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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION[1]

Our definition of a Fourth Amendment seizure turns on a simple syllogism: At the time of the Founding, the quintessential seizure of the person was a common-law arrest, and at common law, an arrest occurred when an officer intentionally applied physical force to restrain someone, regardless of whether the person submitted. Neither Respondents nor their amici undercut either half of the syllogism: A range of historical sources and this Court's precedents confirm that a common-law arrest defines a seizure of a person under the Fourth Amendment, and it is undisputed that, at common law, an officer's intentional application of force to restrain someone amounted to an arrest even when the officer failed to stop the arrestee.

Respondents and their amici instead ask the Court to ignore the common law of arrest because it supposedly arose in a different context and because, well, it is old. RB39, 48; National Association of Counties (NACo) Br. 12, 18-20. The first point is wrong, and the second is simply a call to ignore the Fourth Amendment's original meaning. Respondents' precedent and policy arguments likewise fail to provide any basis for casting aside the original and well-settled understanding that a person is seized when an officer

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[1] We abbreviate Brief for Petitioner "OB," Brief of Respondents "RB," Brief for the United States "U.S. Br.," and other amicus briefs as "__ Br.," according to the lead amicus's name or abbreviation.

intentionally applies physical force to restrain, even if the effort is unsuccessful.

It is undisputed that Respondents intentionally applied physical force to restrain Ms. Torres when they shot her twice in the back.[2] She was therefore seized within the meaning of the Fourth Amendment, and the Court of Appeals' judgment to the contrary should be vacated and the case remanded.

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[2] Although Respondents do not dispute that they fired at Ms. Torres in order to stop her, RB2-3, their purported factual statement of this case is riddled with citations to Respondents' deposition testimony that are contradicted by other evidence in the record. As just one example, Respondents claim that Officer Madrid fired at Ms. Torres "through the windshield" to avoid being hit, RB2, but trajectory analysis shows that all the shots were fired either from the side or rear of the vehicle, JA 108-09, and deposition testimony shows that Officer Madrid stood at the side of the vehicle and was never hit as Ms. Torres's car drove forward, JA75-76, 83-84, 89, 107. *Compare also* RB6 ("Petitioner revved her car engine and sped out of the parking space, placing the officers in fear for their lives."), *with* OB5 ("The car had only inched forward when Respondents opened fire on Ms. Torres," citing deposition testimony). Respondents' cherry-picked account of the shooting must be disregarded because this case is at the summary judgment stage, when all evidence must be taken in the light most favorable to Ms. Torres. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

ARGUMENT

I. The Original Meaning Of "Seizure" In The Fourth Amendment Does Not Require Submission To Physical Force.

A. The common law of arrest defines the limits of seizure of the person in the Fourth Amendment.

Respondents and their amici begin by resisting the first part of our syllogism—that seizures of persons under the Fourth Amendment equate with common-law arrests. This Court has already held, however, that the common law of arrest "defines the limits of a *seizure of the person*" under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 627 n.3 (1991); OB17-18. Our opening brief explains why *Hodari D.* is right. Founding-era Americans understood seizures of persons under the Fourth Amendment to encompass common-law arrests: The Amendment was adopted partly in response to British abuses in arrests, and it employs a term, "seizure," that was used interchangeably with the term "arrest," according to dictionaries of the time. OB16-17.

Respondents and their amici offer two arguments to the contrary, both meritless.

1. Respondents and their amici first contend that Fourth Amendment seizures cannot include common-law arrests based on touch alone because, as a matter of ordinary language, a seizure always requires possession or the acquisition of physical control (submission, for short). RB15-16; NACo Br. 5-6. But for that

proposition, they rely overwhelmingly on definitions of seizures of *objects*, not *persons*.[3] Early Americans saw a fundamental distinction between the two: As Noah Webster put it in 1828, "We say to arrest a person, to seize goods." 2 Noah Webster, *An American Dictionary of the English Language* 67 (1828). *Hodari D.* recognized it as well:

> 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.… To constitute an arrest, *however*—the quintessential "seizure of the *person*" under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with

[3] *See* 2 T. Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771) (NACo quotes entry for "seisin," a feudal term for possession of land); 2 Samuel Johnson, *A Dictionary of the English Language* 1782 (6th ed. 1785) (illustrated by examples about "lands[] and all things" and "ecclesiastical revenues"); 2 Webster, *supra*, at 67 (differentiating between seizures of persons and seizures of goods); 2 John Bouvier, *A Law Dictionary* 510 (6th ed. 1856) (defining seizure as "the act of taking possession of *the property*" and "the taking possession of *goods*" (emphases added)); 2 Benj. Vaughan Abbott, *Dictionary of Terms and Phrases* 458 (1879) ("The words [seize/seizure] are more appropriate to movable property…."). Because these definitions focus on the seizure of an object, several of the dictionaries cited by Respondents and their amici have *additional* entries that define "seizure" without invoking physical control, presumably to reflect that seizures of persons do not require such control. *E.g.*, 2 Johnson, *supra*, at 1782 (definition of "seize" includes "to grasp" and "to lay hold on").

> lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.

499 U.S. at 624 (emphases added). Respondents and their amici rely on *Hodari D.*'s definition of seizures of objects but ignore the critical language clarifying that seizures of persons do *not* require possession. *See* RB5, 15; NACo Br. 6.

This definition of seizures of persons was not a "technical meaning" unmoored from the "normal and ordinary" meaning "understood by the voters." NACo Br. 7 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). General-purpose dictionaries like Webster's explained that a seizure of a person is an arrest, which can be effectuated by "touching the body." 1 Webster, *supra*, at 13; 2 Webster, *supra*, at 67; *cf. McCracken v. Ansley*, 35 S.C.L. 1, 3 (S.C. Ct. App. 1849) ("[T]o the same effect are the definitions of other elementary writers, and the Lexicographers."). The idea appeared in popular sources, too. Alexander Pope's seminal translation of *The Iliad*, for instance, describes the Trojans' dark omen—an eagle who, unable to keep hold of a bloodied serpent with her talons, flings it onto the massed troops—as follows: "The victor eagle … Allow'd to seize, but not possess the prize." *The Iliad of Homer* (Alexander Pope trans. 1717), vol. III, Book XII. And because law enforcement at the time of the Founding was "a business of amateurs," ordinary citizens routinely seized persons and so would have paid attention to what qualified as an arrest and what consequences followed. Lawrence M. Friedman, *Crime and Punishment in American History* 27-29 (1993).

Having failed on the historical front, Respondents and their amici insist that the common law of arrest cannot define Fourth Amendment seizures of persons because saying a seizure occurs in the absence of physical control sounds odd to the modern ear. *E.g.*, RB16 (relying on modern dictionaries); NACo Br. 6 (same). But the Justices of the 1991 *Hodari D.* Court did not think so, offering the sentence, "She seized the purse-snatcher, but he broke out of her grasp," as evidence that the "[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; *cf. Katz v. United States*, 389 U.S. 347, 353 (1967) (describing government recording of a phone call as a "seizure"). In any event, the original understanding controls. And speakers at the time of the Founding knew that the term seizure of the person included "the mere touching of a person." *Hodari D.*, 499 U.S. at 626 n.2.[4]

2. Respondents and their amici next argue that this Court should not look to the common law of arrest to determine whether a seizure of the person has occurred under the Fourth Amendment because the

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[4] Respondents' amici argue that the use of the term "seized" in the Fourth Amendment's Warrant Clause supports reading "seizure" in the earlier clause as requiring control. NACo Br. 7-8. They cite no authority that reads "seized" in the Warrant Clause to require control. They simply assert that it would "be nonsensical for a warrant to list persons or items to be touched but not brought under physical control." NACo Br. 7. But a warrant lists persons or items the officer *intends* to take; obtaining a warrant does not guarantee the officer will succeed in taking them. The original meaning of "seizure" accords with that: intent to restrain is a necessary element, but success is not. OB40-41.

common law of arrest arose in a different context. RB37-38; NACo Br. 18-20. Respondents' amici specifically argue that the existence of a physical-force seizure served the "narrow purpose" of authorizing law enforcement officials to enter debtors' homes and holding officials liable for debtors' escapes, and therefore the common law of arrest is irrelevant to the question this case presents. NACo Br. 12-14, 19-20.

Again, this Court already held in *Hodari D.* that the common law of arrest defines a Fourth Amendment seizure. OB17-18. Indeed, the Court relied on the very sorts of cases Respondents' amici say arise in too "narrow" a context to matter. *See* NACo Br. 16 n.5. *Hodari D.* relied, for instance, on *Whithead v. Keyes*, 85 Mass. 495, 501 (1862), which concerned whether a sheriff had arrested a debtor so as to be liable for his escape. *Hodari D.*, 499 U.S. at 624.

Payton v. New York, on which Respondents (RB38, 45) and their amici rely (NACo Br. 19), confirms that, at common law, the question whether an arrest had occurred "typically arose in civil damages actions for trespass or false arrest." 445 U.S. 573, 592 (1980). And even Respondents' amici acknowledge that courts articulated the common-law rule that an arrest occurs without submission in a range of cases beyond the debtors' context, including cases involving false imprisonment claims. NACo Br. 16-17. The application of that rule in those cases made sense because, to repurpose the words of Respondents' amici, if the common law of arrest "helped an official in some instances, in fairness he must also accept the negative consequences." NACo Br. 16 (citing *Nicholl v. Darley* (1828) 148 Eng. Rep. 974, 976). That reasoning easily

extends to cases involving officers who improperly exercise their authority when making arrests.[5] "[T]he touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass …." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891). In short, the Founding generation and their descendants were familiar with the notion that civil damages actions, including for unjustified arrests and trespasses on the body, would lie against officers who touch individuals without justification. *See* CAC Br. 21-23.

Respondents' amici are of course correct that a modern-day officer cannot justify a forcible intrusion into a home simply because she touched the suspect beforehand, even if that was the rule at common law. NACo Br. 20. But adhering to the original meaning of the Fourth Amendment does not require the Court to import "18th-century tort law" wholesale into the Amendment; it requires only that the Court honor the "18th-century guarantee" against unreasonable

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[5] *E.g.*, *Simpson v. Hill* (1795) 170 Eng. Rep. 409, 409 (evaluating false imprisonment charge against officer and explaining that "if he had tapped her on the shoulder, and said, 'You are my prisoner'; *or* if she had submitted herself into his custody," an arrest would result (emphasis added)); *Williams & Jones & Others* (1736) 95 Eng. Rep. 193, 194 (false arrest case explaining that a man is arrested when another "gently laid his hands in order to arrest"); *State v. Townsend*, 5 Del. (5 Harr.) 487, 488 (Ct. Gen. Sess. 1854) (conviction for resisting arrest; defendant argued that there was no arrest because officer did not show or announce his authority; court held that "[t]he arrest itself is the laying hands on the defendant"); *Roberson v. State*, 43 Fla. 156, 164 (1901) (defendant entitled to manslaughter instruction because killing occurred during course of unlawful arrest; arrest occurred even though defendant "instantly swung himself loose from the grasp of the officers" and "then ran away").

seizures as it was endorsed by the Framers. *See United States v. Jones*, 565 U.S. 400, 411 (2012). Interpreting the term "seizure" of the person to mean a common-law arrest, the way the Framers would have, does not mean that every consequence of a common-law arrest must flow from a seizure, just as interpreting the term "search" as the Founders would have does not mean police officers face all the consequences of a common-law trespass. *Id.*

B. A common-law arrest required only physical touch with intent to restrain, not physical control.

Respondents and their amici offer little in response to the second part of our syllogism: that common-law arrests required only physical touch with intent to restrain. Our opening brief and amici lay out several centuries' worth of cases and commentary, before and after the Founding, consistently recognizing that a physical touching intended to restrain is an arrest, even if the subject evades capture. OB18-25; CAC Br. 15-17. Respondents and their amici do not point to a *single* case in which a court found no arrest when the officer intentionally touched a suspect.

Instead, Respondents cite a handful of cases that mostly just describe circumstances that are sufficient to qualify as an arrest; none of these cases denies that a common-law arrest *also* occurs when the suspect is touched but escapes.[6] A few explain what is necessary

[6] *E.g.*, *Henry v. United* States, 361 U.S. 98, 103 (1959); *Balt. & Ohio R.R. Co. v. Strube*, 73 A. 697, 700 (Md. 1909); *United*

for a formal arrest—the kind that triggers, for instance, *Miranda* obligations—not the more broadly encompassing common-law arrest.[7]

For their part, Respondents' amici mostly seem to concede that at the time of the Founding, physical touch could amount to an arrest, even in the absence of submission. NACo Br. 12-17.[8] Elsewhere, however,

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States v. Scott, 149 F. Supp. 837, 840 (D.D.C. 1957); *see also Jacques v. Sears, Roebuck & Co.*, 285 N.E.2d 871, 874 (N.Y. 1972) ("Arrest *includes* the keeping under restraint of one so 'detained' until brought before the magistrate." (quoting 1 Clarence Alexander, *The Law of Arrest in Criminal and Other Proceedings* § 45 at 358 (1949)) (emphasis added)); *Posr v. Doherty*, 944 F.2d 91, 97 (2d Cir. 1991) (reading *Jacques* as "setting forth one of several circumstances under which there may be an arrest, but not as stating a necessary prerequisite").

Notably, the treatise on which Respondents rely (at 42) proves *our* point: Under a list of "examples" of arrest, it states that "laying on of hands however slightly, without being able to hold and take into actual custody, when more than a mere gesture is an assault, and an arrest as well." Alexander, *supra*, at 359; *see also Rhodes v. Walsh*, 57 N.W. 212, 215 (Minn. 1893) (reciting numerous definitions of arrest, including "detaining" and "restraint" as well as "touching or putting hands upon") (cited at RB43).

[7] *E.g.*, *Christopher v. Nestlerode*, 373 F. Supp. 2d 503, 516 (M.D. Pa. 2005) (describing arrests that authorize incidental searches); *Scott*, 149 F. Supp. at 839-40 (same); *see Jacques*, 285 N.E.2d at 875 (noting that "modern writers often define 'arrest' for convenience as a formal arrest").

[8] Respondents' amici question (at 17 & n.6) whether *People v. McLean*, 68 Mich. 480 (1888), and *United States v. Benner*, 24 F. Cas. 1084 (C.C.E.D. Pa. 1830) (No.14,568), support our position. They do. In *McLean*, the court framed the key question as whether the under-sheriff in that case was with his superior "*at*

they insist that "an 'arrest'—a seizure of a person—has long required an element of physical control." NACo Br. 6. This claim is easy to debunk: The Founding-era dictionaries they quote contain additional definitions that support the proposition that physical contact suffices for an arrest even without submission. *See, e.g.*, 1 Cunningham, *supra* (definition of arrest citing *Genner v. Sparks* (1704) 87 Eng. Rep. 928 to show touch sufficient for arrest); 1 Abbott, *supra*, at 84-85 ("touching or putting hands upon [a person] in the execution of process").

Respondents' amici next ask this Court to ignore physical-force arrests as "legal fiction[s]." NACo Br. 15 & n.4. This too does not withstand scrutiny: Founding-era cases (and beyond) consistently treated physical-force arrests as having the same legal significance as show-of-authority arrests. *E.g.*, *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

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the time of the arrest." 68 Mich. at 484 (emphasis added); *see also* Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 556 (1924) (citing *McLean* when saying what circumstances "constitute arrests"). The arrest was ultimately only an "attempted" one because the under-sheriff in question, having no warrant, also had no "authority to make the arrest." *McLean*, 68 Mich. at 486. (The difference between the attempted and actual arrest was of no moment in *McLean*, because the statute at issue penalized resisting either.) And the jury instruction in *Benner* omitted the question of submission only because it was undisputed that the foreign minister in question *did* submit to the arrest. 24 F. Cas. at 1086-87.

informed of the Bailiff's business, has submitted and gone with the Bailiff, without resistance or flight…."); *Nicholl*, 148 Eng. Rep. at 975 ("I confess I am at a loss to perceive a distinction between a local arrest and a legal custody."). Physical-force arrests carried the same consequences as show-of-authority arrests. *See Hodges v. Marks* (1615) 79 Eng. Rep. 414, 415 (arrest by touching "was legal and well enough … good enough against the party arrested"). Leading commentators later confirmed the equivalency, with one listing "an actual *or* constructive seizure or detention" of a suspect as a necessary element for an arrest, with nothing hinging on the distinction. Wilgus, *supra*, at 543 (emphasis added).

In any event, amici's attempt to write "constructive" seizures out of the Fourth Amendment is also foreclosed by precedent. If any arrests were "recognized as a legal fiction distinct from actual seizure," NACo Br. 20, it was show-of-authority arrests, which were routinely called "constructive seizures" or "constructive arrests." *See, e.g.*, *Searls v. Viets*, 2 T. & C. 224, 228 (N.Y. Sup. Ct. 1873); Edward C. Fisher, *Laws of Arrest* 49 (1967). Yet *Hodari D.* held that these constructive seizures are nevertheless seizures under the Fourth Amendment; as in the case of a physical-touch arrest, their so-called constructive character does not make them any less of an arrest. *See* 499 U.S. at 626-27.

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Ultimately, Respondents and their amici attack not so much our common-law syllogism but the basic proposition that the eighteenth-century

understanding of "seizure" is relevant to this Court's analysis. *See* NACo Br. 4 ("historical relics"); RB48 ("This Court says what the law is, not what English judges two centuries removed from the facts of this case might say."). But they fail to offer any explanation for why a deviation from the original meaning of a Fourth Amendment seizure would be appropriate here. Ms. Torres thus indeed "unabashedly asks" (RB20) this Court to retain the original and long-settled understanding of a Fourth Amendment seizure as including the use of physical force with intent to restrain, regardless of whether the subject submits to that force.

II. Respondents Identify No Reason To Ignore The Fourth Amendment's Original Meaning.

This Court has admonished that neither precedent, *see Crawford v. Washington*, 541 U.S. 36, 67-68 (2004), nor policy, *see District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), can justify abrogating the original understanding of the Constitution. This is particularly true where a party seeks to narrow its protection: 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 also United States v. Carloss*, 818 F.3d 988, 1011 (10th Cir. 2016) (Gorsuch, J., dissenting) ("The Fourth Amendment is … supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences might be."). In any event, Respondents' precedent- and policy-based arguments are wrong.

A. This Court's precedents support the common-law rule.

The *only* case in which this Court has considered whether a Fourth Amendment seizure occurs where the victim does not submit is *California v. Hodari D.* *Hodari D.*'s holding turned on the Court's determination that a common-law arrest is "the quintessential 'seizure of the person'" under the Fourth Amendment: There was no seizure because what happened to Hodari D. did not constitute a common-law arrest, which, per the circumstances of that case, required submission to a show of authority. 499 U.S. at 624, 626; *see* U.S. Br. 7-8. The Court's conclusion that the common law sets the limits of a seizure of person was therefore necessary for the result in *Hodari D.* and so binds the Court. 499 U.S. at 624-25.

In no other case has the Court contemplated the question this case presents, let alone rejected the common-law rule. Respondents lead with *United States v. Mendenhall*, 446 U.S. 544 (1980), claiming that *Hodari D.* took *Mendenhall* to mean that no seizure occurs unless the subject feels unfree to leave. RB9. But Respondents omit the text of *Hodari D.* that makes clear that the "so-called *Mendenhall* test … states a necessary, but not a sufficient, condition for seizure—*or, more precisely, for seizure effected through a 'show of authority.'*" *Hodari D.*, 499 U.S. at 627-28 (original emphasis omitted, emphasis added). The *Mendenhall* test applies only to show-of-authority seizures, not physical-force seizures.

Respondents then stake their argument on the notion that *Brower v. County of Inyo*, 489 U.S. 593

(1989)—which predates *Hodari D.*—held that a seizure requires acquisition of physical control. RB13-14, 23-32. But both we and the Solicitor General have explained without rebuttal why neither *Brower*, nor any other precedent, undercuts *Hodari D.* OB 32-37; U.S. Br. 15-17. Even Respondents' amici admit that the cases on which Respondents rely "d[o] not squarely confront" the question whether seizure occurs by physical force in the absence of submission. NACo Br. 22.

Respondents' amici instead claim that "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." NACo Br. 23. In fact, the Court has assumed in numerous cases that a seizure occurred where officers made contact with suspects in an attempt to restrain them but did not immediately gain physical control of them. *See, e.g.*, *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1770-71 (2015) (officers "*tr[ied]* to subdue" suspect, who would not surrender or drop her weapon (emphasis added)); *Plumhoff v. Rickard*, 572 U.S. 765, 770 (2014) (suspect drove away from officers despite gunshot wounds); *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (suspect "continued down the street" half a block). Perhaps Respondents' amici believe a case "involve[s] the acquisition of physical control" when a suspect is swerving down a block (*Brosseau*), fleeing at top speed (*Plumhoff*), or continuing to charge an officer (*Sheehan*), but if so, that only highlights the difficult line-drawing problems their proposed rule raises. *See* OB44.

Finally, even if Respondents could show that dictionaries, common law, or precedent require "detention" or "restraint" of "liberty" or "movement," *e.g.*, RB8-9, 16, 42-43, none of that necessarily entails physical control. For one thing, "detention" or "restraint" can be accomplished by touch even without submission. *See Hodari D.*, 499 U.S. at 625 ("There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching … although he does not succeed in stopping or holding him even for an instant.") (quoting Asher Cornelius, *Search & Seizure* 163-64 (2d ed. 1930)); OB39 (at common law, "restraint" accomplished by touch alone). For another, "restraint" is just a limit, not a total termination. OB38-39. And "liberty"—the thing that must be "restrained," per the cases Respondents (RB8, 9-10, 25) and their amici (NACo Br. 22) quote—includes the "right to personal security," which is infringed by an unwanted physical intrusion. *Brown v. Texas*, 443 U.S. 47, 52 (1979); *see* Alexander, *supra* § 45 at 358, 361 (laying on of hands without control is an arrest and "[a]ll arrests involve a 'conscious *restraint of liberty*'" (emphasis added)); OB27-28, 39. Even on Respondents' reading, then, Ms. Torres was seized when she was shot—either because the contact effected a detention or restraint under the common-law meanings of those terms; because her freedom of movement was hampered, satisfying the ordinary meaning of "restrain"; or because her liberty interest in personal security was infringed.

B. Policy concerns do not foreclose the common-law rule.

Respondents and their amici fail to support their claim that the common-law rule leads to "illogical" and "anomalous" results. RB24; NACo Br. 11, 25.

They first question the logic in requiring submission for show-of-authority seizures and not physical-force seizures. RB24; NACo. Br. 25. But the distinction is time-tested, with a three-centuries-long pedigree. *See, e.g.*, *Williams & Jones*, 95 Eng. Rep. at 194*; Simpson*, 170 Eng. Rep. at 409. And it is sensible. When someone disobeys an officer's command to stop and continues on her way, essentially nothing has happened to her. She renders the show of authority entirely ineffectual by walking away; the words do not hurt her if she does not hear them or ignores them. But that is not true when an officer inflicts physical force. A real, tangible intrusion on the person's body occurs the instant the officer strikes her. The damage is done once the blow is struck, whether or not the victim is ultimately able to stagger away. *See* ACLU Br. 4, 8, 12.

Nor is it true that, under the common-law rule, a seizure would "last as long as the bullets remain in [the suspect's] body." NACo Br. 9-10; *see id.* at 25. None of the circuits to adopt the common-law rule has ever reached such an absurd result, and for good reason: The common-law rule requires the *use* of physical force *intended to restrain*. That the force must be "use[d]" means that there must be "active employment" of the force. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). When an officer fires a shot that strikes the

suspect, he is actively employing force, but he is no longer doing so after the bullets lodge in the person's body. And because the scope of the seizure is defined by the officer's intent to restrain, and because the officer intends the *impact* of the bullet to restrain, the seizure begins and ends with that impact, regardless of any secondary effects that might follow (e.g., the bullet remains lodged, an injury pains the person for years after). Therefore, and as the Solicitor General's brief explains, the seizure ends when the application of physical force ceases and the suspect flees. U.S. Br. 18.

Amici's concerns about unduly chilling policing conduct are also unfounded. NACo Br. 24-25. First, a seizure occurs under the common-law rule only when an officer intends to restrain the subject. At the moment the officer employs force, then, she anticipates that the subject will submit and has gauged the consequences that come along with that, including a possible § 1983 suit. *See Hodari D.*, 499 U.S. at 627. Second, the common-law rule does not mean liability for *all* physical contact between an officer and an individual. Under the common-law rule, the Fourth Amendment reaches only intentional applications of force to restrain, not uses of force that are accidental or intended to do something other than restrain. OB40-41; U.S. Br. 10-13. Even when such a seizure occurs, the Constitution proscribes only seizures that are unreasonable. OB41-42. And even then, a plaintiff

may recover in a civil suit only if the officer violated clearly established law. OB41-42.[9]

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[9] Although Respondents (at 29-30 n.10) defend the reasonableness of their conduct and claim entitlement to qualified immunity, they ultimately agree that "[t]he sole issue presented in this appeal [is] whether or not the Petitioner was seized when she was shot." RB44. For that reason, those questions should be resolved in the first instance by the lower courts on remand. *See* OB42 n.9; U.S. Br. 20-22. And even if the Court were inclined to address them on first view, material disputes of fact—including where exactly the parties were located when the shooting started, when the pertinent shots were fired, and which officer(s) fired them—preclude granting summary judgment for Respondents on this record. *See supra* note 2; Petr's Cert. Reply 10-11.

Respondents also suggest (at 29-30 n.10) that because the Tenth Circuit previously held that a suspect who escapes is not seized, they are entitled to qualified immunity on remand regardless of whether their use of lethal force was unreasonable under clearly established law. Although again that is a question for the lower courts to resolve in the first instance, we note that Respondents' argument misunderstands the qualified immunity inquiry. Qualified immunity turns on the officers' conduct at the moment they use force, not on what victims do in response. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1150 (2018) ("The question is whether *at the time of the shooting* [the officer's] actions violated clearly established law." (emphasis added)); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) ("'Clearly established' means that, *at the time of the officer's conduct*, the law was 'sufficiently clear' that every 'reasonable official would understand that what *he is doing*' is unlawful." (emphasis added)). And so what Ms. Torres did after Respondents used force is entirely irrelevant. Indeed, that she did not stop is just as inconsequential as an officer subsequently finding out that a suspect that had reached for his waist did not in fact have a gun. The rule cannot be otherwise, for it would make no sense for a remedy aimed at deterring officers' misconduct and compensating victims to turn on the happenstance of what victims subsequently do. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Finally, Respondents' amici suggest that their proposed rule will encourage people to immediately submit to applications of force in order to preserve potential § 1983 claims, while the common-law rule will "incentiviz[e] suspects to flee." NACo Br. 24. That defies common sense. No sane person who is under attack thinks, "I had better yield to preserve my ability to seek civil damages later on."

In short, none of these policy concerns counsels against the common-law rule. If even one of them did, the United States, which has a "substantial interest" in the efficacy and safety of federal law enforcement, would not have urged this Court to reaffirm it. U.S. Br. 1, 9.

The common-law rule for physical-force seizures, by contrast, avoids the difficult line-drawing problems the submission requirement produces. *See* OB44-45. Of course, where the common-law rule requires submission (i.e., in show-of-authority seizures), courts have no choice but to find the line. But it makes no sense to force that thorny inquiry where the original understanding of the Fourth Amendment does not permit it. Like the common-law rule applied in search cases, the common-law rule—that a physical touch meant to restrain effectuates a seizure, whether or not a suspect submits—"keeps easy cases easy." *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

The common-law rule also closes the troubling accountability gap Respondents' rule creates. *See* CATO Br. 9-13; ACLU Br. 13-16; NAACP LDF Br. 8-12; Scholars Br. 20-23. Contrary to what Respondents' amici say (NACo Br. 26-27), there is no adequate

substitute for a Fourth Amendment remedy in a case like this. *See* ACLU Br. 16 n.4 (many unreasonable seizures will not satisfy requirements for Due Process Clause claim); Rutherford Br. 4-6 (availability of federal rights cannot turn on state tort law, particularly since state tort law is often pegged to federal constitution). Abandoning the original and well-settled understanding that a seizure of a person occurs when officers intentionally strike individuals strips the people of critical protection against "physically intrusive government conduct," *Graham v. Connor*, 490 U.S. 386, 395 (1989)—a result the Framers would abhor.

CONCLUSION

This Court should vacate the judgment of the Court of Appeals and remand for further proceedings.

Respectfully submitted,

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