No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

v.

JANICE MADRID AND RICHARD WILLIAMSON,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

Kelsi Brown Corkran
Thomas M. Bondy
Ethan P. Fallon
Sheila Baynes
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
Easha Anand
Rachel G. Shalev
Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

Respondents (two police officers) shot Petitioner twice in the back as she was driving away from them. Their intent was to restrain her, but she initially evaded capture. Petitioner sued under 42 U.S.C. § 1983, asserting that the shooting was an unreasonable seizure in violation of the Fourth Amendment. At common law, "the mere grasping or application of physical force" with intent to restrain constituted an arrest—"the quintessential 'seizure of the person'"—"whether or not it succeeded in subduing the arrestee." *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

The question presented is:

Does the application of lethal force to restrain someone constitute a "seizure" within the meaning of the Fourth Amendment, even if the force does not immediately stop the person?

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JURISDICTION

The Tenth Circuit entered judgment on May 2, 2019. Pet. App. 1a. On July 15, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

At the time of the Founding, a common-law arrest was "the quintessential 'seizure of the person.'" *California v. Hodari D.*, 499 U.S. 621, 624 (1991). And at common law, an arrest occurred the moment an officer applied physical force to someone with the intent to restrain her, whether or not she in fact stopped. When Respondents shot Petitioner Roxanne Torres twice in the back to stop her from leaving, she was seized within the original meaning of the Fourth Amendment, regardless of her subsequent flight.

Ms. Torres was driving away from Respondents when they shot at her thirteen times in an attempt to stop her, hitting her twice. Her left arm was paralyzed by the bullets, but she was able to continue driving. Her injuries were so severe that she ultimately had to be airlifted to a hospital.

According to Respondents and the decision below, Ms. Torres's ability to put her foot on the gas pedal and temporarily avoid apprehension, despite the bullet wounds in her back, means the shooting is outside the ambit of the Fourth Amendment. That result would hold even if Ms. Torres had died at the hospital from her injuries. It would hold even if Respondents had no reason to shoot her. And it would hold even if Respondents were plainly incompetent or knowingly violated the law.

That result makes no sense. And it would have been unfathomable to the Framers of the Fourth Amendment. They drafted an amendment that protects individuals from unjustified intrusions on their

personal security. They did that by incorporating into the Fourth Amendment the prevailing understanding of seizures of persons: common-law arrests. At common law, the intentional application of physical force to restrain was an arrest, regardless of whether the suspect nonetheless escaped.

This Court already held in *Hodari D.*, 499 U.S. 621, that the Fourth Amendment encompasses the common-law definition of arrest. And it confirmed that, at common law, "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 (emphasis added).

Respondents cannot deny that a common-law arrest is "the quintessential 'seizure of the person' under [the] Fourth Amendment" or dispute the centuries-long consensus that a common-law arrest occurs even when the suspect does not stop or submit. *Id*. Nor was the Tenth Circuit ever asked to contend with the overwhelming historical evidence. To resist the common-law rule—the rule this Court fully endorsed in *Hodari D.*—Respondents resort to out-of-context phrases in other decisions and unfounded practical concerns.

The Court should reaffirm the common-law rule—as a matter of original understanding, precedent, and common sense—and reverse the judgment below.

STATEMENT OF THE CASE

Police Officers Shoot Ms. Torres Twice In The Back

In the early morning of July 15, 2014, Petitioner Roxanne Torres drove to an apartment complex to drop off a friend.[1] Pet. App. 10a; JA 14. She backed into a parking spot, with cars parked on either side of her. Pet. App. 11a.

It was still dark when four New Mexico state police officers, including Respondents Janice Madrid and Richard Williamson, arrived at the apartment complex in unmarked vehicles. Pet. App. 2a, 10a-11a; JA 16-17, 110. They were there to arrest a different woman who had no relationship to Ms. Torres. Pet. App. 10a-11a, 22a; JA 37.

Respondents parked their vehicles near Ms. Torres's vehicle. Pet. App. 11a, 22a. Ms. Torres was in the driver's seat with the doors locked and engine running when Respondents approached. Pet. App. 11a, 22a; JA 18-20. Respondents say they shouted commands at Ms. Torres, but Ms. Torres testified that she could not hear them. Pet. App. 3a, 11a; JA 22 (Torres dep.). One officer stood at the driver's side window, the other at the side of the front tire. Pet. App. 3a, 11a; JA 21; JA 39, 89 (diagrams of scene). Respondents then attempted to open the driver's side door.

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[1] Because this case was decided at summary judgment, the facts and inferences are viewed in the light most favorable to Ms. Torres as the non-moving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

Pet. App. 11a, 22a. Ms. Torres looked up and saw Respondents—and their guns—for the first time. JA 23. She did not know they were officers: They wore dark clothing and marked tactical vests, but Ms. Torres could not read the markings on their clothing and Respondents never verbally identified themselves as police. Pet. App. 11a; JA 50-51 (Madrid dep.), JA 110-11 (Williamson dep.).

Believing Respondents were carjackers, Ms. Torres began to drive forward. Pet. App. 3a-4a, 11a; JA 23. Neither officer was in front of Ms. Torres's car when she moved forward, though they later said they feared Ms. Torres would hit them. Pet. App. 11a, 23a; JA 39, 89, 114-15 (diagrams of scene).

The car had only inched forward when Respondents opened fire on Ms. Torres, trying to stop her. Pet. App. 3a-4a; JA 51-52 (Madrid dep.); JA 111-12 (Williamson dep.). Ms. Torres accelerated further and Respondents continued to fire as she drove past them. JA 19-20; JA 53-54. Respondents collectively fired thirteen shots at Ms. Torres as she drove away. JA 115-18. They hit her car several times. Two of the bullets entered her back. Pet. App. 4a, 23a; JA 30-31. The bullets temporarily paralyzed Ms. Torres's left arm, leaving her unable to control or use it. JA 25.

After She Is Shot, Ms. Torres Drives To The Hospital And Temporarily Evades Capture

Despite being shot twice in the back and partially paralyzed, Ms. Torres was able to put her foot on the gas pedal and escape the apartment complex. Pet. App. 4a, 11a; JA 25. She drove a short distance before

losing control of her car and stopping. JA 27-28. She got out and asked a bystander to call the police for help. Pet. App. 4a; JA 27.

Receiving no response, Ms. Torres took a nearby car that was left running and drove to a hospital in Grants, New Mexico. Pet. App. 4a, 12a; JA 27-32. Her injuries were so serious that she was airlifted to a bigger hospital in Albuquerque. Pet. App. 4a, 23a; JA 32-33. The next day, officers arrested Ms. Torres at the hospital on charges related to the incident, to which she pleaded no contest. Pet. App. 4a, 12a.

The District Court Grants Summary Judgment To Respondents, Ruling That No Seizure Occurred

Ms. Torres brought suit against Respondents under 42 U.S.C. § 1983, alleging they violated her Fourth Amendment right to be free from unreasonable seizures when they shot her twice in the back. JA 4-10; *see Graham v. Connor*, 490 U.S. 386, 394-95 (1989) (claims that officers use "excessive force … in the context of an arrest or investigatory stop" are analyzed under "the Fourth Amendment's prohibition against unreasonable seizures of the person").

Respondents first moved to dismiss under *Heck v. Humphrey*, 512 U.S. 477 (1994). The district court denied the motion, explaining that Ms. Torres's § 1983 claims were not inconsistent with her conviction and so *Heck* did not bar her suit. Pet. App. 28a-29a. Respondents then moved for summary judgment, which the district court granted. Pet. App. 10a. The court did not address whether Respondents' use of force was

reasonable. Nor did the court address whether the constitutional right at issue was "clearly established" for purposes of qualified immunity. Instead, it held that the Fourth Amendment had no application in the first place: An excessive force claim requires a seizure, Pet. App. 17a, but "Ms. Torres was never seized." Pet. App. 13a; *see* Pet. App. 20a. Relying on Tenth Circuit precedent, the court reasoned that a seizure requires the "'intentional acquisition of physical control' of the person being seized," Pet. App. 17a (quoting *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000)), and "there [wa]s no dispute that Ms. Torres did not stop when the officers fired their guns at her." Pet. App. 20a.

The Tenth Circuit Affirms Summary Judgment On The Ground That No Seizure Occurred

The Tenth Circuit affirmed the summary judgment order, holding that Ms. Torres was not seized because, "[d]espite being shot, Torres did not stop or otherwise submit to the officers' authority." Pet. App. 7a. Like the district court, the Tenth Circuit declined to address the reasonableness of Respondents' use of force or whether the right they violated was clearly established. Pet. App. 6a. Instead, the court explained that this case was governed by its prior decision in *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010), which held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." Pet. App. 7a.

In *Brooks*, as here, officers shot a fleeing person in the back but he was still able to temporarily escape. 614 F.3d at 1215. He later filed a § 1983 suit claiming

the officers' use of force was excessive. He pointed to this Court's decision in *Hodari D.*, arguing that he was seized when the bullet struck him, regardless of his subsequent flight. *Id.* at 1218. The Tenth Circuit disagreed, characterizing *Hodari D.* as stating "common law dicta" that "merely illustrated the principle 'attempted seizures' are beyond the Fourth Amendment's scope." *Id.* at 1221. (The parties did not present to the Tenth Circuit, and the court did not address, the content of the common law.) Looking to other Supreme Court cases, the court held that, when officers shoot an individual, no seizure occurs unless the shot "terminate[s] his movement or otherwise cause[s] the government to have physical control over him." *Id.* at 1224.

Applying *Brooks*'s rule, the court below concluded that, because "the officers' use of deadly force against Torres failed to 'control [her] ability to evade capture or control,'" Pet. App. 8a (quoting *Brooks*, 614 F.3d at 1223), and because Ms. Torres initially "managed to elude police," there was no seizure and "Torres's excessive-force claims … fail as a matter of law." *Id.*

SUMMARY OF THE ARGUMENT

I. The Fourth Amendment protects "[t]he right of the people to be secure in their persons … against unreasonable … seizures." U.S. Const. amend. IV. In adopting that language, the Framers and their contemporaries understood the "quintessential 'seizure of the person'" to be a common-law arrest, which occurs when an officer applies physical force to restrain someone, regardless of whether the person submits. *Hodari D.*, 499 U.S. at 624.

A. This Court has long recognized that the Fourth Amendment protects against unreasonable "searches and seizures" in accordance with the common-law meaning of those terms. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 409, 411 (2012). And at the Founding, the term "seizure" encompassed the common-law term "arrest." *See, e.g.*, Mass Decl. of Rights of 1780, art. XIV (using the word "arrest" to refer to "seizures" of a person in Fourth Amendment analogue). Unsurprisingly, then, the Court has already held that the Fourth Amendment embraces the common law of arrest. *Hodari D.*, 499 U.S. at 626.

At common law, arrests could be effected in two ways: by a show of authority that causes the person to submit, or by the application of physical force with the intent to restrain. *Id.* at 625-26. The latter was complete when physical force was applied, whether or not it succeeded in subduing the arrestee. *Id.* A wealth of historical sources, spread across the centuries, make that clear. *See, e.g.*, *id.* at 624-25 (quoting sources).

B. The common-law rule is further compelled by this Court's precedents.

In *Hodari D.*, this Court recognized that an intentional application of physical force constitutes a seizure "even though the subject does not yield," whereas a mere "show of authority" effects a seizure only when the suspect submits. *Id.* at 626. The Court had good reason to draw that conclusion. First, it followed directly from the Framers' common-law backdrop. *Id.* at 624-25. And second, the Fourth Amendment's text accommodates that reading: "The 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." *Id.* at 626.

That conclusion is buttressed by this Court's other Fourth Amendment precedents, which repeatedly identify "interfere[nce] with … personal security" as the harm against which the Fourth Amendment protects. *Terry v. Ohio*, 392 U.S. 1, 19 (1968). Indeed, if "[v]irtually any 'intrusio[n] into the human body'"—from surgical removal of a bullet to a cheek swab or a fingernail scraping—"will work an invasion of 'cherished personal security' that is subject to constitutional scrutiny," *Maryland v. King*, 569 U.S. 435, 446 (2013), then surely shooting a bullet into the human body must as well.

II. Respondents' contrary arguments fail.

A. No precedent of this Court forecloses the common-law rule. *Hodari D.*'s observation that "attempted seizure[s]" fall outside the Fourth Amendment does not (as Respondents contend) mean that the application of physical force without submission is not a Fourth Amendment seizure. 499 U.S. at 626 & n.2. At common law, an arrest was *accomplished*, not merely attempted, when the officer made physical contact, even if the arrestee was able to flee.

Cases like *Brower v. County of Inyo*, 489 U.S. 593 (1989), *Brendlin v. California*, 551 U.S. 249 (2007), and *Terry*, 392 U.S. 1, are also consistent with the common-law rule. In each of those cases the suspect stopped, so the Court had no reason to (and did not) address whether the application of physical force to

restrain someone must terminate movement in order to effect a seizure. Indeed, many courts have found no tension between the common-law rule and this Court's precedents. That includes *this* Court, which often assumes that a seizure occurred when the police applied physical force to restrain a suspect, even though the suspect did not immediately stop.

In any event, even if the Court's precedents were read to require some restraint on liberty or movement, that standard is easily satisfied here: Respondents' bullets struck and entered Ms. Torres's body and temporarily paralyzed her arm. Pet. App. 11a-12a; JA 25.

B. Finally, the policy concerns urged by the Tenth Circuit and Respondents are misplaced. The common-law rule does not mean that "any time a suspect is struck by a law enforcement officer, the Fourth Amendment's prohibition against unreasonable seizures is violated." BIO 12. First, the rule counts physical force as a seizure only when the officer applies the force *with the intent to restrain*. When officers intend to restrain someone, they use force capable of doing that, not *de minimis* force. The intent requirement also weeds out accidental and other innocuous touches, like inadvertently brushing against someone or nudging him awake.

Second, the fact that a seizure has occurred does not mean that the Fourth Amendment has been violated or that the officers ultimately will be held liable. "[W]hat the Constitution forbids is not all … seizures, but unreasonable … seizures," *Elkins v. United*

States, 364 U.S. 206, 222 (1960), and in many situations, the seizure will be perfectly reasonable. When it is not, officers facing liability for excessive force can claim qualified immunity, which protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation marks omitted).

Respondents also mischaracterize our position as endorsing the notion of a "continuing seizure"—a seizure that extends during the time the suspect evades capture. BIO 12-13. Ms. Torres has never claimed she was subject to a "continuing seizure." The seizure here occurred when Respondents' bullets struck Ms. Torres's body. It makes no difference to Ms. Torres's claim whether the seizure continued beyond that moment. Accordingly, recognizing that Respondents seized Ms. Torres when they shot her in no way forecloses this Court from considering when a seizure ends in a different case and whether (and under what circumstances) evidence that is abandoned after a suspect is struck but takes flight should be suppressed as the fruit of an unlawful seizure.

The real practical problems lie with Respondents' rule. It raises a series of difficult questions about how quickly and completely a person must stop, and it leads to absurd consequences. This case is a prime example: Officers shot a fleeing person twice in the back, but the court held that the shooting is entirely outside the Fourth Amendment, even if the officers had no reason whatsoever to shoot her and even if clearly established law prohibited them from doing so.

The common-law rule, by contrast, avoids these problems. It offers a clear standard that can be easily understood by officers in the field and applied by courts after the fact. It does all that while vindicating the original, common-law understanding of seizure that prevailed when the Fourth Amendment was adopted and that this Court has since reaffirmed.

ARGUMENT

I. A Fourth Amendment Seizure Occurs When An Officer Applies Physical Force With Intent To Restrain.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures." U.S. Const. amend. IV. When Respondents shot at Ms. Torres with the intent to stop her from leaving and two of the bullets struck her body, she was in that moment seized within the meaning of the Fourth Amendment, regardless of what happened next. As this Court has explained, "[t]he word 'seizure' readily bears the meaning of … application of physical force to restrain movement, even when it is ultimately unsuccessful." *Hodari D.*, 499 U.S. at 626.

This definition of seizure derives directly from the common law of arrest that the Framers incorporated into the Fourth Amendment. *See id.* at 627 n.3. Common-law arrests—"the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"—fall into two categories: those that are accomplished by a show of authority that causes the person

to submit, and those that are accomplished by the application of physical force to the person's body, no matter whether the person submits in response. *See id.* at 624-26 (a common-law arrest "requires *either* physical force … *or*, where that is absent, *submission* to the assertion of authority"). Accordingly, where the police apply physical force to restrain, the impact of that physical force—here, the moment Respondents' bullets struck Ms. Torres's body—constitutes a "quintessential" Fourth Amendment seizure "whether or not it succeed[s] in subduing the arrestee." *Id.* at 624.

A wealth of historical sources confirm that the Fourth Amendment protects individuals from the unreasonable use of physical force by law enforcement in undertaking arrests, regardless of whether that force immediately brings those individuals within the officer's control. That original understanding of seizure is also compelled by this Court's precedents and accords with ordinary understanding of the Fourth Amendment's text as well as its purpose.

A. The original meaning of seizure in the Fourth Amendment included common-law arrests, which did not require the suspect to submit in response to intentional physical force.

The Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Jones*, 565 U.S. at 411; *see id.* at 420 (Alito, J., concurring in the judgment) ("The Court argues—and I agree—that 'we must assur[e] preservation of that degree of privacy against government that ex-

isted when the Fourth Amendment was adopted.'" (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001))); *see also Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (the Court's Fourth Amendment analysis is "informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted'" (alteration in original) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925))).

This Court has long recognized that the Fourth Amendment has, since its inception, protected against unreasonable "searches and seizures" in accordance with the common-law meaning of those terms. *See, e.g.*, *Hodari D.*, 499 U.S. at 626 n.2 ("We … consult[] the common-law to explain the meaning of seizure …."); *Jones*, 565 U.S. at 409, 411 (common-law trespass on property is a Fourth Amendment search); *see also Carpenter*, 138 S. Ct. at 2243 (Thomas, J., dissenting) ("[B]y prohibiting 'unreasonable' searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure.").

When it comes to seizures of persons, this Court looks to the common law of arrest, just as the Founders did. § I.A.1. And, at common law, there is no question that an arrest could be effected by mere touch with the intent to restrain, even if the suspect was not stopped or brought under control. § I.A.2.

1. The original meaning of seizure of persons arises from the common law of arrest.

The right of people to be secure "in their persons" against unreasonable seizures, U.S. Const. amend. IV, incorporates "the common law of arrest." *Hodari D.*, 499 U.S. at 627 n.3. "There is no doubt that by the reference to the seizure of persons, the Fourth Amendment was intended to apply to arrests." *United States v. Watson*, 423 U.S. 411, 436-37 (1976) (Marshall, J., dissenting). Indeed, the Framers drafted the Fourth Amendment largely in response to the British use of "general warrant[s]" for "arrest[]" as well as "writs of assistance"—both of which "perpetuated the oppressive practice of allowing the police to arrest and search on suspicion." *Henry v. United States*, 361 U.S. 98, 100 (1959); *see Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817 (landmark case on general warrants interchangeably using "arrest" and "seize" with respect to persons). And so just as the Framers understood a common-law trespass on property to be a Fourth Amendment search, *see Jones*, 565 U.S. at 409, 411, they understood a common-law arrest to be a Fourth Amendment seizure and wrote an amendment that guarded against both.

Contemporary sources confirm that the Framers and their audience understood seizures of persons to encompass common-law arrests. Indeed, they used the words interchangeably. Webster, when defining "seize," explained, "We say, to *arrest* a person, to *seize* goods." 2 Noah Webster, *An American Dictionary of the English Language* 67 (1828); *see also* Samuel Johnson, *A Dictionary of the English Language* (1755)

(defining "arrest" as including to "seize by a mandate from a court or officer of justice" and to "seize, to lay hands on"). And several colonial constitutions—including ones that "served as models for the Fourth Amendment," *Atwater v. City of Lago Vista*, 532 U.S. 318, 339 (2001)—used the word "arrest" when discussing "seizure" of persons. *See, e.g.*, N.H. Const. of 1784, pt. I, art. XIX (specifying warrants "to make search in suspected places, or to arrest one or more suspected persons, or to seize their property;" referring to "persons or objects of search, arrest, or seizure"); Mass Decl. of Rights of 1780, art. XIV (same); *see also* Brief of the United States, *California v. Hodari D.*, No. 89-1632 (S. Ct. Oct. Term 1990), 1990 WL 10012696, at *10 & n.4 (citing others).

Unsurprisingly, then, this Court's precedents already hold that "seizure" in the Fourth Amendment includes common-law arrests. As *Hodari D.* explains, "[w]e have long understood that the Fourth Amendment's protection against 'unreasonable … seizures' includes seizure of the person" and that an arrest is "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence." 499 U.S. at 624. That understanding—that the term "seizure" is defined by the common law of arrest—was essential to the outcome in *Hodari D.*: The Court rejected the suspect's claim that he was seized for Fourth Amendment purposes because the circumstances of the encounter did not amount to a common-law arrest. *Id.* at 626. Both the majority and dissenting opinions made explicit that the outcome of the case turned on the common law of arrest. *See id.* at 627 n.3 ("[T]he common law of arrest … defines the limits of a *seizure of the person*."); *id.* at 647 (Stevens, J., dissenting)

("[T]he Court's own justification for its result is its analysis of the rules of the common law of arrest ….") Indeed, the *Hodari D.* Court unanimously agreed that the Fourth Amendment's reference to "seizure" encompasses, at the very least, the common-law understanding of arrest, whatever else it also includes. *See id.* at 627 n.3 (majority op.); *id.* at 630-31 & n.5 (Stevens, J., dissenting).

2. At common law, a police officer's use of physical force against a person with intent to restrain her was an arrest, regardless of whether the person escaped.

So far as we can tell, no court has ever disputed that, at common law, any intentional physical contact with the purpose to restrain was enough to complete an arrest. With good reason: An abundance of historical sources confirm that a common-law arrest was "effected by the slightest application of physical force, despite the arrestee's escape." *Hodari D.*, 499 U.S. at 625.

The same Founding-era dictionaries defining seizures to include common-law arrests also establish that an arrest could be effected by physical force alone. Webster's dictionary, for instance, states that "[a]n arrest is made by seizing or touching the body." Webster, *An American Dictionary, supra*, 13. Samuel Johnson similarly defined arrest to include "to lay hands on." Johnson, *supra*; *see also* B. Abbott, *Dictionary of Terms & Phrases Used in American or English Jurisprudence* 84-85 (1879) (defining "arrest" to include "touching or putting hands upon [a person]

in the execution of process"); T. Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771) (explaining that any citizen "may lay hold of a person" in order to arrest him, and that if a bailiff merely "touched" a man, "that had been an arrest").

Up to, through, and after the Founding era, judges and commentators in England and America all agreed that mere touch with the intent to restrain effected an arrest, even if the suspect was not stopped or brought under control. Starting well before the Founding, it was clear that arrest required only the slightest use of physical force, regardless of whether the arrestee submitted. In 1704, for instance, *Genner v. Sparks* conveyed the prevailing understanding that there was no arrest because "the bailiff ha[d] not laid hands on the defendant" before the defendant retreated, "[b]ut it was agreed, that if here he had but touched the defendant even with the end of his finger, it had been *an arrest*." 87 Eng. Rep. 928, 928-29 (per curiam).

Other English jurists shared that view, repeatedly finding, both before and during the Founding era, that arrests occurred when officers touched persons with the intent to arrest them, even if they did not succeed in subduing them. *See, e.g.*, *Hodges v. Marks* (1615) 79 Eng. Rep. 414, 414 (sufficient arrest where bailiff "laid his hands on" suspect and announced he was arresting him before he was rescued from the bailiff and "escaped"); *Simpson v. Hill* (1795) 170 Eng. Rep. 409 (Eyre, C.J.) ("If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be, in point of law, an imprisonment, as, for example, if

he had tapped her on the shoulder, and said, 'You are my prisoner'; or if she had submitted herself into his custody, such would be an imprisonment."); *Anonymous* (1702) 87 Eng. Rep. 1060 ("If 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."); *Anonymous* (1676) 86 Eng. Rep. 197 (noting that when a "bailiff caught one by the hand (whom he had a warrant to arrest) as he held it out of a window," it constituted "a taking of him, that the bailiff might justif[y] the breaking open of the house to carry him away"); *Williams & Jones & Others* (1736) 95 Eng. Rep. 193, 194 (explaining that a man is arrested when another "gently laid his hands in order to arrest," but that an arrest could also "be made without touching the person").

Nineteenth-century English jurists correctly read those earlier precedents to "abundantly sh[o]w that the slightest touch is an arrest," which "cannot be invalidated by [the officer's] inability to detain [the suspect], or by the subsequent rescue." *Nicholl v. Darley* (1828) 148 Eng. Rep. 974, 975, 976. The eight separate opinions of the judges in *Sandon v. Jervis & Dain* are instructive. Relying on eighteenth-century cases, they unanimously and emphatically *rejected* (in the words of one) the idea that the "officer must have, at the time of touching, the ability of taking corporal possession of the debtor, or, at least, of keeping him under restraint" as "not sanctioned by the authorities." (1858) 120 Eng. Rep. 758, 760 (Hill, J). Said another: "The argument that the officer must, at the time of touching the debtor, possess the ability of retaining him in custody is *not* supported by the

authorities." *Id.* (Crompton, J.) (emphasis added). Two more said in the same vein: "[M]ere touch by the officer … is sufficient, without such power of restraint as has been contended for," *id.* (Erle, J.); and "a mere touch constitutes an arrest, though the party be not actually taken," *id.* at 762 (Crowder, J.). Yet another confirmed: "It is perfectly clear that it has always been assumed that touching the person constitutes an arrest." *Id.* (Williams, J.). Other English jurists of this era agreed.[2]

So did their early American counterparts. For instance, Justice Henry Baldwin, riding circuit, charged a jury that an arrest included "taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process," adding

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[2] *See, e.g.*, *Moore v. Moore* (1858) 53 Eng. Rep. 538, 540 ("A capture requires either a touch or something approaching to it, or else a statement to the prisoner that he must consider himself in custody and the prisoner obeying and following the officer, which would amount to the same thing."); *Aga Kurboolie Mahomed and Others v. The Queen on the Prosecution of Mahomed Kuli Mirza* (1843) 18 Eng. Rep. 459, 460 ("[I]n order to constitute a lawful arrest, one of two things is necessary—either that the Bailiff or his assistant have laid hold of or touched the person meant to be arrested; or that the person, upon being informed of the Bailiff's business, has submitted and gone with the Bailiff, without resistance or flight."); 2 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* 893-94 (14th ed. 1885) ("The arrest is usually made by actual seizure of the defendant's person; but any touching, however slight, of the person, is sufficient for this purpose; and where the officer laid hold of the defendant's hand, as he held it out of the window, it was deemed sufficient.").

that "[w]hether [the arrestee] submitted or consented to the arrest is not material." *United States v. Benner*, 24 F. Cas. 1084, 1086-87 (C.C.E.D. Pa. 1830) (No. 14,568). And courts broadly embraced the principle that, "[i]f the defendant resist[s] the arrest, then there must be some corporal touching of the body to make the arrest complete." *McCracken v. Ansley*, 35 S.C.L. 1, 5 (S.C. Ct. App. 1849). Thus, an arrest would occur when a bailiff "laid hand on" a suspect, even if the suspect then fled on horseback, *Pike v. Hanson*, 9 N.H. 491, 493 (1838), because "[t]he arrest itself is the laying hands on the defendant," *State v. Townsend*, 5 Del. (5 Harr.) 487, 488 (Ct. Gen. Sess. 1854).

Cases from later in the nineteenth and twentieth centuries attest to the persistence of the Founding-era consensus that intentional touching consummates an arrest, even when the suspect takes immediate flight.[3] An arrest occurred, for instance, when an officer "laid his hand on" the arrestee's shoulder and then the arrestee drove the officer away at gunpoint. *People v. McLean*, 36 N.W. 231, 232 (Mich. 1888). It was also an arrest when an officer "laid his hand" on a defendant's arm, even though "[t]he defendant instantly swung himself loose … then ran away." *Roberson v. State*, 43 Fla. 156, 164 (1901).

Indeed, courts throughout the early Republic articulated the same definition of arrest as the earliest English common law: that "an officer effects an arrest

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[3] This Court regularly looks to nineteenth- and even twentieth-century cases and commentaries to discern the original meaning of the Constitution. *E.g.*, *Atwater*, 532 U.S. at 342-43; *District of Columbia v. Heller*, 554 U.S. 570, 605-19 (2008).

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." *Whithead v. Keyes*, 85 Mass. 495, 501 (1862), *quoted in Hodari D.*, 499 U.S. at 624; *see also Searls v. Viets*, 2 T. & C. 224, 226 (N.Y. Sup. Ct. 1873) ("I have not been able to find any real conflict between English and American authorities as to what constitutes an arrest.").

Finally, legal commentators surveying centuries of common law (and reflecting still-pervasive norms) observed that "any touch, however slight, will be sufficient to constitute a valid arrest," Samuel Howe, *The Practice of Civil Actions and Proceedings at Law in Massachusetts* 146-47 (1834), and that "an arrest is complete when the officer lays his hand upon the person …, although he may not succeed in stopping and holding him," 3 William Wait, *A Treatise upon Some of the General Principles of the Law, Whether of a Legal, or of an Equitable Nature, including Their Relations and Application to Actions and Defenses in General* 209 (1885).[4]

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[4] *See also* Joseph Backus, *A Digest of Laws Relating to the Offices and Duties of Sheriff, Coroner and Constable* 116 (1812) ("[I]f [an officer] touches [a person] for the purpose of an arrest, and he escapes, it is a rescous."); *id.* at 142 ("[A] [r]escous cannot be committed, unless the ... person supposed to be rescued, were in actual custody of the party from whom the rescue is made; for if a man come to make an arrest ... and is disturbed, before having made the arrest, ... it is no rescous."); 1 John Houston Merrill, *The American and English Encyclopaedia of Law* 730-32 &

That includes commentators on which this Court has previously relied. *See, e.g.*, Asher Cornelius, *Search & Seizure* 163-64 (2d ed. 1930) (there is an "arrest, although the party is never actually brought within the physical control of the party making an arrest," which "is accomplished by merely touching, however slightly, the body of the accused … for that purpose, although he does not succeed in stopping or holding him even for an instant"), *quoted in Hodari D.*, 499 U.S. at 625; Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 206 (1940) ("[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.'"), *quoted in Hodari D.*, 499 U.S. at 631 n.5 (Stevens, J., dissenting); Harvey Cortlandt Voorhees, *Law of Arrest* § 74 at 44 (1904) ("An officer effects an arrest of a person … by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him."), *source cited in Atwater*, 532 U.S. at 344; Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 556 (1924) (explaining that "an arrest … is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose" "although the party is never actually brought within the physical control of the party making an arrest"), *source cited in Atwater*, 532 U.S. at 343, *and Watson*, 423 U.S. at 418.

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n.3 (1887) (surveying English and American cases and recognizing that touching without submission is sufficient to constitute an arrest).

In short, there is no dispute that at common law, an intentional physical touching intended to restrain was an arrest—and thus a seizure under the original meaning of the Fourth Amendment—even if the suspect evaded capture.

B. This Court's precedents confirm that when a police officer shoots someone with the intent to restrain her, the shooting is a Fourth Amendment seizure.

This Court's precedents also compel reversal here.

Hodari D. states in no uncertain terms that "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence … [is] the mere grasping or application of physical force with lawful authority, whether or not it succeed[s] in subduing the arrestee." 499 U.S. at 624.

In *Hodari D.*, officers approached a group of young people on the street late at night, and Hodari took off running. *Id.* at 622-23. An officer gave chase, concededly without reasonable suspicion. *Id.* at 623 & n.1. When Hodari saw the officer had nearly caught up to him, he tossed away drugs and then a moment later was apprehended. *Id.* at 623. In the juvenile proceeding against him, Hodari moved to suppress the drug evidence as fruit of the chase, arguing that the chase itself was an illegal seizure by show of authority even before the officers made any physical contact with him. *Id.* at 623-24.

In assessing this argument, the Court began with what it treated as an uncontroversial observation: The intentional application of physical force to a suspect effectuates a seizure regardless of whether the suspect stops. The question presented, the Court explained, was "whether, with respect to a show of authority *as with respect to application of physical force*, a seizure occurs even though the subject does not yield." *Id.* at 626 (emphasis added). The question in *Hodari D.* was thus "one step further removed" from the rule the Court viewed as well-established: that "an arrest is effected by the slightest application of physical force, despite the arrestee's escape." *Id.* at 625. To be sure, the Court emphasized, a seizure under these circumstances lasts only as long as the physical contact—there is no "*continuing* arrest during the period of fugitivity." *Id.* But no "holding," "stopping," or "subduing" is necessary to effectuate a seizure when the officer is touching someone with the purpose of restraining her. *Id.* at 624-25 (quotation marks and citations omitted). The Court ultimately concluded that Hodari was not seized when officers chased him without touching or controlling him because an "arrest requires *either* physical force … *or*, where that is absent, *submission* to the assertion of authority." *Id.* at 626.

Hodari D. supported its definition of seizures by citing the common-law understanding relied upon by the Framers. *Id.* at 624-25. And it explained that, although "one would not normally think that the mere touching of a person would suffice" to effectuate a seizure, *id.* at 626 n.2, the Fourth Amendment's text is consistent with that understanding: "The 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*." *Id.* at 626 (emphasis added); *id.* (giving the example, "She seized the purse-snatcher, but he broke out of her grasp"); *see also, e.g.*, *The Iliad of Homer* (Alexander Pope trans., 1717), vol. III, Book XII ("The victor eagle … Allow'd to seize, but not possess the prize.").

Hodari D.'s understanding of seizures is supported by this Court's other Fourth Amendment precedents. The Court has repeatedly identified the Fourth Amendment's central concern as protecting against "interfere[nces] with … personal security." *Terry*, 392 U.S. at 19; *id.* at 17 n.15 ("[T]he Fourth Amendment governs *all* intrusions by agents of the public upon personal security." (emphasis added)); *see also Brown v. Texas*, 443 U.S. 47, 52 (1979) (referring to the "right to personal security"). Indeed, the Fourth Amendment "provides an explicit textual source of constitutional protection against … physically intrusive governmental conduct." *Graham*, 490 U.S. at 395; *see Jones*, 565 U.S. at 407 ("[W]hen the Government *does* engage in physical intrusion of a constitutionally protected area …, that intrusion may constitute a violation of the Fourth Amendment." (citation omitted)).

It is hard to imagine an act more "physically intrusive" than intentionally piercing a body with a bullet. If piercing someone's body with a needle to draw blood triggers Fourth Amendment protection, so should shooting her. *Schmerber v. California*, 384 U.S. 757, 767 (1966). If *removing* a bullet from a person's body "implicates expectations of privacy and security" of a great "magnitude," firing that bullet into

her body must as well. *Winston v. Lee*, 470 U.S. 753, 759 (1985). And if even a brief frisk for weapons constitutes a "serious intrusion upon the sanctity of the person," surely shooting bullets into someone does, too. *Terry*, 392 U.S. at 17.

The notion that the Fourth Amendment focuses narrowly on whether the officer's use of force prevents the person from escaping ignores this Court's repeated exhortation that the Fourth Amendment's core concern is personal security. *See, e.g.*, *id.* at 19; *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (Fourth Amendment "guarantees … [the] inviolability of the person"). And it minimizes the extent to which official use of force itself breaches that security, even in the absence of physical control. Indeed, "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

The Court's search cases also affirm that the Fourth Amendment reaches any unreasonable contact with the body intended to restrain. "Virtually any 'intrusio[n] into the human body' will work an invasion of 'cherished personal security' that is subject to constitutional scrutiny." *King*, 569 U.S. at 446 (citations omitted); *see also United States v. Jones*, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (noting that the Court's Fourth Amendment cases recognize that "the police's physical contact with the defendants' property" triggers the Fourth Amendment). That is true even when the intrusion is minimal—cheek swabs, fingernail scrapes, and even breathalyzer tests are all covered by the Fourth Amendment,

even though the contact is slight. *King*, 569 U.S. at 446. "The fact that an intrusion is negligible is of central relevance to determining reasonableness," but not to the entirely separate question whether the Fourth Amendment applies in the first place. *Id*. The Fourth Amendment draws a line of protection around the body, and officers must have justification to cross it.

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Applying the original meaning of "seizure" as understood by the Framers and confirmed by this Court's precedents, there is no doubt that Respondents seized Ms. Torres under the Fourth Amendment when they shot her twice in the back with the intent to restrain her. Both officers acknowledge that they applied physical force—lethal force, in fact—to Ms. Torres with the intent to restrain her. Pet. App. 3a-4a; JA 111-12 (Williamson dep.); JA 52-53 (Madrid dep.). Indeed, it is difficult to imagine a more self-evident sign that officers want a suspect to stop than shooting her when she tries to leave. And there is no dispute that two of Respondents' bullets struck and entered Ms. Torres's body, temporarily paralyzing her left arm. Pet. App. 4a, 23a; JA 25. In that moment, she was seized under the Fourth Amendment; it made no difference to the Framers that she was temporarily able to evade apprehension, and it makes no difference under this Court's precedents.

II. Respondents' Contrary Arguments Fail.

Respondents' position is that Ms. Torres had no Fourth Amendment protection from their bullets, unreasonably shot or not, because she reacted by driving

herself to the hospital rather than submitting to their authority. In so arguing, Respondents wholly ignore the common law the Framers incorporated into the Fourth Amendment. *Supra* § I. Like the Tenth Circuit, they instead rely on misreadings of this Court's precedents, *infra* § II.A, and misplaced policy concerns, *infra* § II.B.

A. Respondents misunderstand this Court's precedents.

As discussed, *supra* § I, history and precedent could not show more clearly that a common-law arrest—that is, the "application of physical force to restrain"—is a "quintessential" Fourth Amendment seizure, regardless of whether "it succeed[s] in subduing" the subject. *Hodari D.*, 499 U.S. at 624, 626. Respondents' effort to undermine the common-law rule with a muddled reading of *Hodari D.* fails, and so does their reliance on stray lines from other cases that did not contemplate the question presented here and that Respondents quote out of context.

1. According to Respondents, *Hodari D.* itself forecloses the common-law rule because the Court noted that "neither usage nor common law tradition makes an *attempted* seizure a seizure." BIO 11 (quoting *Hodari D.*, 499 U.S. at 626 n.2). The Tenth Circuit deployed similar reasoning in *Brooks*. *See* 614 F.3d at 1221.

Hodari D. does indeed say that attempted arrests, which were sometimes unlawful at common law, do not fall within the Fourth Amendment. 499 U.S. at 626 n.2. This is because the Fourth Amendment

makes no reference to "*attempted* seizure[s]," proving that the Framers declined to "elevate[] [them] to constitutional proscription[]." *Id.* And so, for instance, if the police shoot at a suspect with the intent to subdue her but the shots miss and she gets away, no Fourth Amendment protection attaches—the arrest was never completed because neither physical force nor a submission to a show of authority occurred and so no seizure has occurred.

But *Hodari D.*'s rejection of *attempted* seizures has no bearing on the question whether *completed* arrests—that is, arrests where the officer applies physical force with intent to restrain or where the suspect submits to a show of authority—fall within the meaning of the Fourth Amendment. The original understanding of the term "seizure" supplies the answer, and *Hodari D.* reaffirms it: The term "seizure" includes a common-law arrest, *id.*, which in turn is accomplished by touch with intent to restrain alone. *Hodari D.* therefore leaves no doubt that when the police apply physical force to a person with intent to restrain, the moment of impact is itself a seizure—a complete, not just attempted seizure—even if that force does not bring the suspect within the officer's control. Indeed, the Court repeated the point at least five times. *Id.* at 624 ("mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient" to constitute seizure); *id.* at 625 (arrest "is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant" (quotation marks omitted)); *id.* ("[A]n arrest is effected by the slightest

application of physical force, despite the arrestee's escape …."); *id.* at 626 ("ultimately unsuccessful" applications of physical force constitute "seizures"); *id.* ("An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.").

2. Respondents also misunderstand the Court's reasoning in *Brower*. *See* BIO 7; *see also Brooks*, 614 F.3d at 1220-21 (relying on *Brower*). Brower died when he drove into a roadblock that police set up to end a car chase. 489 U.S. at 594, 596-97. The question presented was whether the roadblock constituted a seizure, given that Brower could have stopped his car rather than driving into it. In holding that a seizure occurred, the Court explained that it is "*enough* for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599 (emphasis added). *Brower* did not hold that—nor did the Court have any reason to consider whether—the result would be different had Brower continued fleeing after colliding with the roadblock.

The few lines Respondents quote do not suggest otherwise. First, *Brower* said:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental

> termination of freedom of movement *through means intentionally applied*.

Id. at 596-97. As the original emphasis and context make clear, the word "only" in this sentence draws a contrast to cases where there is no "*intentional application*," not to cases where there is no termination of freedom of movement. The Court was highlighting that in a hypothetical situation where the police accidentally restrain someone—perhaps an unattended police cruiser pins a passerby against a wall after the parking brake fails—there would be no seizure even if the passerby was a wanted serial killer with police in close pursuit. *Id.*

The same is true of *Brower*'s statement that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Id.* at 596. The Court was distinguishing a hypothetical situation where there is no *intent* (e.g., a police chase where the suspect unexpectedly loses control of his car), *id.*, not a hypothetical where there was no *physical control* (e.g., the police intentionally shoot the suspect but he manages to drive away).

In any event, *Brower* cannot possibly be read as overriding *Hodari D.*'s explicit and repeated declaration that neither termination of movement nor control (i.e., submission) is necessary to trigger a seizure by physical force: *Hodari D.* post-dated *Brower* and specifically discussed *Brower* in the course of "expand[ing]" the meaning of seizure to encompass circumstances where officers do not acquire control or terminate movement. 499 U.S. at 626 n.2, 628-29.

3. Nor is *Brendlin* at odds with *Hodari D.* There, the Court held that a traffic stop subjects the passengers, and not just the driver, to seizure. 551 U.S. at 254. Because the suspect stopped in response to the officer's show of authority, *id.* at 252, the Court had no need to reconsider *Hodari D.*'s view that the application of physical force with intent to restrain constitutes a seizure even if it does not result in the termination of the person's freedom of movement.

In suggesting otherwise, Respondents point to *Brendlin*'s observation that "[a] person is seized by the police … when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement '*through means intentionally applied*.'" *Id.* at 254 (first quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991); then quoting *Brower*, 489 U.S. at 597); *see Brooks*, 614 F.3d at 1221 (similarly relying on this language). The question here, however, is not whether intentional physical force that terminates movement amounts to a seizure—we all agree it does. The question is whether termination of movement is *necessary*, a question *Brendlin* had no reason to address.[5]

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[5] For the same reason, *Garner* offers no support to Respondents: The Court merely stated that restraining a person's movement and apprehending him (which happened in that case) are sufficient to effect a seizure; the Court did not have the occasion to decide whether such restraint was also necessary. *See* 471 U.S. at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person. While it is not always clear just when minimal police interference becomes a seizure,

Likewise, when *Brendlin* observed that a "fleeing man is not seized until he is physically overpowered," the Court's point was only to illustrate, by contrast, that someone "sitting in a chair" can be taken to submit to a "show of authority" by remaining seated. 551 U.S. at 262. And the Court was explicit that it was discussing only show-of-authority seizures (and not also physical-force seizures) when it said that "[a] police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission." *Id.* at 254. The "without actual submission" language applies only when the officer is attempting to seize someone "without the use of physical force." *Id.* That must be right because *Brendlin* cites *Hodari D.* for that proposition. *Id.*

4. Respondents find no support in *Terry*, either. As in *Brower* and *Brendlin*, the suspect did in fact stop and submit to the officers' control, so the Court had no reason to address whether a seizure occurs without submission. *Terry*, 392 U.S. at 6-7. And *Terry*'s statement that "[o]nly 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," *id.* at 19 n.16 (emphasis added), is wholly consistent with *Hodari D.* Physical force that does not terminate someone's movement still restrains her liberty, specifically, her

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there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." (citations omitted)).

freedom from intrusion upon her personal security.[6] *Supra* 27-29. That is why *Terry* says in the next sentence that a seizure took place upon the officer's "initiation of physical contact" with the suspect. 392 U.S. at 19 n.16. It would be perverse to use *Terry*—which recognized that the Fourth Amendment's protections extend *beyond* station-house arrests to reach "governmental invasion of a citizen's personal security," *id.* at 19—to cut back on protections the Fourth Amendment has afforded since the Founding.

To the extent *Terry* and its progeny apply an alternative, more modern test than the common law to determine whether a seizure occurred, such modern tests have always sat alongside—and not supplanted—common-law search-and-seizure standards. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (modern Fourth Amendment tests "supplement[] rather than displace[]" common-law understandings); *Jones*, 565 U.S. at 409 ("The *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."). And so just as the reasonable-expectation-of-privacy test "did not narrow the Fourth Amendment's scope" to exclude trespasses on property intended to obtain information, neither can any modern standard focused on restraint exclude from the Fourth Amendment's ambit what are effectively

[6] *United States v. Mendenhall*, on which Respondents also rely, similarly speaks of "restrained" rather than extinguished "freedom of movement." 446 U.S. 544, 553 (1980). And as in the other cases Respondents cite, the suspect in *Mendenhall* submitted to officers. *Id.* at 547-49.

trespasses on the body intended to restrain. *Id.* at 408.

5. Unsurprisingly, most courts have seen no tension between *Hodari D.*'s repeated statements that the application of physical force intended to restrain is itself a seizure and the Court's other Fourth Amendment seizure precedents.[7] The U.S. Department of Justice has agreed.[8] The courts that have disagreed were never presented with the robust

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[7] *See, e.g.*, *Carr v. Tatangelo*, 338 F.3d 1259, 1268 (11th Cir. 2003) ("[I]t is [the officer's] intent and the physical contact of the bullet from his gun that governs our Fourth Amendment[] seizure analysis. Although [the suspect] was not immediately stopped by the bullet from [the officer's] gun, he nevertheless was seized within the meaning of the Fourth Amendment when the bullet struck or contacted him."); *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) ("[A] seizure is 'effected by the slightest application of physical force' despite later escape." (quoting *Hodari D.*, 499 U.S. at 625)); *Nelson v. City of Davis*, 685 F.3d 867, 873-74, 876 n.4 (9th Cir. 2012) ("Even in the absence of [plaintiff's] submission, the government's intentional application of force to [plaintiff] was sufficient to constitute a seizure."); *Acevedo v. Canterbury*, 457 F.3d 721, 724-25 (7th Cir. 2006) (rejecting the argument that "physical force alone cannot constitute a seizure" because "the Supreme Court has held otherwise"); *State v. Garcia*, 217 P.3d 1032, 1038 (N.M. 2009) (holding that defendant was seized the moment he was sprayed with pepper spray because "[u]nlike assertion-of-authority cases, there is no need for a defendant to demonstrate submission in cases of physical force").

[8] *See United States v. Dupree*, 617 F.3d 724, 727 (3d Cir. 2010) (noting the government's "concession" that suspect was seized when officer grasped him momentarily before he fled); Brief for the United States in Opposition at 7, *Huertas v. United States,* 138 S. Ct. 1985 (2018) (No. 17-818) (Apr. 9, 2018) ("An individual is seized within the meaning of the Fourth

historical evidence that leaves no doubt that the common-law rule accords with both the original and longstanding understanding of the Fourth Amendment. *See generally* Briefs for Appellant and Appellee, *Henson v. United States*, 55 A.3d 859 (D.C. 2012) (No. 10-CF-1177); Briefs for Appellant and Appellee, *Brooks*, 614 F.3d 1213 (10th Cir. 2010) (No. 09-1489).

Indeed, in case after case, *this* Court continues to assume that a seizure occurs when a bullet hits a suspect, even when the suspect does not immediately stop. The Court resolved each of those cases on the ground that the officers' use of force was either reasonable or protected by qualified immunity without so much as suggesting that the plaintiffs' claims failed for want of a seizure. *See, e.g.*, *Mullenix*, 136 S. Ct. at 307-08 (driver shot and killed by police but car continued down highway until hitting a police spike strip); *Plumhoff v. Rickard*, 572 U.S. 765, 770, 776-77 (2014) (fleeing driver repeatedly shot by police but "managed to drive away and to continue driving" until he "lost control of the car and crashed into a building"); *Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004) (driver drove off after being shot in the back).

6. Finally, even if Respondents were correct that the Court meant to impose a separate "restraint on liberty" or "restraint on movement" requirement in physical-force seizure cases, those statements would

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Amendment only if a law enforcement officer applies physical force to restrict the individual's movement (whether or not successful), or if the officer invokes his authority to stop the individual and the individual submits to that show of authority." (citing *Hodari D.*, 499 U.S. at 626-27; *Brower*, 489 U.S. at 596-97)).

not be incompatible with the common-law rule. To restrain means "[t]o limit" or "restrict"—not to curtail entirely. *Webster's New International Dictionary of the English Language* (2d ed. 1937); *see also Webster*, *An American Dictionary*, *supra*, at 13 (defining arrest to include "to check or hinder motion"). A "meaningful interference, however brief" suffices. *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984). At common law, in fact, a "restraint of the person" could occur by a simple touching—the same way an arrest could occur. *E.g.*, Voorhees, *supra* §§ 73-74 (explaining that "in all cases [of arrest] there must be a restraint of the person" but that "Touching consummates Arrest"). Ms. Torres underwent both a "restraint on liberty" when her right to be free from unwanted physical intrusion was restricted by Respondents' bullets and a "restraint on movement" when her left arm was temporarily paralyzed. Pet. App. 11a-12a; JA 25.

B. Any policy concerns are misplaced.

Finally, Respondents suggest that adopting our rule—the common-law rule—and recognizing their shooting of Ms. Torres as a seizure causes the Fourth Amendment to sweep too broadly. Even if such overbreadth concerns could displace the original meaning of a constitutional term—and this Court has repeatedly said these kinds of policy concerns cannot—Respondents mischaracterize our position and overlook the numerous practical problems with the rule they endorse.

1. Respondents' overbreadth arguments rely primarily on a distortion of the common-law rule: They say we argue "for a *per se* rule stating that any time a

suspect is struck by a law enforcement officer, the Fourth Amendment's prohibition against unreasonable seizures is violated." BIO 12. But the common-law rule does not mean that there is a seizure "any time" a suspect is struck; it does not mean that the Fourth Amendment "is violated" every time force is used; and it certainly does not mean that officers will face liability each time that the Fourth Amendment is violated.

a. Contrary to Respondents' contention, the common-law rule does not hold that physical force amounts to a seizure "any time a suspect is struck"; it recognizes that a seizure occurs only when force is applied with *the intent to restrain*. *See supra* § I.A.2; *Hodari D.*, 499 U.S. at 626; *Brower*, 489 U.S. at 596-97. It is well-established and uncontested here that no seizure occurs where an officer accidentally brushes against someone's arm. *See Brice v. City of York*, 528 F. Supp. 2d 504, 512 & n. 11 (M.D. Pa. 2007) (recognizing that accidental conduct cannot effect a seizure and collecting cases). And no seizure occurs when an officer intentionally touches someone without any intent to restrain, such as by tapping someone on the back to get his attention or nudging a sleeping person awake. *See, e.g.*, *Carlson v. Bukovic*, 621 F.3d 610, 620 (7th Cir. 2010) ("Even physical contact is acceptable if it is consensual, a normal means of attracting a person's attention or obviously serves some nonseizure purpose." (quoting 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.4(a) (4th ed. 2010))); *Martinez v. Nygaard*, 831 F.2d 822, 826-27 (9th Cir. 1987); *see generally Terry*, 392 U.S. 1, 19 n.16 ("[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons.").

This intentional-restraint limitation also assuages the Tenth Circuit's concern about the supposedly "illogical result[]" that an officer who throws a stun grenade at a person to stop him but misses does not effect a seizure, but an officer who hits a person with a snowball (or a feather) does. *See Brooks*, 614 F.3d at 1223 n.7. No officer seeks to restrain someone with a snowball or feather. They use force actually capable of stopping someone—a punch, an electric shock from a taser, a bullet. These are precisely the types of force that "interfere[] with … personal security," *Terry*, 392 U.S. at 19, and thus should not be exerted without reason.

b. Nor does the common-law rule mean the Fourth Amendment "is violated" by every application of physical force that meets the definition of seizure. The only question presented here is whether a seizure occurred, not whether the seizure was unreasonable in violation of the Fourth Amendment. As this Court has made clear, "[t]o say that the Fourth Amendment applies here is the beginning point, not the end of the analysis," *King*, 569 U.S. at 446, for "what the Constitution forbids is not all … seizures, but unreasonable … seizures," *Elkins*, 364 U.S. at 222.

In excessive force cases, for instance, reasonableness turns on the totality of the circumstances, including the level of force used. *Garner*, 471 U.S. at 8-9; *see Graham*, 490 U.S. at 396 (reasonableness is judged from the perspective of the officer at the scene; "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." (internal citations omitted)). A large swath of physical-force seizures will

not be unlawful—"mere grasping" may be a seizure, but it is unlikely to be unreasonable in most circumstances (and even if excessive, unlikely to cause injury warranting damages). *Cf. King*, 569 U.S. at 446 ("The fact that an intrusion is negligible is of central relevance to determining reasonableness."). So even if an officer did attempt to restrain a suspect with a snowball or feather, it is highly unlikely that force would qualify as excessive.

c. Finally, affirming the common-law rule in no way narrows other broad protections afforded to officers when they initiate and execute seizures. Even if a seizure is unreasonable, officers facing civil liability may be entitled to qualified immunity, which protects "all but the plainly incompetent or those who knowingly violate the law." *Mullenix*, 136 S. Ct. at 308 (citation omitted).[9]

2. Respondents also mischaracterize our position as endorsing the notion of a "continuing seizure"—a seizure that extends during the time the suspect evades capture. BIO 12-13. As we have recognized, *see* Reply Brief for Petitioner 7-8, *Hodari D.* explicitly rejected that idea: "To say that an arrest is effected by the slightest application of physical force, despite the

[9] Whether Respondents acted reasonably in this particular case and whether they are entitled to qualified immunity are issues beyond the scope of the question presented and were not addressed below. Those questions rest on unresolved factual disputes that are for the lower courts to resolve on remand. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

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. Ms. Torres has never claimed she was subject to a "continuing seizure." The seizure here occurred when Respondents' bullets struck Ms. Torres's body. It makes no difference to Ms. Torres's claim whether the seizure continued beyond that moment, and she has never argued otherwise.

Accordingly, recognizing that Respondents seized Ms. Torres when they shot her in no way forecloses this Court from considering in a different case whether (and under what circumstances) evidence abandoned by a suspect in flight after police unreasonably apply physical force to restrain him should be suppressed as the fruit of an unlawful seizure. *See Dupree*, 617 F.3d at 727 (government conceded that suspect was seized when officer grasped him momentarily before he fled but argued that "the policies underlying the exclusionary rule and the fruit-of-the-poisonous-tree doctrine do not require suppression of evidence voluntarily discarded by a fleeing defendant").[10]

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[10] Other policy concerns with the common-law rule are misplaced, including the fear that it will encourage suspects to flee. *See Henson v. United States*, 55 A.3d 859, 865-66 (D.C. 2012). A suspect who is motivated to flee from police is not going to stop in the hopes that doing so will allow him to invoke the exclusionary rule or because if he does not, he will not be able to bring an excessive force claim. In any event, the Fourth Amendment is intended to guide the conduct of police officers, not the citizens with whom they interact.

3. The real practical problems come from Respondents' definition of seizure, which requires that the application of physical force terminate the person's movement.

First, Respondents' rule raises a series of tough questions without ready answers. Among them: What counts as termination of movement? How soon after the force is applied must the person come to a stop? A few seconds? A few minutes? If she stumbles a few feet before coming to halt, has the shot terminated her movement? What if it is 10 feet? 20? And how long must the person remain stopped for her to be considered under the officer's control? Where is the line between just a momentary pause and a complete halt?

These questions arise in real cases. *See, e.g.*, *Holland v. Krogstad*, No. Civ. 10-374, 2012 WL 13076246, at *3 (D.N.M. Aug. 23, 2012) (even with video evidence, court could not say when it became clear that suspect who struggled with police was restrained and controlled). And show-of-authority seizure cases, which require courts to answer just such bedeviling questions about the precise moment of submission, illustrate the difficulties of such an approach. *See, e.g.*, *United States v. Salazar*, 609 F.3d 1059, 1065 (10th Cir. 2010) (noting that "lower courts … will frequently be confronted with difficult questions concerning precisely when the requisite physical seizure or submission to authority occurs"); *United States v. Stover*, 808 F.3d 991, 996 (4th Cir. 2015) ("[W]hat constitutes 'submission' can be a difficult, fact-intensive inquiry."). Absent a compelling constitutional man-

date, this Court should not "launch courts on a difficult line-drawing expedition." *Riley v. California*, 573 U.S. 373, 401 (2014).

Making matters worse, Respondents' rule leads to absurd consequences. Even if the passenger of a car is shot dead without reason, for instance, her family will have no Fourth Amendment remedy if the driver of the car keeps going. *Cf. Lytle v. Bexar County*, 560 F.3d 404, 410 (5th Cir. 2009) (parties did not dispute that passenger was seized when she was shot and killed but the chase continued). Indeed, Respondents' rule leaves many wholly unjustified uses of deadly force untouched by the Fourth Amendment. This case is a prime example: Police officers shot a fleeing person twice in the back, temporarily paralyzing her arm and causing such severe injuries she had to be airlifted to a bigger hospital—and yet by the lower court's reasoning, the shooting is entirely outside the bounds of the Fourth Amendment even if the officers had no reason whatsoever to shoot Ms. Torres and even if they violated clearly established law in doing so.

Ms. Torres is not alone. Relying on the Tenth Circuit's decision here, a district court in New Mexico recently dismissed a young man's claim that officers acted excessively when, unprovoked and acting on a grudge, they shot him 10 times in 17 seconds; his claim failed, the court held, because he was able to drive a short distance and call his mother, who found him lying in the street bleeding. *Carrillo-Ortiz v. N.M. State Police*, No. 18-CV-334-NF-KHR, 2019 WL 4393989, at *5 (D.N.M. Sept. 13, 2019).

The common-law rule, by contrast, not only accords with the understanding of seizure that prevailed when the Fourth Amendment was adopted and subsequently construed, it also "conserve[s] public interests as well as the interests and rights of individual citizens." *Florida v. White*, 526 U.S. 559, 563 (1999) (quoting *Carroll*, 267 U.S. at 149). The public's interest in deterring unjustified intrusions on personal security is served by clear standards that can be easily applied by both officers in the field and courts after the fact. The common-law rule is clear on both counts: An officer in the field knows what it means to lay his hands on someone intending to restrain her, and a court can easily determine whether the officer made contact with the suspect. *See United States v. Steele*, 782 F. Supp. 1301, 1308 (S.D. Ind. 1992) ("Seizure by physical force is usually not difficult to assess."). Officers who know in advance that their actions may be subject to Fourth Amendment scrutiny are more likely to exercise their duties with care and within the Constitution's limits. And of course, the existence of qualified immunity and the fact that reasonable uses of force are lawful ensure that officers will not refrain from acting when it is appropriate, or even inappropriate but not clearly so. When they fall short, due respect for the Constitution and the values it enshrines requires holding them to account.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

Kelsi Brown Corkran
Thomas M. Bondy
Ethan P. Fallon
Sheila Baynes
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
Easha Anand
Rachel G. Shalev
Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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