No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES

Petitioners,

v.

JANIS MADRID AND RICHARD WILLIAMSON,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment or must physical force be successful in detaining a suspect to constitute a "seizure"

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STATEMENT OF THE CASE

On July 15, 2014, New Mexico State Police (NMSP) officers went to an apartment complex in Albuquerque to carry out an arrest warrant on Kayenta Jackson. Upon arriving, two of the officers, Respondents Janice Madrid and Richard Williamson, observed Petitioner speaking to someone near a Toyota FJ Cruiser. Unsure of who she was, the officers approached. Petitioner entered the vehicle and started the engine in response.

Both officers were positioned near the driver's side window when they witnessed Petitioner move suspiciously. Petitioner, who was under the influence of methamphetamine at the time of the incident, would later say that she believed they were "carjackers". "Freaked out" by the officers, she put the car in drive and maneuvered in their direction. Officers Madrid and Williamson perceived this as an attempt to strike them. They drew their service weapons and fired at the vehicle, striking Petitioner twice. At no point did she stop or slow down. Later, Petitioner stole another vehicle and drove 75 miles to a hospital in another town. Petitioner was ultimately arrested in the hospital on July 16, 2014.

Two years later, Petitioner filed a lawsuit against the police officers under 42 U.S.C. § 1983, alleging a violation of the Fourth Amendment. The district court said the Fourth Amendment was not triggered because Petitioner had not been "seized" by the gunfire. On appeal, the 10th Circuit Court of Appeals affirmed the decision. Petitioner petitioned this Honorable Court for a writ of certiorari, which has been granted.

INTRODUCTION

English common law gave law enforcement broad discretion to investigate and take control of people and their possessions with general warrants. By issuing these writs of assistance, the everyman was stripped bare of his rights to privacy and autonomy, beholden to the whims of police officers. James Otis, *Arguments Against Writs of Assistance* (1761) ("[The writ of assistance] appears to me… the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in the English law-book.").

The outrage and vitriol for general warrants extended to the American colonies and weighed heavily on the minds of the Founding Fathers. When the time came to draft a bill of rights protecting the individual liberties of all Americans, the Founding Fathers made clear their intention to eliminate the practice. *See* e.g. New York Ratification Convention Debates and Proceedings (1788). The final product, the Fourth Amendment, outlaws use of the general warrant while promoting the special warrant, which specifies the time, place, and manner by which a "search and seizure" could be conducted. U.S. Const. amend. IV**.**

In the years since the Constitution's ratification in 1789, the Fourth Amendment has evolved. The first modern Fourth Amendment case was Terry v. Ohio, 392 U.S. 1 (1968). For purposes of this case, *Terry*'s most important contribution was its definition of a seizure. *Id*. at 19 n.16 (Only when the officer, by means of physical force or show of authority, has in some way

restrained the liberty of a citizen may we conclude that a "seizure" has occurred.)

In *Brower*, this Court was tasked with clarifying the intent requirement of a seizure. Brower v. County of Inyo, 489 U.S. 593 (1989) (The petitioner's estate filed a suit alleging a violation of the petitioner's Fourth Amendment right against an unreasonable seizure when the police placed a roadblock trap that resulted in his death). The Court decided to affirm the relevant principle of *Terry* and give the judiciary a revised definition of "seizure". "Violation of the Fourth Amendment requires an intentional acquisition of physical control." *Id*. at 596.

Brower's definition has served as a guiding star for Fourth Amendment seizure cases across the American legal system including in Brendlin v. California 551 U.S. 11 (2007). Although this case involves detainment during a routine traffic stop, the analysis is applicable to this case. *Id*. at 5 ("stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment"). This analysis is consistent with the historical and public meaning of "seizure". In today's case neither Petitioner's physical body nor her vehicle of transportation was restricted from movement. In these circumstances, no successful seizure has occurred to invoke the spirit of the Fourth Amendment.

SUMMARY OF THE ARGUMENT

The unsuccessful attempt to detain Petitioner by using physical force does not constitute a "seizure", within the meaning of the Fourth Amendment. This court should see to the historical and public meaning of a "seizure" (requires restraint of one's freedom of

movement) as adopted in Terry *supra* at 19, Brower *supra* at 596, and Brendlin *supra* at 11. Though Officers Madrid and Williamson succeeded in hitting Petitioner, they failed to restrict her movement in any way. Not for a moment did she stop, slow down, or otherwise change her movements. Petitioner's reliance on dicta from *Hodari* does not affect the determination of this Fourth Amendment question; nor does their reliance on English common law. American jurists' interpretation of the Constitution has diverged from common law principles to the point where it is used only for guidance. Finally, ruling in favor of the Petitioner will set a precedent that overburdens the American legal system and unnecessarily and unproductively diminishes the quality of police work, damaging all of society.

ARGUMENT

I. CASES INVOLVING SEIZURES BY PHYSICAL FORCE, PARTICULARLY BROWER, CONTAIN THE DEFINITION OF "SEIZURE" THAT CONTROLS THIS CASE.

A. The definition described in *Brower* comports with the plain definition of "seizure" which requires a successful acquisition of control.

Dictionary definitions throughout all of American history have described seizures as taking possession of something. *See* 2 T. Cunningham, A New and Complete Law Dictionary (2d ed. 1771) ("take possession"); 2 N. Webster, An American Dictionary of the English Language 67 (1828) ("take possession"); 2 J. Bouvier, A Law Dictionary 510 (6th ed. 1856) ("taking possession," "seizure is complete as soon as the goods are within the power of the officer"); 2 B. Vaughan Abbott, Dictionary of Terms and Phrases 458 (1879) ("take a thing into custody," "actual control or custody"); Black's Law Dictionary 1631 (11th ed. 2019) ("forcibly take possession (of a person or property)").

This plain English meaning has also guided other facets of law such as maritime law and property law. Hodari, *supra* at 624 ("A ship still fleeing, even though under attack, would not be considered to have been seized as a war prize"); Pierson v. Post, 3 Cranch 175 (NY 1805) (A person does not have "a right of action against another" for killing an animal that he "is on the point of seizing").

In cases involving the use of physical force, *Brower* supplies a direct example for the relevant rule of decision here in our case. Officers must restrain the freedom of a person to walk away in order for a seizure to have occurred, meaning the physical force must always be successful in detaining the suspect, if only momentarily, to constitute a "seizure".

B. In this case, the Fourth Amendment can only be triggered when there is a successful seizure.

Common sense dictates that there can be no "unreasonable seizure" without a "seizure" in the first place. As the plain meaning and *Brower*'s meaning of "seizure" dictate, there was no seizure in this case.

Respondents fired at the vehicle striking Petitioner but failed to terminate her movements or even momentarily take physical control over her. Petitioner, despite the officers using the guns as physical force, managed to flee 75 miles to the next town, showing no restraints of any kind that could affect her ability to escape. While at the hospital, the next day, Petitioner was officially placed under arrest. At the second that she submitted to their show of authority, the police "seized" her. Without the initial seizure during the incident, there can be no Fourth Amendment violation.

II. THE DEFINITION OF "SEIZURE" THROUGH THE "APPLICATION OF PHYSICAL FORCE" IN HODARI D IS NOT BINDING ON THIS COURT.

In *Hodari D*, the defendant threw away a bag of a controlled substance during a foot chase with police. After managing to escape, the police discovered the discarded bag and used it as evidence during the defendant's trial. Both the lower courts and this Court agreed that the situation constituted an unsuccessful "show of authority". Grappled with a novel issue, the majority opinion clarified the definition of a "seizure" by show of authority stating that "an arrest requires… *submission* to the assertion of authority." *Id*. at 626. We do not contend that this definition is incorrect. We do, however, contend that the Court's discussion about the definition of a "seizure" by use of force was irrelevant when deciding the case's outcome, making it non-binding dicta.

We are not alone in our assessment. In fact, a plethora of lower courts have also recognized our view. *See*, *e.g.*, Thomas v. Durastanti, 607 F.3d 655, 663 (10th Cir. 2010); United States v. Dupree, 617 F.3d 724, 730 n.5 (3d Cir. 2010); Buck v. City of Albuquerque, 2007 WL 9734037, *34 (D.N.M. Apr. 11, 2007) (unpublished) ("[t]he language in Hodari D. indicating that "[t]he word 'seizure' readily bears the meaning of a[n] . . . application of physical force to restrain movement," . . . is dicta, as the actual holding was limited to the proposition that a show of authority coupled with submission to that authority constitutes a seizure")

III. COMMON LAW DOES NOT CONTROL THIS COURT'S UNDERSTANDING OF "SEIZURE" FOR THE PURPOSES OF THE FOURTH AMENDMENT.

A. Common law is used for guidance in court decisions and does not control them.

The common law principles of an arrest that Petitioner relies heavily upon bear no importance in deciding this case. Indeed, previous courts have looked to common law because of its informative discussions about issues brought forth in current courts. With that said, common law is certainly not dispositive. "Neither usage nor common-law tradition makes an attempted seizure a seizure. The common law… made many things unlawful, very few of which were elevated to constitutional proscriptions." Hodari, *supra* at 626 n.2. Justice Breyer, in his concurring opinion in *Houghton* noted that, "history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question." Wyoming v. Houghton, 526 U.S. at 307. Constitutional law issues involving seizures by using physical force have evolved beyond heavy reliance on English common law.

B. "Seizure" and "arrest" are not synonymous.

Despite Petitioner's repeated assertions, the Fourth Amendment does not bar false arrests; it bars "unreasonable seizures". Terry *supra* at 13; Posr v. Doherty, 944 F.2d 91 (2d Cir. 1991). ("Of course, just as

not every encounter between a citizen and the police is a seizure… not every seizure is an arrest"). Respectively, the definition of a "seizure" should not rest only on arrests but with common sense and common understanding. As we discussed earlier, it is *Brower*'s definition—unlike the *Hodari D* and common law definition—which comports with the common meaning of the word "seizure".

C. By ruling in favor of the Petitioner, the American legal system would be overburdened.

The courts have long held that seizures must be successful in detaining their suspects, ultimately restraining their freedom of movement. Terry *supra* at 19, Brower *supra* at 596, Brendlin *supra* at 11. If this Court were to expand on the definition of a "seizure" by including the "mere touch" or "attempted seizures" doctrine as Petitioners suggest, it would create an immense load for the American legal system. Courts would be left to sort through the legion of new cases that involve such acts, taxing an already overburdened system.

Moreover, this revised definition would weigh heavily on police officers unnecessarily. For example, if a police officer were to unsuccessfully grab at a suspect during a chase, tapping their shoulder instead, this would constitute a Fourth Amendment "seizure" under Petitioner's new meaning. This level of scrutiny could hinder police officers' ability to act quickly, for fear that

they could be sued. In turn, this would interfere with an officer's ability to conduct good police work and protect society. Effectively, the "mere touch" and "attempted seizures" doctrines would endanger not only the justice system but also society as a whole; finding in favor of the Petitioner would put us all in harm's way.

CONCLUSION

An attempt to detain a suspect by the use of physical force must be successful to constitute a "seizure" within the meaning of the Fourth Amendment as plain definitions and existing case law such as *Brower* suggest. Furthermore, Petitioner's reliance on *Hodari D* and common law arrest cases is misguided. With that, we pray that you find in our favor and affirm the lower court's decision.

Respectfully submitted.

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