No. 19-292

In The
Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

v.

JANICE MADRID &
RICHARD WILLIAMSON,

Respondents.

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

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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February 7, 2020

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment to the United States Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

[1] This amicus brief is filed with the consent of Petitioner and Respondents. No counsel for a party authored this brief in whole or in part; nor has any person or entity, other than Restore the Fourth and its counsel, contributed money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Mitchell v. Wisconsin*, No. 18-6210 (U.S. filed Mar. 4, 2019); Brief of *Amicus Curiae*, Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Byrd v. United States*, No. 16-1371 (U.S. filed Nov. 16, 2017).

SUMMARY OF THE ARGUMENT

Over the course of 150 years, the common law achieved a deep understanding about what is—and is not—an arrest. This tradition uniformly establishes that "[a]n arrest requires either physical force" or "submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). In short, arrests may be either *physical* or *constructive*.

The common law also teaches that any amount of physical force, even if unsuccessful, will prove an arrest. *See id.* at 625. Yet, the Tenth Circuit here ruled that gunfire used to restrain Petitioner Torres was no arrest because Petitioner "did not stop or otherwise submit to the officers' authority." *Torres v. Madrid*, 769 F. App'x 654, 656–57 (10th Cir. 2019).

This is a problem. Courts are bound to uphold "that degree of privacy against government that existed when the Fourth Amendment was adopted." *United States v. Jones*, 565 U.S. 400, 406 (2012). The decision below cannot be squared with this mandate or the indispensable rights that it protects.

This case, then, is about more than just the meaning of arrest. This case is about the respect that courts owe to common-law history in deciding Fourth Amendment disputes. The Court should now use this case to drive home this principle, so that "[r]ights declared in words" are not "lost in reality." *Weems v. United States*, 217 U.S. 349, 374 (1910).

ARGUMENT

I. This case exemplifies a bigger problem: lower court neglect of common law history in gauging searches and seizures.

The Fourth Amendment secures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In *United States v. Jones*, 565 U.S. 400 (2012), this Court reinvigorated the importance of consulting the common law of trespass in applying this guarantee. *Id.* at 409. Rightly so: "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the [specific] areas . . . it enumerates." *Id.* at 406.

By emphasizing the rightful place of common-law history in Fourth Amendment law, the Court restored "an irreducible constitutional minimum." *Id.* at 414 (Sotomayor, J., concurring). And this limit matters now more than ever before given the pace at which new technology is enabling the police "to shrink the realm of guaranteed privacy."[3] *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Indeed, a focus on history reminds all courts of their duty to uphold "that degree of privacy

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[3] *See, e.g.*, Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES, Jan. 18, 2020, https://nyti.ms/2NEbiJZ (secret use of new facial recognition software by over 600 law enforcement agencies); Jennifer Valentino-DeVries, *Police Snap Up Cheap Cellphone Trackers*, WALL ST. J., Aug. 19, 2015, http://on.wsj.com/2ux3Ep0.

against government that existed when the Fourth Amendment was adopted." *Jones*, 565 U.S. at 406.

Jones's critical achievement is now in jeopardy. "American courts are pretty rusty at applying the traditional approach to the Fourth Amendment." *Carpenter v. United States*, 132 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting). This approach calls for careful review of "the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). Only then is it possible to extend "the specific rights known at the founding" to "their modern analogues." *Carpenter*, 132 S. Ct. at 2271 (Gorsuch, J., dissenting).

Unfortunately, faced with this task, lower courts have opted for an easier path: neglecting common-law history altogether. An illustrative example is *LMP Services, Inc. v. City of Chicago*, 95 N.E.3d 1258 (Ill. App. Ct. 2017), *aff'd*, No. 123123, 2019 Ill. LEXIS 658 (Ill. May 23, 2019). An Illinois state court ruled that no "search" was entailed by a city ordinance requiring all food trucks to have global-positioning-system (GPS) devices and provide the GPS data to the city. *See id.* at 1265, 1274–76.

In reaching this conclusion, the court made no effort to review "the common law when the [Fourth] Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The court instead assumed that this tradition only concerned *physical* intrusions. *See LMP Servs.*, 95 N.E.3d at 1275–76. And on this basis,

the court found that the GPS requirement was not a "search" as the city did not "physically enter[ ] [a] . . . food truck to place [a] [GPS] device" and none of the GPS devices were "[c]ity property." *Id.*

Such reasoning neglects common-law history establishing a long-standing doctrine of "constructive trespass." *Haythorn v. Rushforth*, 19 N.J.L. 160, 165 (1842) (collecting cases). Under this doctrine, "any unlawful interference with or assertion of control over the property of another" is a trespass. *Wall & Wall v. Osborn*, 12 Wend. 39, 40 (N.Y. Sup. Ct. 1834). This enabled the common law to reach a "threat[ ] to remove goods . . . although the goods are not touched by the officer." *Haythorn*, 19 N.J.L. at 165.

In light of this history, the GPS requirement in *LMP Services* was a "search," as it was an "assertion of control over the property of another," with the City mandating "under pretence of . . . right" that all food trucks must contain a GPS device. *Id.* The only way to avoid this conclusion is to neglect common-law history by focusing on the lack of a *physical* trespass despite the presence of a *constructive*[4] one. And that is just what the Illinois court in *LMP Services* did. *See* 95 N.E.3d at 1276 (finding the lack of a "*physical* occupation of property" to be the "key issue").

The present case, *Torres*, neglects common-law history in the other direction: by focusing on the lack of a *constructive* trespass despite the presence of a

[4] "Constructive" means "[l]egally imputed" or "having an effect in law though not necessarily in fact." BLACK'S LAW DICTIONARY 333 (8th ed. 2004).

physical one. To appreciate this point, one must begin with *California v. Hodari D.*, 499 U.S. 621 (1991). At issue was whether certain police conduct was an "arrest"—i.e., a seizure of the person governed by the Fourth Amendment. *See id.* at 625–26. The Court held that common-law history answered this question through its separate recognition of *physical* and *constructive* arrests: "[a]n arrest requires *either* physical force . . . *or*, where that is absent, submission to the assertion of authority." *Id.* at 626 & n.2.

The Court also highlighted why this difference matters when a "subject does not yield." *Id.* Under the common law, this meant no *constructive* arrest existed. *See id.* But a *physical* arrest simply required intentional "application of physical force to restrain movement, **even when it is ultimately unsuccessful**." *Id.* (bold added). Also, "the slightest application of physical force" would do. *Id.* at 625. The Court thus recognized—consistent with its later analysis in *Jones*—that "[t]he 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." *United States v. Carloss*, 818 F.3d 988, 1011 (10th Cir. 2016) (Gorsuch, J., dissenting).

The Tenth Circuit's decision in *Torres* pays no mind to this reality. *See Torres v. Madrid*, 769 F. App'x 654 (10th Cir. 2019). To stop Roxanne Torres from leaving the site of a police raid, officers shot Torres twice—i.e., an intentional use of physical force to restrain movement. *See id.* at. 655–56. Yet, a Tenth Circuit

panel ruled that the shooting was no arrest because "[d]espite being shot, Torres did not stop or otherwise submit to the officers' authority." *Id.* at 657. Such analysis collapses the legal distinction between *constructive* arrests (which require a show of submission) and *physical* arrests (which do not). And this is no small detail, but rather a central aspect of common-law history that *Hodari D.* expressly strives to carry forward.[5] *See* 499 U.S. at 626 & n.2.

This makes *Torres* another case of a lower court neglecting "the norms that the Fourth Amendment was meant to preserve." *Moore*, 553 U.S. at 168. Such neglect obviously erodes this Court's achievement in restoring common-law history as a core protection against unreasonable searches and seizures. *Jones*, 565 U.S. at 406. Less obvious—but no less important—is how such neglect also erodes the common law's own achievement in limiting the power of search and seizure. This is especially true here, with the Tenth Circuit's decision in *Torres* serving to unravel the

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[5] Later decisions of this Court do not detract from this point (contrary to the Tenth Circuit's view). In *County of Sacramento v. Lewis*, 532 U.S. 833 (1998), the Court held that a person is seized under the Fourth Amendment "only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* at 844 (emphasis in original). And in *Brendlin v. California*, 551 U.S. 249 (2007), the Court held "there is no seizure without actual submission" when the police attempt to arrest "by a show of authority and without the use of physical force." *Id.* at 254. In neither case did the Court suggest that it was abandoning *Hodari D.*'s rule that a Fourth Amendment seizure exists whenever physical force is intentionally used to make an arrest, even if the arrestee does not yield.

common law's accumulated wisdom that arrests may be either physical or constructive in nature.

II. Out of respect for the person, the common law recognized that an arrest could be either physical or constructive.

"No right [was] held more sacred, or [was] more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ."[6] *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Hence, "[a]t common law . . . the [mere] touching of one person by another without consent and without legal justification was a battery." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). The common law even dictated that so long as it was "worn on the person," jewelry could not be immediately seized in order to recover a debt. *Union Pac. Ry. Co.*, 141 U.S. at 251.

Consistent with this view of the person, the common law's first and foremost definition of arrest[7] was a

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[6] *See also*, *e.g.*, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27 (1690) (explaining that every individual has a property right "in his own person"); SIR MATTHEW HALE, ANALYSIS OF THE LAW: BEING A SCHEME, OR ABSTRACT, OF THE SEVERAL TITLES & PARTITIONS OF THE LAW OF ENGLAND 100 (London: E. Nutt 1716) ("Every man has a right to his own person; and a wrong done to that is nearest to him, because a man has the greatest property in his own person.").

[7] 'Arrest' derives "from the French, *arreter*, to stop or stay, and signifies a restraint of a man's person; depriving him of his own will and liberty, and binding him to become obedient to the

physical one: "[a]n arrest must be by corporal seising or touching the defendant's body."[8] Early decisions put this in concrete terms. In 1676, a court found the "taking" of a person where a bailiff caught the person "by the hand." *Anonymous* (1676) 86 Eng. Rep. 197 (KB). And in 1702, a court ruled: "If a window be open, and a bailiff put in his hand and touch one against whom [the bailiff] has a warrant, [the person] is thereby [the bailiff's] prisoner . . . ." *Anonymous* (1702) 87 Eng. Rep. 1060 (QB).

By tying arrests to physical contact, the common law protected individuals in two main ways. **First**, this standard upheld the safety of persons in their own homes—so long as they avoided open windows. A bailiff could not "break[] open the house" to reach the subject of a warrant unless the bailiff had first touched the subject.[9] **Second**, this standard afforded a bright-line way for persons (including officers) to know when they could be held liable for an escape or rescue. "[For] there could not be . . . an escape or a rescue of a person, unless he is first arrested." *Whithead v. Keyes*, 85 Mass. 495, 501 (1862).

The common law's physical view of arrests was put to the test in the seminal 1704 case of *Genner v.*

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will of the law. It is called the beginning of imprisonment." *Legrand v. Bedinger*, 20 Ky. 539, 540 (1827).

[8] 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 288 (1769).

[9] *Id.* (absent physical contact with the subject of a warrant, a bailiff "ha[d] . . . no power" to enter the subject's home and instead had to "watch [for] his opportunity to arrest").

Sparks, 87 Eng. Rep. 928 (QB) (per curiam). Genner was a bailiff who had a warrant for Sparks. *Id.* at 928. Genner came to Sparks' home and found Sparks in the yard. *Id.* Genner "pronounced the word *arrest*, but did not lay his hands on [Sparks]." *Id.* Sparks then "snatched up a pitchfork" and used it to keep Genner at bay. *Id.* Sparks finally "retreated into his house and shut the door against [Genner]." *Id.*

The court held there was "no arrest" because Genner never "laid [his] hands" on Sparks. *Id.* Had Genner "touched [Sparks] . . . even with the end of his finger," this would "[have] been an arrest." *Id.* at 929. But Genner "pronouncing the word 'arrest,' without touching [Sparks]" fell short. *Id.* at 928. In the court's view, this was "no more an arrest" than a bailiff telling a person at a distance looking out a window that the bailiff was "arrest[ing] him." *Id.* at 928–29.

Genner thus affirmed the common law's physical view of arrests. The case also exposed key problems with this view being the only way to prove an arrest. If every arrest required some form of physical contact, every arrest necessarily risked a physical altercation or bodily injury.[10] Put another way, a physical view of arrest undercut the idea that "[i]f an officer say

[10] *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130 (1768) ("For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion.").

to [a] party, 'I arrest you in the *king's name,*' the party . . . ought to obey him."[11]

The common law's physical view of arrests also did not account for the fact that officers were "not obliged to use violence or menace" in making arrests, "but had a right to abstain from any unnecessary force." *Josselyn v. McAllister*, 25 Mich. 45, 48 (1872). Arrests lacking physicality, in turn, were no less arrests. In 1736, Chief Justice Hardwicke illustrated this point with a hypothetical: "if a bailiff comes into a room, and tells the defendant he arrests him, and locks the door, that is an arrest." *William & Jones & Others* (1736), 95 Eng. Rep. 193, 194 (KB).

Enter *Horner v. Battyn* (KB 1738).[12] At issue was an objection to a acquiesced-to arrest because "the bailiff . . . never touched the defendant."[13] The court overruled the objection, finding "[t]his is a good arrest."[14] The court explained that if a person "go[es] or fle[es] from [a bailiff], it could be no arrest unless the bailiff had laid hold of him."[15] But if a bailiff says to a person

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[11] 1 WILLIAM DICKINSON, A PRACTICAL EXPOSITION OF THE LAW RELATIVE TO THE OFFICE AND DUTIES OF A JUSTICE OF THE PEACE 117 (London: Reed & Hunter 1813).

[12] *Reported in*: WILLIAM LOYD, CASES ON CIVIL PROCEDURE 798 (1916); *see also*, *e.g.*, *Pike v. Hanson*, 9 N.H. 491, 493 (1838) (citing *Horner*); *Hollister v. Goodale*, 8 Conn. 332, 335 (1831) (same); *see generally* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 61–62 (London: W. Strahan & M. Woodfall 1772) (detailing *Horner*).

[13] LOYD, *supra* note 12, at 798.

[14] *Id.*

[15] *Id.*

"[y]ou are my prisoner," and the person then "submits . . . or goes with him," this is an arrest "because [the person] submitted."[16] It did not matter that the bailiff "never touched" the person.[17]

This was a watershed moment for the common law: the innovation of a *constructive* view of arrests. *Horner* made it possible for the law to recognize an arrest without inviting violence or a risk of injury.[18] And *Horner* did this while observing (as the physical view did) that "[m]ere words will not constitute an arrest." *Russen v. Lucas* (KB 1824).[19] The essential ingredient of a constructive arrest was *a show of submission*: "if [a] party acquiesces in the arrest, and goes with the officer, it will be a good arrest."[20]

The common law fast embraced this reasoning. Shortly after *Horner* was decided, Chief Justice Lee declared: "though a man is not touched, yet if he knows there is a process against him, and submit to it, it is an arrest." *Sheriff of Hampshire v. Godfrey* (1738), 87 Eng. Rep. 1247, 1247 (KB). Justice Probyn further detailed when submission to an arrest may be inferred: "If no hands are laid upon a man, but his horse is stopped,

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[16] *Id.*

[17] *Id.*

[18] *See Pike*, 9 N.H. at 493 (adopting a constructive view of arrest because persons are "not obliged to incur the risk of personal violence and insult" that physical arrests pose).

[19] *Reported in*: 1 F. A. CARRINGTON & J. PAYNE, REPORTS OF CASES ARGUED & RULED AT NISI PRIUS 153 (1825).

[20] *Id.*

and he prays to go to a house to [stable the horse], it is a submission . . . ." *Id.*

None of this, however, lessened the common law's separate appreciation of physical arrests. Just consider *Sandon v. Jervis* (QB 1858).[21] All three presiding judges reaffirmed *Genner* and the physical view.[22] Justice Erle deemed it "clear" that "the touch of the sheriff's officer constitutes an arrest."[23] Justice Compton agreed: "The touch is the test, and it is no part of the test that the officer must have corporal possession of the party."[24] Justice Hill finally declared that "touching in the most indefinite manner is sufficient" to prove an arrest.[25]

Such analysis then confirms that the common law's development of a constructive view of arrests neither replaced nor merged with the common law's original physical view of arrests.[26] Rather, the two operated side by side. This can be seen in cases like *Simpson v. Hill* (KB 1795),[27] where Chief Justice Eyre explains that an arrest would occur if **either**: (1) a constable

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[21] *Reported in*: 4 THE JURIST (NEW SERIES) 737–38 (1859).

[22] *See id.*

[23] *Id.* at 738.

[24] *Id.*

[25] *See id.*

[26] This resembles the Court's observation in *Jones* that when it comes to government searches, "the *Katz* reasonable-expectation-of-privacy test has been added to, *not substituted for*, the common-law trespassory test." 565 U.S. at 409.

[27] *Reported in*: 1 ISAAC ESPINASSE, REPORTS OF CASES ARGUED & RULED AT NISI PRIUS 431 (London: G. Auld 1801).

"tapped" a person "on the shoulder" and told her "You are my prisoner"; **or** (2) a person "submitted herself" into a "[constable's] custody."[28] *Berry v. Adamson* (KB 1827) then offers the ultimate distillation of this point: to decide a false-arrest claim, a court must first consider if the plaintiff has "either **actually** or **constructively** been arrested?"[29]

The same understanding may be seen in leading common-law treatises of the founding era. As one such treatise explained: "[t]o constitute an arrest, the party . . . must **either** be actually touched by the officer . . . **or** must submit himself either by words or actions to be in custody."[30] Another major treatise offered a similar description: an arrest could be made by "laying hold of the prisoner and pronouncing words of arrest" or "without . . . laying hold of him, if he had before submitted to the arrest."[31]

American state courts took notice. For example, in 1862, the Massachusetts Supreme Judicial Court adopted the common law's physical view of arrests. *See Whithead v. Keyes*, 85 Mass. 495, 501 (1862) ("[A]n officer effects an arrest of a person . . . by laying his hand on him for the purpose of arresting him, though he may

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[28] *Id.*

[29] *Reported in*: 6 R. BARNEWALL & C. CRESSWELL, REPORTS OF CASES ARGUED & DETERMINED IN THE COURT OF KING'S BENCH 528, 530 (London: A. Strahan 1828) (bold added).

[30] 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 48 (London: A. J. Valpy 1816) (bold added).

[31] 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 300 (Philadelphia: P. Byrne 1806).

not succeed in stopping and holding him."). Then, a few years later, the same court adopted the common law's constructive view of arrests. *See Mowry v. Chase*, 100 Mass. 79, 85 (1868) ("[I]t was not necessary to touch the person of the defendant in order to make an arrest. It is enough, to constitute an arrest, if the party be within the power of the officer and submit to the arrest.").[32]

In summary: Over 150 years, the common law developed two separate limits on the power to seize persons. Through a *physical* view of arrests that provided "any touching, however slight, is sufficient," the common law guarded the home and established clear lines of liability.[33] And through a *constructive* view of arrests, the common law made it possible for arrests to be made—and later contested—without endangering life and limb, as "no manual touching of the body or actual

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[32] Other examples of American state courts embracing the common law's physical and constructive views of arrest include: *Richardson v. Rittenhouse*, 40 N.J.L. 230, 235 (1878) ("It is not necessary that there should be a manual touching of the body, or actual force used to constitute an arrest; it is sufficient if the party . . . submits to the arrest."); *Jones v. Jones*, 35 N.C. 448, 448 (1852) ("To constitute a legal arrest, it is not necessary that the officer should touch the person . . . . It is sufficient . . . [if] the person says 'I submit to your authority'. . . ."); *Field v. Ireland*, 21 Ala. 240, 245 (1852) ("[N]o manual touching of the body . . . is necessary to constitute an arrest. It is sufficient if the party is within the power of the officer and submits.").

[33] 1 THOMAS WATERMAN, A TREATISE ON THE LAW OF TRESPASS IN THE TWOFOLD ASPECT OF THE WRONG AND THE REMEDY 312 (New York: Baker, Voorhis & Co. 1875).

force [was] necessary to constitute an arrest, if the [arrestee] . . . submit[ted]."[34]

This was a massive achievement—one that the Tenth Circuit's decision in *Torres* completely undoes. As noted above, this decision makes submission-to-arrest a condition of proving any arrest, even when officers shoot someone. *See* 769 F. App'x at 655–56. This decision thus "clear[s] away a fence" that has long separated physical arrests from constructive arrests, and does so without ever looking "for the reason it was built in the first place." *Artis v. D.C.*, 138 S. Ct. 594, 608 (2018) (Gorsuch, J., dissenting). That reason, as borne out by the preceding common-law history, was to better protect "the right of every individual to the possession and control of his own person." *Union Pac. Ry. Co.*, 141 U.S. at 251.

CONCLUSION

Ultimately, this case is about the "constitutional floor below which Fourth Amendment rights may not descend." *Carpenter v. United States*, 132 S. Ct. 2206, 2270 (2018) (Gorsuch, J., dissenting). Common-law history creates this floor through its recognition of physical and constructive trespasses. While "[m]uch work is needed to revitalize this area," when it comes to arrests, no heavy lifting is required. *Id.* All the Court has to do is affirm over 150 years of common-law

[34] *Id.*

jurisprudence establishing that a physical arrest may be proven without a show of submission.

Respectfully submitted,

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Dated: February 7, 2020