

without the benefit of adversarial briefing on the common-law "mere touch" rule or whether the Fourth Amendment incorporates the legal fiction of a constructive arrest. *Cf.* Pet. Br. 37-38 (suggesting decisions should not be entitled to weight when courts were not "presented with the robust historical evidence" about the common-law constructive-arrest doctrine). Moreover, the *Hodari D.* Court recognized that it was resolving only a "narrow question" about show-of-authority seizures because the case did "not involve the application of any physical force." 499 U.S. at 625. *Hodari D.*'s statements about the common-law "mere touch" rule were not necessary to the Court's holding concerning show-of-authority seizures and should not prevent consideration of whether the Fourth Amendment incorporates the legal fiction of constructive arrest in this case, where the issue has been briefed and is squarely presented.

2. In contrast to *Hodari D.*, other decisions by this Court describe seizures as involving an element of physical control. In *Brower*, for example, the Court observed that a "seizure" requires "intentional acquisition of physical control." 489 U.S. at 596. Put another way: "[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Or again: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968). To be sure, these cases did not squarely confront the question whether a seizure can be effected by mere touch if the subject's freedom of movement is not thereby constrained. But the Court's focus on the acquisition of physical control reflects the commonsense intuition that a person has not been "seized" if, despite being touched, he has suffered no actual restraint.

Notably, all of this Court's cases recognizing or assuming the existence of a seizure involved the acquisition of physical control either through a show of authority or by physical force. *See, e.g.*, *Terry* 392 U.S. at 19 (individual seized when the officer "took hold of him"); *Tennessee v. Garner*, 471 U.S. 1, 4, 6 (1985) (burglar seized when stopped by a bullet); *Brower*, 489 U.S. at 594, 599 (driver in high-speed chase seized when he crashed into a barrier intended to stop him); *Hodari D.*, 499 U.S. at 629 (individual "not seized until he was tackled"); *Brendlin v. California*, 551 U.S. 249, 251, 257 (2007) (passenger seized when car was pulled over for traffic stop); *see also, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 196-97 (2004) (suspect surrendered "about a half block" away from where he was shot); *Plumhoff v. Rickard*, 572 U.S. 765, 770 (2014) (high-speed driver was shot, causing him to crash into building where his movement terminated); *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015) (high-speed driver killed when shot). A holding that a "seizure" requires the acquisition of physical control accordingly is consistent with this Court's cases.

IV. ADOPTING A "MERE TOUCH" DEFINITION OF SEIZURE WOULD HAVE DETRIMENTAL CONSEQUENCES FOR CRIMINAL JUSTICE

Interpreting a "seizure" to occur based on mere touch with no acquisition of physical control also would have adverse effects on the criminal process. Such a rule would place police and the public in danger from fleeing suspects, would create unwarranted anomalies in the Fourth Amendment's application, and is unnecessary to provide redress for egregious and unjustified uses of force.

1. As this Court recognized in *Hodari D.*, "[s]treet pursuits always place the public at some risk." 499 U.S. 621, 627 (1991); *see, e.g.*, *Scott v. Harris*, 550 U.S. 372, 380 (describing "Hollywood-style car chase of the most frightening sort, placing police officers and innocent

bystanders alike at great risk of serious injury"); *Plumhoff*, 572 U.S. at 777 (driver in high-speed chase posed a "deadly threat for others on the road"). These pursuits often end in death or severe injury for suspects, officers, and bystanders. *See* Brian A. Reaves, *Police Vehicle Pursuits, 2012-2013*, U.S. Dep't of Justice Bureau of Justice Statistics (May 2017) (finding that "from 1996 to 2015, an average of 355 persons (about 1 per day) were killed annually in pursuit-related crashes"). Petitioner's proposed definition of a "seizure" will increase this danger by incentivizing suspects to flee when they are touched—particularly when they have contraband that they want to hide or destroy. *See United States v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994) (rule "would encourage suspects to flee after the slightest contact with an officer in order to discard evidence, and yet still maintain Fourth Amendment protections."), *United States v. Dupree*, 617 F.3d 724, 737 (3d Cir. 2010) (rule "would encourage suspects to disobey orders from law enforcement officers, thereby placing the public at risk").

Petitioner's proposed rule could also chill police officers from using the force necessary to restrain a fleeing suspect. Individuals who disregard police orders to stop are likely to be more aggressive and combative than the average suspect, and their decision to flee may necessitate the use of force to bring them under physical control. In addition, the more an individual resists, the more likely it is that greater force will be necessary to restrain him. If suspects who successfully flee can bring excessive-force claims, officers may hesitate to use additional force to prevent that escape for fear of facing unwarranted legal action. And permitting excessive-force claims to be brought in this circumstance will not deter unlawful police conduct, since officers cannot control a suspect's response and will not know in advance whether he will resist and escape. *See Hodari D.*, 499 U.S. at 627 ("Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply

the deterrent [of the exclusionary rule] to their genuine, successful seizures."). In short, "compliance with police orders to stop should . . . be encouraged," and the Fourth Amendment should not be "stretch[ed] beyond its words" in this case to achieve the opposite result. *Id.*

2. Petitioner's rule would also create unwarranted disparities in the Fourth Amendment's application. As *Hodari D.* made clear, a "seizure" effected by a show of authority turns not only on the officer's actions, but also on the suspect's response, requiring an actual "*submission* to the assertion of authority" that halts the suspect's movement. 499 U.S. at 626. Under petitioner's "mere touch" rule, in contrast, a suspect's response would be wholly irrelevant. So long as an officer grazes the suspect's arm in an unsuccessful attempt to restrain him, a Fourth Amendment seizure would occur. Little justification exists for interpreting the Fourth Amendment's reference to "seizure" to turn on the suspect's response in some situations but not in others.

Petitioner suggests that defining "seizure" based on the suspect's response would "raise[] a series of difficult questions" about when a seizure occurs. Br. 12. But that standard already applies in show-of-authority cases, and interpreting "seizure" to have a uniform definition would not be unworkable. In any event, petitioner's proposed definition raises its own difficult questions about how to determine when a seizure ends—an issue sufficiently thorny that petitioner takes no position on it. *See* Br. 43.

Indeed, petitioner's rule would produce particularly anomalous results as applied to suspects who are shot. As described, the duration of a seizure in that circumstance would turn on the happenstance of whether the bullet remained in the suspect's body. It makes little sense for the extent of a "seizure" to turn on such distinctions, and the Fourth Amendment does not require that counterintuitive result.

3. Nor is it necessary to distort the meaning of a "seizure" to provide relief for victims of egregious excessive force.

Petitioner contends it would be "absurd" to find the Fourth Amendment inapplicable to an individual who is shot while fleeing, "even if the officers had no reason whatsoever to shoot her and even if clearly established law prohibited them from doing so." Br. 12. To be sure, the Fourth Amendment provides the exclusive remedy for excessive-force claims that occur "in the course of an arrest, investigatory stop, or other 'seizure.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989). But when a "seizure" has not occurred, and the Fourth Amendment is therefore inapplicable, other constitutional protections, including substantive due process, may provide a remedy for egregious governmental conduct. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843, 844-45 (1998) (observing that not "all constitutional claims relating to physically abusive government conduct" arise under the Fourth Amendment, and listing cases where plaintiffs sued under substantive due process); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990) (claims of excessive force occurring outside a "seizure" can be analyzed under substantive due process); *Schaefer v. Goch*, 153 F.3d 793, 797 (7th Cir. 1998) (same).

In addition, state tort law may provide a remedy in appropriate circumstances to individuals who have been subject to physical force but not "seized" for Fourth Amendment purposes. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 333 (1986) (observing that injuries by government officials that are "not addressed by the United States Constitution" may nevertheless "raise significant legal concerns and lead to the creation of protectable legal interests," such as under "tort claim statutes"); *Landol-Rivera*, 906 F.2d at 797 n.12 (observing in case where no seizure occurred that "the appropriate vehicle for relief is a state law tort suit" and that "[a] tort claim against law

enforcement officers" was available under state law); *Brown v. Fournier*, No. 2015-CA-001429-MR, 2017 WL 2391709, at *5 (Ky. Ct. App. June 2, 2017) (describing state-law battery claim brought by individual who was briefly physically restrained by a police officer but then left the scene). It is therefore unnecessary to twist the meaning of a Fourth Amendment "seizure" to provide redress for unjustified uses of excessive force.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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March 9, 2020