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Can a woman sue cops who shot her in the back? Supreme Court unsure if Fourth Amendment even applies

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The Supreme Court on Wednesday held oral argument in *Torres v. Madrid*, which debated whether police in Albuquerque had “seized” Roxanne Torres when they shot her in the back, even though she was able to drive away. If the Supreme Court declares that Torres wasn’t “seized,” then her lawsuit under the Fourth Amendment would fail.

There is “no doubt” that when the “bullets entered Ms. Torres’s back, she was seized within the original meaning of the Fourth Amendment,” noted attorney Kelsi Corkran, who argued on behalf of Torres.

“A Constitution that’s unconcerned with the police shooting someone without any provocation so long as the person doesn’t immediately stop moving, it’s not just counterintuitive,” Corkran added, “it defies the sanctity of the person that forms the foundation of the Bill of Rights, the right to be secure in our bodies from unreasonable government intrusion.”

Justice Samuel Alito was skeptical that people using “ordinary speech” would refer to a sniper shooting someone or a baseball pitcher who “intentionally beans the batter” as “seizures,” claiming this was “not consistent with the language of the Fourth Amendment.” On behalf of the accused officers, attorney Mark Standridge made a similar argument.

“No ordinary person as a matter of common sense,” he claimed, “could say that a person who is shot by the police but continues to drive well out of range, well out of their sight, and eludes them for a full day could be seized as a matter of the Fourth Amendment.” “As the officers did not seize [Torres],” he asserted, “they cannot be held liable to her for excessive force in violation of the Fourth Amendment.”

But as Corkran pointed out, under Supreme Court precedent, “it’s the ordinary meaning *at the time of the founding* that controls, especially if the modern understanding risks diminishing the constitutional right.” (Emphasis added.) “The Constitution must, at minimum, protect today what it protected at the time it was adopted,” she added.

Back then, a “seizure” included both seizures of goods *and* arrests, which were considered the seizure of a person. As none other than Noah Webster once phrased it, “We say to arrest a person, to seize goods.”

Moreover, a seizure is still a seizure, even if it’s fleeting. Representing the U.S. Department of Justice, Assistant to the Solicitor General Rebecca Taibleson stated that “if a subject does not stop, the seizure lasts only a moment, the moment of physical impact.” “Under that test, Ms. Torres was seized, albeit briefly, so the Fourth Amendment applies,” she added.

Though this debate may seem like splitting hairs, without the Fourth Amendment, “no alternative avenue for redress exists” in many excessive force cases, the Rutherford Institute and the National Association of Criminal Defense Lawyers argued in an amicus brief. Victims of excessive force can also claim that their due-process rights were violated under the Fourteenth Amendment.

But as the amicus brief noted, those challenges have to overcome “threshold question [of] whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience,” a “demanding standard” that “sets a nearly insurmountable burden for any plaintiff.”

And while both Justices Alito and Neil Gorsuch claimed that Torres could have filed a battery claim against the officers under New Mexico law, that would be “insufficient,” the Rutherford-NACDL amicus countered, since “state tort claims do not remedy or vindicate constitutional violations.”

Plus, law enforcement can often “undercut state torts.” For example, courts in New Mexico have ruled that because police officers “did not employ unconstitutionally excessive force, [they] cannot be liable for assault and battery under New Mexico law.”

This lack of accountability is why many organizations from across the political spectrum, including the ACLU, the Cato Institute, the Institute for Justice, the Leadership Conference, LEAP, the NAACP, the Reason Foundation, and the R Street Institute, have all filed amicus briefs urging the Supreme Court to side with Torres.

“If this Court takes the extraordinary position that a police officer deliberately shooting at and wounding an individual is not a Fourth Amendment ‘seizure,’” the NAACP warned, “many innocent victims of police shootings will be left without a remedy.”