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 U.S. Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

CAMPBELL COLLINS
Counsel of Record
Homeschool

GABRIELLA LOVINS

2/26/2021

QUESTIONS 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"?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....4

JURISDICTION 6

CONSTITUTIONAL PROVISIONS INVOLVED.....6

FACTS.....7

SUMMARY OF ARGUMENT.....9

ARGUMENT.....10

I. The application of physical force with intent to restrain constitutes a seizure.....10

A. The Respondents applied lethal physical force to Ms. Torres with the intent to restrain her.....10

II. Common law supports that a seizure occurred in this case.....12

A. Founding-era common law supports that a physical-force seizure does not require submission.....12

B. This Court has a long history of considering common law in decisions.....15

III. This Court's precedents support the Petitioner.....16

A. *California v. Hodari D.* gives a clear definition of physical-force seizures……...16

B. *Florida v. Bostick* upheld Hodari D.'s definition of seizure……..18

C. *Brower v. County of Inyo* offers a clear test for a seizure that agrees with *Hodari D.*……..……19

IV. Shrinking the definition of "seizure" removes many protections intended by the Framers……...20

CONCLUSION……..22

TABLE OF AUTHORITIES

CASES

PAGE(S)

Brower v. County of Inyo,

489 U.S. 593 (1989) ……..……19, 20

Byrd v. United States,

584 U.S. ___, (2018)…….……16

California v. Hodari D.,

499 U.S. 621 (1991).....3, 9, 11, 16, 17, 18, 19, 20, 21

Carpenter v. United States,

138 S. Ct. 2206 (2018)…….……15

Cupp v. Murphy,

512 U.S. 291 (1973)……..……10

Florida v. Bostick,

501 U.S. 429, (1991)…….……...…18

Entick v. Carrington

(1765) 95 Eng. Rep. 807……...……..14

Henry v. United States,

361 U.S. 98 (1959)……...…..……14

Terry v. Ohio,

392 U.S. 1 (1968)……...……9, 10, 11

United States v. Jones,

565 U.S. 400 (2012)……..…16

United States v. Martinez-Fuerte,

428 U.S. 543 (1976)…….……21

United States v. Se. Underwriters Ass'n,

322 U.S. 533 (1944)……...…12, 15

United States v. Watson,

423 U.S. 411 (1976)……...……...12

Wilson v. Arkansas,

514 U.S. 931 (1995)……..…15

CODES, RULES, & STATUTES

42 U.S.C. 1983

OTHER AUTHORITIES

George Mason, *Virginia Declaration of Rights* (adopted June 12, 1776).

James Otis, *Arguments Against Writs of Assistance* (Feb. 1761).

Massachusetts Declaration of Rights (enacted 1780).

To the Farmers and Planters of Maryland, Md. J. (Apr. 1, 1788), in *The Complete Anti-Federalist.*

JURISDICTION

This case comes to the Court on writ of certiorari from the Tenth Circuit Court, arising under jurisdiction granted by 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.

FACTS

On July 15, 2014, Petitioner Roxanne Torres parked in the lot of an apartment complex. It was dark, and there were cars packed on either side of her. Four New Mexico state police officers—Respondents Janice Madrid and Richard Williamson, along with two other officers—approached her. They were there to arrest a different woman who had no relation to Ms. Torres. Ms. Torres, who had used methamphetamine, was standing in the parking lot when the officers approached. They had arrived and parked in unmarked vehicles, and both Respondents wore dark-colored tactical gear, not uniforms.

Ms. Torres saw the officers and quickly got in her car and started it. Madrid and Williamson approached Ms. Torres's locked and running car, tapped on the glass, and allegedly shouted commands at her, although she testified to not hearing them. The officers, who surrounded her car at the window and the front wheel, attempted to open her car door. Both held guns. Ms. Torres only saw people in dark clothes holding guns and assumed she was being carjacked. At no time before Ms. Torres was taken into custody did she understand they were police. She drove forward to protect herself.

Both officers fired shots aimed at Ms. Torres the second her car inched forward. While Madrid claimed that she thought she would be hit by the car, she was not in front of the vehicle, and bullet trajectory analysis showed that her shots came from the side, not the front. The Respondents did not stop at merely a few shots; together, they fired thirteen shots at the Petitioner. Many

hit her car, and two hit her in the back, temporarily paralyzing her left arm.

Ms. Torres escaped the volley of bullets fired at her, but soon lost control of her car and stopped. She laid on the ground attempting to give the "carjackers" what they wanted. She asked a nearby person to call the police and received no response, prompting her to drive to a hospital in a nearby running car to get urgent medical attention. She did not stop until she arrived at a hospital in Grants, New Mexico. Her injuries were so severe she was airlifted to a bigger hospital in Albuquerque to save her life. The day after she arrived at the hospital, she was arrested on three charges based on the incident, aggravated fleeing from a law-enforcement officer (Officer Williamson), assault on a police officer (Officer Madrid), and unlawfully taking a motor vehicle. She pleaded no contest.

In October 2016, Ms. Torres filed a civil rights action under 42 U.S.C. 1983, claiming the respondents violated her Fourth Amendment rights by using excessive force against her. Respondents argued they were entitled to qualified immunity as they believed their force was reasonable and did not violate any laws. Furthermore, they claim Ms. Torres was never seized and therefore Ms. Torres had no Fourth Amendment claim. The magistrate judge granted a summary judgment motion related to the argument that there was no seizure and dismissed the case with prejudice.

The court of appeals affirmed the lower court's decision that there was no Fourth Amendment seizure.

SUMMARY OF ARGUMENT

When the respondents' bullets penetrated Ms. Torres's body, she was seized under the Fourth Amendment even though she evaded capture for a day.

Since before the founding era, common law defined seizures as any time physical force was applied with the intent to restrict freedom. The respondents applied lethal physical force to Ms. Torres by firing bullets into her body, causing her serious injury and leaving her left arm temporarily paralyzed and unusable. Ms. Torres was seized because the force was applied with the *intent* to restrain her, which constitutes a common-law arrest.

The Fourth Amendment was drafted assuming that the accepted definition of seizure would include common law. In *California v. Hodari D.*, this definition was upheld. This Court defined a seizure as occurring from either a show of authority that leads to submission from the suspect, or physical force which does not need to end in the submission of the suspect. 499 U.S. 621, 626.

Defining the shots that hit Ms. Torres as a seizure does not expand the definition of seizure; rather, it upholds the original meaning of the Fourth Amendment and provides the full protection the Framers intended. This Court must uphold all rights given at the founding, while keeping the end goal of the Fourth Amendment—protecting "personal security"—in mind. *See Terry v. Ohio,* 392 U.S. 1, 19 (1968). Unreasonable seizures violate personal

security regardless of the subsequent actions of the suspect.

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

ARGUMENT

I. The application of physical force with intent to restrain constitutes a seizure.

A. The Respondents applied lethal physical force to Ms. Torres with the intent to restrain her.

When the bullets fired from the Respondents' guns penetrated Ms. Torres's body, she was seized in a Fourth Amendment sense. The fundamental purpose of the Fourth Amendment is to protect an individual's "personal security." *Terry v. Ohio,* 392 U.S. 1, 19 (1968). When the government intrudes into the body, an action that is "subject to constitutional scrutiny," it invades this personal security. *Cupp v. Murphy,* 512 U.S. 291, 295 (1973) (internal citations omitted). Ms. Torres was shot repeatedly; bullets tore through her tissues and caused her serious injury. This is an invasion of personal security that violates the Fourth Amendment.

The Fourth Amendment specifically protects against the invasions of personal security caused by "unreasonable searches and seizures." U.S. Const. amend. 4. When police intentionally restrain an individual's freedom of movement, a seizure occurs. There are two ways for a police officer to do this:

through "physical force" or a "show of authority" that "in some way restrain[s] the liberty of a citizen" *Terry v. Ohio,* 392 U. S. 1, 19, n. 16 (1968). The two police officers in this case applied physical force to Ms. Torres. They shot multiple bullets at her; several of these bullets penetrated her car, and two hit her. Each bullet applied force, and each was fired with the intent to stop her, allegedly because the Respondents thought she would hit them with her car. Each shot that made contact with her was a seizure. These were not continuing seizures; they only lasted for the moment of impact of each bullet. But in the moments Ms. Torres was hit, she was seized.

Not only was force applied to Ms. Torres with intent to restrain, but her freedom of movement was also directly impaired—although this is not required for a physical force seizure. *See California v. Hodari D.,* 499 U.S. at 626 (1991). Ms. Torres's left arm was temporarily paralyzed. Her movement was limited; the only question in this case is whether a seizure can occur if she did not stop.

The Fourth Amendment was designed to dictate the actions of police and not the responses of subjects. Its original purpose was preventing British officials from using writs of assistance, or general warrants, to search houses and ships without due process. James Otis, *Arguments Against Writs of Assistance* (Feb. 1761). A court decision that bases the definition of a seizure on what individuals do after a clear show of force seizure by the police—not a show of authority seizure, which is based on different criteria—does not serve this principle. This type of

decision would also lead to unreasonable results and arbitrary distinctions. Does a seizure occur when a fleeing suspect stops after two miles? Two feet? Two inches? The clearest way to define a seizure, and the definition that is most useful to police officers in real-world scenarios, is one in which any application of physical force, with the intent to restrain, is a seizure—regardless of the response of the suspect.

Both common law and case law support this view of the amendment's protections, and both show that a violation of the Fourth Amendment occurred in this case.

II. Common law supports that a seizure occurred in this case.

A. Founding-era common law supports that a physical-force seizure does not require submission.

The shots that hit Ms. Torres were physical-force seizures as defined by Founding Era common law. *See United States v. Watson,* 423 U.S. 411, 419 (1976). "Common-law arrests" included any application of physical force, not dependent on whether the suspect escaped. This Court generally includes founding-era definitions in its interpretation of the Constitution and its amendments, and it specifically does not give words "a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539 (1944). Thus, physical-force seizures must be included in the amendment's protections. At

the time of the founding, as today, those seizures are not dependent on the individual's response.

In "common parlance," the use of the term "seizure" in the eighteenth century did not require the continued possession of an object or a person. This use is clear in the phrase "*seize* it and *carry it away* with them." *To the Farmers and Planters of Maryland,* Md. J. (Apr. 1, 1788) (emphasis added). A seizure in itself does not imply that the person or object was "carried away." Even today, it is correct to say, "I seized my brother's arm, but he jerked away and continued running." Neither common law nor case law provides a reason for excluding this use from the definition of a physical-force seizure, and doing so would artificially limit the protections of the Fourth Amendment.

When a person is seized, this means that the individual does not necessarily need to submit for a seizure to occur. The moment force was applied to Ms. Torres, she was seized in a common-law sense. Her behavior after the application of physical force by the police is not relevant to the presence or absence of a seizure in this sense, because the common-law definition of seizure included instances in which subjects escaped after physical contact. In multiple cases at the time of the founding, the court held that "merely touching" a defendant was a seizure. *See, e.g., Genner v. Sparks* ("if...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). The future actions of the suspect did not matter in these cases, and they should not matter here.

This definition of a seizure is consistent with the original aim of the Fourth Amendment, which was to prevent the "villainy" of general warrants and writs of assistance. James Otis, *Arguments Against Writs of Assistance* (Feb. 1961). George Mason, *Virginia Declaration of Rights* (adopted June 12, 1776). These warrants "perpetuated the oppressive practice of allowing the police to arrest and search on suspicion." *Henry v. United States*, 361 U.S. 98, 100 (1959). They violated personal security. These types of searches are related to seizures, as the *Massachusetts Declaration of Rights* shows, equating "search[es] in suspected *places," "*arrests[s]...[of] *persons*," and "seiz[ures] [of] *property.*" (enacted 1780) (emphasis added). The violations of personal security that occur when police officers apply force to a suspect in a common-law seizure are similar to those from general warrants that the amendment was explicitly created to forbid.

The Framers looked at the Fourth Amendment through the lens of common law and understood their words to protect citizens against *all* seizures, not just those where the officer subdued the suspect. This is consistent with the founding-era view of the use of the term "arrest" when referring to the "seizure" of a person, and the use of "arrest" to refer to the "merest physical contact." *See Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817. In this case, the force applied to Ms. Torres meets the definition of a founding-era seizure and therefore the seizure falls under Fourth Amendment protections.

B. This Court has a long history of considering common law in decisions.

The Framers understood that seizures did not require submission. This Court cannot construe the protections of the Fourth Amendment as less than those at the time of the founding, which means that the court must include protections against physical-force seizures, which do not require submission. This Court should not "construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539 (1944). Excluding clearly defined physical-force seizures from Fourth Amendment protections would violate this principle, something that this Court has decided against in previous cases involving Fourth Amendment searches.

This Court has consistently included the "traditional protections" afforded to citizens at the founding under the Fourth Amendment, specifically indicating that "[i]n evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In a long series of cases, this Court has interpreted those protections as including eighteenth- and nineteenth-century common law. In *Carpenter v. United States,* the Court noted that, in cases concerning surveillance technology, it must base decisions on "founding-era understandings." 585 U.S. ___, 2244 (2018). In *United*

States v. Jones, this court described how the interpretation of Fourth Amendment searches was based on "*common-law* trespass" for two centuries after the founding. *See United States v. Jones* 565 US 400 (emphasis added). Nowhere does this Court state that founding-era definitions must be *excluded* from the purview of the Fourth Amendment. On the contrary, this court has held that "modern Fourth Amendment tests 'supplement[] rather than displace[]'" the common-law definition of a seizure. *Byrd v. United States,* 584 U.S. ___, (2018). Thus, any case law since the founding can only increase the protections that were included under the amendment in its original sense.

Physical-force seizures do not require submission. This is clear from the use of the word "seizure" at the founding. This Court has not—and should not—exclude clear founding-era definitions from the purview of the Fourth Amendment. In similar cases to this one, this Court has explicitly included those protections, and it should do so here.

III. This Court's precedents support the Petitioner.

A. *California v. Hodari D.* gives a clear definition of physical-force seizures.

This Court's precedent follows the common law of arrest, defining physical force as a seizure. A seizure "requires either physical force ... or, where that is absent, submission to the assertion of authority." *California v. Hodari D.,* 499 U.S. at 637. *Hodari D.* also gives a clear definition of what that

physical force is, stating, "[t]o constitute an arrest, ...—the quintessential "seizure of the person" under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, *whether or not it succeeded* in subduing the arrestee, was sufficient." *California v. Hodari D.,* 499 U.S. at 624 (emphasis added). The court distinguished between show-of-authority seizures, which do require submission, and physical force seizures which do. A show of authority seizure happens when an officer tells a suspect to stop, and the suspect then submits themselves to the officer. A show of authority seizure does not happen without the submission of the suspect. A physical force seizure happens whenever an officer applies force to the suspect with the intent to restrain. *Hodari D.* held that this type of seizure does not require submission from the suspect.

Under this definition, each bullet that hit Ms. Torres was a seizure. This does not mean that there was a "continuing arrest" the entire time the bullets remained in Ms. Torres's body. *California v. Hodari D.* 499 U.S. at 625. The bullets were not the seizure. The force applied to her when the bullets hit her was. Because it was based on physical force, this seizure did not require Ms. Torres's submission.

Hodari D. distinguished between show-of-authority seizures, which require submission, and physical-force seizures, which do not. This conclusion was relevant to the Court's decision in *Hodari D.* and there is no cause for this Court to overturn its statements in *Hodari D.* Because the respondents seized Ms. Torres using physical force,

no submission was required.

B. *Florida v. Bostick* upheld Hodari D.'s definition of seizure.

Florida v. Bostick held, "So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Florida v. Bostick,* 501 U.S 429 (1991) (citing *California v. Hodari D.,* 499 U. S. 621, 628 (1991)) Ms. Torres did not give consent to have bullets shot into her back. She did not give consent to be so injured that she needed to be airlifted to a hospital. She did not feel "free" to leave; instead, she fought against the restraint of her freedom in an attempt to save her life. Firing bullets at an individual is the ultimate indication that they are not free to leave. The lack of submission from Ms. Torres does not change that. Furthermore, the *Bostick* court never addressed whether a seizure had occurred if the suspect had not submitted to force and focused on the non-consensual nature of unconstitutional searches and seizures.

In *Bostick,* the court also held 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." *Florida v. Bostick,* 501 U.S. at 434. The *Bostick* court based its definition of a seizure on *Hodari D.;* when they say physical force or show of authority, they are confirming the statements in

Hodari D. and upholding the common law definition. There is no possible way to conclude they suddenly ignored the dichotomy between physical-force and show-of-authority seizures that the *Hodari* court laid out.

C. *Brower v. County of Inyo* offers a clear test for a seizure that agrees with *Hodari D.*

In *Brower v. County of Inyo,* this Court laid out a test to determine what qualifies as a seizure, defining one as any time "when there is a governmental termination of freedom of movement through means *intentionally applied*" *Brower v. County of Inyo* 489 US 593, 597 (1989) (emphasis added), The *Brower* court was answering a specific question: does a seizure occur when officers apply physical force without the intent to restrain a suspect? This is different from the question in Ms. Torres's case, which is whether a seizure occurs when officers apply physical force intended to restrain a suspect, but that suspect does not fully stop. In fact, the *Brower* court never addressed whether a seizure would have occurred if Brower had not stopped. The distinction in *Brower* was not between stopping and not stopping, nor even between show-of-authority seizures and physical-force seizures. Instead, it was between the *intentional* application of physical force and the *unintentional* application of physical force. In *Brower,* this court found that only application of physical force with intent constituted a seizure.

The Respondents met this standard when they fired bullets meant to restrain Ms. Torres. Because the *intent* to restrain was present in each shot that

hit Ms. Torres, that satisfied the test in the *Brower* court's holding despite her flight.

Brower also demonstrates that the touch does not need to be direct to qualify as a common-law seizure. This Court held that it "was enough...that...Brower was meant to be stopped by the physical obstacle of the roadblock." *Brower v. County of Inyo,* 489 US at 599. In the same way, Ms. Torres was meant to be stopped by the bullets, making them a physical-force seizure.

By the holdings in both *Brower* and *Hodari D.*, officers seize subjects when they touch with the *intent* to restrain but never when they touch *without* that intent. In this case, the intent of the police was clear: they shot a fleeing suspect multiple times, attempting to stop her from leaving the parking lot. The shots that hit Ms. Torres fulfilled the requirements that *Brower* and *Hodari D.* impose for a physical-force seizure.

Including physical-force seizures under the Fourth Amendment does not extend its protections beyond what the Founders intended. Rather, it follows the original common-law meaning as well as this Court's past holdings.

IV. Shrinking the definition of "seizure" removes many protections intended by the Framers.

Applying the definition of seizures found in both common caw and *Hodari D.* removes a loophole allowing officers to escape liability for unreasonable

intrusions on the security of private citizens.

The Fourth Amendment offers protection against *all* unreasonable searches and seizures. Without this protection, every police officer may be a tyrant. The abuse comes from the officer, not the suspect. The focus of its protections is on officers and their actions, not the responses of suspects. The amendment was meant to cover all violations and protect individuals from "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

The original, most narrow aim of the Fourth Amendment reflects this focus. At the time of the Founding, people were terrorized with "writs of assistance," that is, general search warrants that allowed anything that looked suspicious to be investigated without due process for those whose property was being searched. The colonists saw this as a "villainy," an instrument of "arbitrary power." James Otis, *Arguments Against Writs of Assistance* (Feb. 1761). The Framers intended to prevent this and other infringements on citizens' rights. They did this with the Fourth Amendment. From the beginning, it was aimed at the actions of officers, not how suspects would react to those actions. The Fourth Amendment was written to protect individuals from intrusions into their personal security.

If the standard of what is acceptable conduct from officers is based on whether or not the suspect was immediately taken into custody, it will allow

officers to commit dangerous or reckless violations of the Fourth Amendment without sufficient recourse for victims. Policing has greatly evolved since the 1700s and has gained much greater potential for violating citizens' rights, making it more important to cement the right of the people to be safe from all seizures that the Framers attempted to protect against.

Police officers have been given immense power to restrain individuals for suspicious behavior. This power creates safer environments as long as it does not infringe on the rights of the people. The Constitution was designed to provide the necessary restraints on government and police power. Narrowing the meaning of seizure to protect fewer rights than intended fails to fulfill the intent of the Framers. Without this definition of seizure, an officer can get away with gross misconduct based on the escape of the suspect. Officers cannot be held to a lower standard based on the actions of a suspect.

CONCLUSION

The history of common law in this country includes physical force with intent to restrain as a seizure, regardless of whether a suspect submits, and this Court's prior rulings support this definition. Categorizing seizures based on submission would force this Court to make illogical distinctions that reinforce dangerous behavior from law enforcement officers. This Court should grant Ms. Torres's appeal and reverse the judgment of the Court of Appeals.

Respectfully submitted,

CAMPBELL COLLINS
COUNSEL OF RECORD
HOMESCHOOL
5116 CONCHO CREEK BND
AUSTIN, TX 78735
512-658-1685
CAMPBELLCOLLINS@GMAIL.COM

GABRIELLA LOVINS
Waterloo Austin
1511 S Congress Ave,
Austin, TX 78704
512-906-9592
ellaglovins@gmail.com

[2/26/21]