No. 19-345

IN THE
Supreme Court of the United States

DORIAN JOHNSON,
Petitioner,

v.

CITY OF FERGUSON MISSOURI, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

PATRICIA E. ROBERTS
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

TILLMAN J. BRECKENRIDGE*
AARON J. GOLD
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
601 Pennsylvania Ave., NW,
South Tower, Suite 700
Washington, DC 20004
Telephone: 202-759-6925
tjb@piercebainbridge.com

*Counsel of Record

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

INTRODUCTION

The petition presented a pressing Fourth Amendment question: "[W]hether a person can be 'seized' when he is not confined to a particular space." This is of critical importance because the right "to remain in a public place" of one's choosing, which is "as much a part of his liberty as the freedom of movement," *City of Chicago* v. *Morales*, 527 U.S. 41, 54 (1999) (opinion by Stevens, J. joined by Souter and Ginsburg, J.J.) and when a person "has no desire to leave" a place, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Florida* v. *Bostick*, 501 U.S. 429, 435–36 (1991). As the petition demonstrated, courts nationwide disagree whether an order to leave a place, instead of remaining in one, can ever be a seizure. The Sixth Circuit ruled such orders can be seizures; the Second and Eighth Circuits ruled they cannot. Their sister circuits only create further confusion. Combined, the split of authority on this issue, how frequently it recurs, and the importance it bears on citizens' rights, demand this Court's attention and intervention.

Respondents do not address this issue head-on; instead they falsely claim the record does not raise the question presented and that the issue was not briefed and decided below. The record easily belies their position—indeed, Respondents' *first argument* in their brief below was that Officer Wilson's conduct was not a show of authority that would cause a reasonable person to move on.

Respondents further try to twist Petitioner's position, suggesting Petitioner seeks a *per se* rule. Just the opposite, the Eighth and Second Circuit's per

se rule that "move on" orders categorically *cannot* constitute seizures, in conflict with decisions of other circuits, is the heart of the problem. Respondents do not even address the division in the circuits, instead arguing that the analysis here does not lend itself to a per se rule. On that, the parties seem to agree—a per se rule is inappropriate here, and this Court should rule that, *under the facts of Petitioner's case*, a seizure *did* occur, or at least the Court should reverse the Eighth Circuit's decision that the a move on order cannot constitute a seizure and remand for further proceedings.

I. THE RECORD RAISES THE EXCEPTIONALLY IMPORTANT QUESTION PRESENTED.

"[W]hether a person can be 'seized' when he is not confined to a particular space" is a crucial Fourth Amendment question that requires this Court's resolution because it (i) implicates core freedoms against government oppression, Pet. at 12–14, 16–17; and (ii) divides courts nationwide, Pet. at 5–8, 14–16. Michael Brown and Dorian Johnson were walking down the street when Officer Wilson passed them in his cruiser. Pet. App. 34a–35a. Wilson, a uniformed law enforcement officer, gave them the strident and vulgar command to "[g]et the f*ck on the sidewalk." *Id.* at 35a. Wilson then reinforced his order by swiftly throwing his car into reverse and stopping inches in front of Brown and Johnson, blocking their way. *Id.* It is undisputed that the car cut off Johnson's path and that he stopped and remained in place while Wilson "fought with Brown and threatened to fire his firearm." *Id.* at 11a. As such, the question for the Court is "whether a reasonable person would feel free to decline" Wilson's command "or otherwise terminate

the encounter" without compliance, *Bostick*, 501 U.S. at 436—*i.e.*, whether a seizure occurred—even though Wilson did not confine Johnson to a particular place by word or deed but instead ordered him to go elsewhere.

Respondents argue that this issue was not briefed or decided below, Resp. Br. at 8, but that is demonstrably false. Among Petitioner's lead arguments to the Eighth Circuit was that Wilson's actions—his order to "[g]et the f*ck on the sidewalk" and subsequent show of authority with his car—constituted a seizure. *See* ECF No. 4423464 at 13–15. And Respondents argued just the opposite, that Wilson did not seize Johnson when Wilson "crudely ordered" him to the sidewalk and "park[ed] his cruiser at an angle so as to block [Johnson's] path[]." *See* ECF No. 4407607 at 15–18 (internal quotation marks omitted). Thus, even though an amicus was the only one to use the three words "move on order," Pet. App 9a, Petitioner and Respondents clearly discussed the matter. Further, the *en banc* panel below took great interest in how Johnson's perceived ability to leave the area affected the seizure analysis. *See* Pet. App. 3a (majority opinion commenting that "Wilson's police vehicle constituted no barrier to Johnson's ability to cross to the sidewalk."); *id* at 10a (observing that the majority "asserts there was no seizure because Johnson could merely have complied with the police officer's directive and moved to the sidewalk"). The issue was raised and decided below.

Respondents' assertion that Petitioner requests a "per se" rule is similarly infirm. Resp. Br. at 1, 11–12. Petitioner asks no such thing because "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States* v. *Drayton*, 536

U.S. 194, 201 (2002) (emphasis in original). Rather, the Court should grant this petition and decide that the Eighth and Second Circuits were wrong to adopt a per se rule that, regardless of "all the circumstances," *id.* (quoting *Bostick*, 501 U.S. at 439), an officer does not "seize a citizen when the officer takes intimidating actions and orders that citizen to leave a given place," Pet. at 12. The totality of circumstances, not just the singular fact of Wilson's move on order, confirms that a seizure took place. These facts in concert showed Johnson that he was not "at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (quoting *Michigan* v. *Chesternut*, 486 U.S. 567, 569 (1988)).

The focus on the totality of circumstances is exactly why the question presented does not, as Respondents argue, "assume[] a scenario where an officer is able to escort or otherwise address an individual to effect an order." Resp. Br. at 11 (advocating for the very sort of talismanic *per se* approach they incorrectly imagine Petitioner advances). Wilson did not escort Johnson anywhere (though Wilson did fire a gun at him), Resp Br. at 1, 3, and Johnson was in the street instead of on a bus or in a car at the time Wilson ordered him to the sidewalk, Resp. Br. at 7–8. These are all facts for the Court to evaluate when deciding if Wilson's move on order, coupled with his subsequent actions showing his authority, worked a seizure upon Johnson. So too is the fact that Wilson never told Johnson to "stop" or "freeze;" these are just factors for the Court to consider, rather than—as the Respondents suggest—items preventing a finding of seizure *per se*. *See* Resp. Br. at 7.

Although in no way relevant to the propriety of the question presented, Respondents correctly state that qualified immunity involves considering "whether the officer had fair notice that her conduct was unlawful," and that "reasonableness is judged against the backdrop of the law at the time of the conduct." Resp. Br. at 9 (quoting *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152 (2018)). Yet, their assertion that qualified immunity could protect Wilson is unsupportable. Petitioner alleges Wilson stopped him "without reasonable suspicion of criminal activity" or any other "legal justification" to do so. Pet. App. 35a. Wilson had far more than "fair notice" that such a stop violated the Fourth Amendment. *See Ornelas* v. *United States*, 517 U.S. 690, 693 (1996) ("An investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion."). The same is true for Wilson's conduct during the stop. Wilson fired his gun at the fleeing Johnson without reason to believe he posed any risk of harm to anyone. Pet. App. 35a. This Court has been crystal clear: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985).

II. RESPONDENTS FAIL TO ADDRESS THE CIRCUIT SPLIT ON THE QUESTION PRESENTED OR ITS CRITICAL IMPORTANCE

Respondents refused to even acknowledge, much less try to refute, the split of authority on this issue in the Courts of Appeals. The Sixth Circuit is clear in its view that a seizure can occur "when a reasonable person would not feel free to *remain* somewhere, by

virtue of some official action." *Bennett* v. *City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) (emphasis in original) (finding that an order to leave an area accompanied with a brief escort was sufficient to consummate a seizure). The Second Circuit takes the opposite view, holding that someone could not be seized, despite a show of official authority, if he is "free to go anywhere else that he desire[s]." *Sheppard* v. *Berman*, 18 F.3d 147, 153 (2d Cir. 1994). In fact, the Second Circuit even concludes that applying physical force does not seize someone "as long as the person is otherwise free to go." *Salmon* v. *Blesser*, 802 F.3d 249, 253 (2d Cir. 2015) (noting that "police may take a person by the elbow or employ comparable guiding force short of actual restraint to ensure obedience with a departure order" without effecting a seizure).

With its *en banc* decision below, the Eighth Circuit aligns with the Second, askance from the Sixth. But on top of this direct split lies further division on the matter in courts at all levels across the country. *See* Stephen E. Henderson, *"Move on" Orders as Fourth Amendment Seizures*, 2008 B.Y.U. L. Rev. 1, 22–30 (2008) (describing the "disparate results" and inconsistent reasoning when the federal courts confront "move on" orders); *see, e.g.*, Pet. at 7–8, 14–16 (collecting cases from the Seventh and Tenth Circuits as well as a variety of district courts and describing the differing outcomes). This persistent inconsistency subordinates the right "to remain in a public place" of one's choosing, which is "as much a part of [one's] liberty as the freedom of movement." *Morales*, 527 U.S. at 54, to the caprice of judges and geography. Such a situation, with scrutiny on police conduct ever compounding, *see* Pet. at 16–17, demands this Court's attention and intervention.

Instead of addressing the split of authority and crucial importance of the present issue, Respondents raise inapposite distinctions. First, they attempt to narrow the Fourth Amendment seizure inquiry solely to "possession" of the individual, asking only if there was "termination of freedom of movement through means intentionally applied." Resp. Br. at 11 (quoting *Brower* v. *County of Inyo*, 489 U.S. 593, 597 (1989)). But that is the point here—the circuits are divided on whether seizures are so limited. Limiting the inquiry in that manner is inconsistent with this Court's precedent. The actual "touchstone" of the seizure analysis is—regardless of how an officer creates the situation—whether "a reasonable person would feel free to terminate the encounter" with police. *Drayton*, 536 U.S. at 201. Further, Respondents' analysis ignores situations such as this where a person "has no desire to leave" a place. In such situations, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Bostick*, 501 U.S. at 435–36. Courts must account for "all of the circumstances surrounding the encounter" and whether police "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437 (quoting *Chesternut*, 486 U.S. at 569). Yet, even adopting Respondents' cramped understanding of the Fourth Amendment, Mr. Johnson was "seized": Wilson "intentionally applied" means to "terminate" Johnson's "freedom of movement"—namely by backing his car within inches of Johnson to block his path. Pet. App. 6a; *see Brower*, 489 U.S. at 599 (concluding, just as here that "[i]t was enough . . . that, according to the allegations of the complaint, Brower

was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped").

Equally unavailing is Respondent's preoccupation with *California* v. *Hodari D.*, 499 U.S. 621 (1991) and Johnson's supposed lack of submission to Wilson's authority. Resp. Br. at 11–14. As noted, Wilson consummated the seizure by (i) ordering Johnson to "[g]et the f*ck on the sidewalk;" and (ii) intentionally terminating Johnson's freedom of movement by blocking Johnson's path with his police cruiser. In any event, the record shows that Johnson "submitted" to Wilson's show of authority. When Wilson stopped his car in front of Johnson and Brown, Johnson, unable to continue with his chosen path, stood and waited. Pet. App. 12a. Johnson did not "momentarily hesitate" as Respondents claim, Resp. Br. at 13, but remained in place as Wilson attacked Brown, Pet. App. 12a. Johnson did not leave the scene to flout Wilson's authority but to flee for his life when Wilson began firing his sidearm. Pet. App. 12a. Because Johnson first stopped and acquiesced to police authority and then ran from deadly force, Respondents' string cites of lower court decisions have no bearing on this case. See Resp. Br. at 13–14 (citing (a) cases merely stating the basic principle that 'seizure' requires something more than submission and needs more than a "momentary pause" and (b) instances where the suspect did not stop before police used or threatened force).

Finally, Respondents claim that "[p]ublic policy is not served if the term 'seizure' were stretched to apply" to this situation. Resp. Br. at 12–13. But the necessary inverse of their argument is that a public policy demands a citizen stand their ground in the face of deadly force to have any hope of invoking the

Fourth Amendment. Such a view is both absurd and self-discrediting. *Garner*, 471 U.S. at 11 (reasoning that the government "ha[s] not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life"). Ultimately, in certain circumstances, an order not to remain in a place can constitute a seizure, and this Court should grant the writ so that it can clarify that point for the circuits that have adopted a *per se* rule against finding such conduct to be a seizure.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

PATRICIA E. ROBERTS
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
Telephone: 757-221-3821

TILLMAN J. BRECKENRIDGE*
AARON J. GOLD
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
601 Pennsylvania Ave., NW,
South Tower, Suite 700
Washington, DC 20004
Telephone: 202-759-6925
tjb@piercebainbridge.com

*Counsel of Record

Counsel for Petitioner