AMICUS

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Clarifying Law Enforcement Parameters at the Supreme Court

As the current Supreme Court term ends, most news coverage has understandably been on *Texas v. California*[1] and *Fulton v. City of Philadelphia*.[1] Additionally, the Court has already stacked headline-grabbing arguments on its docket for next term, including those involving the Second Amendment and abortion. But other recent decisions highly relevant to local government may end up flying under the radar. This article will summarize two such cases recently decided by the Court, each construing the Fourth Amendment, and review a qualified immunity case in which IMLA recently filed an amicus brief in support of a petition for Supreme Court certiorari.[2]

Caniglia v. Strom

Kim Caniglia and her husband got in a fight during which got a gun, threw it on their dining room table and said: "shoot me and get it over with." She left the home and stayed at a hotel. The next morning, when she could not reach her husband on the phone, Kim called the non-emergency line and asked the police to accompany her home, recounting the fight from the evening before and her concern about "what she would find" when she arrived.

The police accompanied Kim to her residence and spoke to her husband on their porch. The ranking officer determined that Mr. Caniglia was "imminently dangerous to himself and others" and convinced him to go to the hospital for a psychiatric evaluation. Mr. Caniglia claims he only agreed to go because the officers told him his firearms would not be confiscated. After Caniglia went to the hospital, police seized his firearms on the belief that he was imminently dangerous to himself and/or others.

Caniglia sued, claiming that he and his guns were unconstitutionally seized without a warrant. The First Circuit found no Fourth Amendment violation, relying on the community caretaking exception from *Cady v. Dombrowski,* 413, U.S. 433 (1973). In *Cady,* the Supreme Court upheld a warrantless search of an automobile that the police believed contained a firearm because the search was divorced from their criminal investigatory activities and was based solely on the police officers' community caretaking functions in preventing vandals from accessing the car and obtaining the gun.

The Court had never extended the community caretaking function to warrantless searches and seizures in the home and in a unanimous opinion authored by Justice Thomas, closed that door, concluding the exception does not extend into the home.[3] The Court explained that there is an important constitutional difference between searching a vehicle (*Cady*) and searching a home: "[w]hat is reasonable for vehicles is different from what is reasonable for homes."[4]

Perhaps limiting the reach of its decision, the Court noted that its previous rulings have allowed for intrusions into the home when police have a warrant, when consent is provided, or when exigent circumstances exist, "including the need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[5] (internal quotations omitted). The Court noted that the respondent in this case had not argued that exigent circumstances justified the warrantless intrusion.[6] In other words, while exigent circumstances might have justified the warrantless seizure under these circumstances, we will have to wait for further development of the law in this area for a more definitive answer.

Three separate concurrences authored by Justices Roberts, Alito, and Kavanaugh underscored the Court's recognition of the important function officers engage in when they seek to render emergency assistance as well as the open questions that remain after the Court's decision. Both Justices Alito and Kavanaugh noted the frequency with which the elderly fall in their homes, and agreed

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that police need to respond to calls related to these types of exigencies that fall outside the criminal context, including for falls and suicide.[7] And Justice Alito pointed out that even if the "community caretaking" doctrine did not apply to the home, that did not necessarily mean that the Fourth Amendment rules applicable in the criminal context would apply to searches and seizures conducted for non-law-enforcement purposes.

For example, Justice Alito highlighted a scenario that arose at oral argument where hypothetical neighbors call the police because their elderly neighbor, who is never late, did not come to dinner.[8] The question was whether it would violate the Fourth Amendment for police officers to enter the home to check on her without a warrant; the petitioner indicated it would, even if 24 hours had gone by.[9] To that, in his concurring opinion Justice Alito quipped that "[t]his imaginary woman may have regarded her house as her castle, but it is doubtful that she would have wanted it to be the place where she died alone and in agony."[10] He noted the Court's current precedents would not cover this situation and suggested that States could seek to institute procedures for warrants in these non-criminal cases.[11]

Chief Justice Roberts, joined by Justice Breyer, wrote a short concurrence to explain that the question of whether a warrant is required to enter a home "when there is a 'need to assist persons who are seriously injured or threatened with such injury'" was decided in *Brigham City v. Stuart,* 547 U.S. 398 (2006) and that the Court's decision here did not deviate from that principle.[12] Presumably, the Chief Justice would have concluded that police could enter the home without a warrant under *Brigham City* to render aid to the imaginary woman in Justice Alito's hypothetical.

Justice Kavanaugh disagreed more directly with Justice Alito on the question of whether the Court's existing precedent would cover such a scenario. While indicating there should not be a community caretaking exception to the warrant requirement, he believed the Court's current exigent circumstances doctrine would "of course" allow police to enter the home of the elderly person who falls and needs assistance but does not answer the door, or the suicidal individual in his or her home who does not let the officers inside voluntarily.[13] This is because under *Brigham City,* according to Justice Kavanaugh, the police would have an "objectively reasonable basis for believing that an occupant is seriously injured or threatened with injury."[14] (internal quotations omitted).

IMLA joined a brief filed by the State and Local Legal Center (SLLC) highlighting the importance of avoiding an absolutist rule which would bar police and other first responders from performing non-criminal, emergency duties, like wellness checks, helping to prevent suicide, and assisting the elderly and mentally ill.[15] In our brief, we highlighted that these actions do not involve criminal investigations and thus warrants are often not available. While the case is not a win for local governments, given the narrow scope of the majority decision and the concurrences that all highlight the belief that police would be able to enter homes in these scenarios under the exigent circumstances doctrine, perhaps Justice Kavanaugh is right where he says the issue is "more labeling than substance."[16]

That said, as Justice Alito notes, there are still many open questions that lower courts will need to grapple with under the Fourth Amendment until the issue of exigent circumstances in these scenarios is properly before the Court. The Justices' seeming disagreement that precedent would cover some of the examples provided in the decision underscores that these issues will be litigated further in the lower courts.

Torres v. Madrid

In this case, two police officers sought to arrest a woman at her apartment in Albuquerque, New Mexico. They noticed two women standing in front of the apartment next to a Toyota FJ Cruiser and decided to talk to them. The officers were wearing tactical vests with police markings. Roxanne Torres was in the car and experiencing methamphetamine withdrawal. One of the officers told Torres several times to show her hands.

Torres claims she thought she was being carjacked. The facts are in dispute, but Torres drove away: she asserts neither officer was in her path, but the officers claim she drove at one of them. What is not in dispute is that officers fired at her 13 times and two bullets struck her. (Whether she was driving at the officers will ultimately be resolved below and that question will go toward the reasonableness of the seizure). Despite being shot, Torres drove 75 miles where checked herself into a hospital. She was airlifted back to Albuquerque to another hospital for treatment and arrested the next day.

She sued, claiming the officers used excessive force in violation of the Fourth Amendment. The Tenth Circuit rejected her claim, holding that, to be cognizable, the use of force "must terminate the suspect's movement" or result in physical control of the suspect.

In a 5-3 decision authored by Chief Justice Roberts, the Court reversed, providing a new rule for determining if a seizure occurs under the Fourth Amendment where force is used, but a suspect gets away.[17] The Court concluded that "[t]he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."[18] Relying on common law at the time of the Fourth Amendment's adoption and before, as well as its own precedent, the Court held that "the officers' shooting applied physical force to her body and

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objectively manifested an intent to restrain her from driving away" and concluded she was seized "the instant that the bullets struck her."[19]

The Court came to its conclusion relying, in part, on *California v. Hodari D.*, 499 U.S. 621 (1991) for the proposition that "the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee."[20] The Court explained that this common law rule, which *Hodari D.* relied on, "achieved recognition to such an extent that English lawyers could confidently (and accurately) proclaim that '[a]ll the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.'"[21] Although the common law did not deal with weapons, the Court extrapolated the rule to all seizures, including the application of force with weapons, and saw no reason to draw "artificial line[s] between grasping with a hand and other means of applying physical force to effect arrest."[22]

The Court noted, however, that not every application of force would constitute a seizure. There must also be an intent to restrain, so accidental force or force applied for some other reason (though what reason was not specified) would not satisfy the rule. Although the decision indicated there must be an intent to restrain, the Court explained the test is "whether the challenged conduct objectively manifests an intent to restrain" and that the Court "rarely probe[s] the subjective motivations of police officers in the Fourth Amendment context."[23]

Finally, the majority remanded the case to determine if the seizure was reasonable and/or if the officers were entitled to qualified immunity.

The dissent, authored by Justice Gorsuch and joined by Justices Thomas and Alito, complains:

The majority holds that a criminal suspect can be simultaneously seized and roaming at large. On the majority's account, a Fourth Amendment "seizure" takes place whenever an officer "merely touches" a suspect. It's a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again. That view is as mistaken as it is novel.[24]

While this case is a disappointing loss for local governments, the SLLC / IMLA amicus brief was notable enough that the majority quoted it, though it did so to reject our arguments that *Hodari D.* should not apply.

Rivas-Villegas v. Cortesluna

IMLA also recently participated as an amicus at the Supreme Court petition stage. In *Rivas-Villegas v. Cortesluna,* a 911 dispatch received a call from a 12-year-old girl that her mother's boyfriend was threatening her, her sister, and her mother with a chainsaw. The child reported they had locked themselves in a bedroom. She described the boyfriend and noted he was drinking.

When officers were dispatched to the scene, they saw Ramon Cortesluna through a window but did not see or hear a chainsaw. They formulated a plan, which included using less than lethal force, and knocked on the door, announcing themselves and asking Cortesluna to come outside and speak with them. When Cortesluna came to the door, he was holding a large metal object that appeared to be a crowbar. The officers ordered him to drop the weapon and come outside.

Cortesluna dropped the metal object, put his hands up and exited the home. The officers ordered him to his knees, at which point they noticed a knife in his pocket. They ordered him not to put his hands down (toward the knife) but to raise them. Cortesluna nevertheless lowered his head and hands (toward the knife), whereupon Officer Leon, immediately shot him with two rounds from a bean bag shotgun. Cortesluna then put his hands up and the officers ordered him to get down on the ground, and he complied. Officer Rivas-Villegas then put his knee on Cortesluna's back for approximately eight seconds (there is a video of the incident), deploying a common tactic used to prevent officer injury where a suspect is known to be armed.

Cortesluna sued the officers, claiming excessive force for both the use of the bean bag shotgun and for the knee on his back. The Ninth Circuit concluded that the officer who fired the beanbag rounds did not violate the Fourth Amendment, given the rapidly unfolding events and the threat when Cortesluna was reaching toward the knife in his pocket.[25] As to officer Rivas-Villegas, however, the Ninth Circuit concluded that he violated the Fourth Amendment right to be free from excessive force "by leaning too hard" on Cortesluna's back, allegedly causing injury because by the time he did so, the threat had passed.[26] The Circuit also denied qualified immunity, concluding it was clearly established that "police may not kneel on a prone and nonresisting person's back so hard as to cause injury."[27]

The dissenting judge chastised the majority for downplaying "the dangers officers face in making arrests" "from the comfort of [their] chambers," noting that the "suggestion that Cortesluna suddenly no longer posed a risk at the moment the beanbag shots were fired … is factually unreasonable."[28] The dissent also pointed out that the reasonableness of the officer's actions in placing his knee on the suspect's back given that Cortesluna was still armed at that time.[29]

The petition for certiorari argues, among other things, that the Ninth Circuit failed to properly apply *Graham v. Connor* to a widely accept-

ed police practice and also in the alternative that qualified immunity should be granted given the law was not clearly established at the time of the handcuffing. IMLA's amicus brief agrees with the legal analysis in the petition, but separately underscores the serious public safety ramifications of the Court's decision for officers.[30] The case has not yet been distributed for conference and as of this writing, IMLA awaits the outcome of the petition. ML

Notes

1. In a 7-2 opinion, the Court declined to find standing by individuals and states who had challenged the constitutionality of the Affordable Care Act.
2.In a unanimous opinion that masked deeper divisions, the Court ruled in favor of Catholic Social Services (CSS) in its free exercise challenge to the City of Philadelphia's contract requirement that CSS agree to certify same-sex couples as potential foster parents in order to comply with the City's antidiscrimination laws and policies. While the decision was technically a loss for the City, it was very narrow and applied because of particular contract language giving the Commissioner discretion to allow exceptions to the antidiscrimination language. The Court declined to overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990).
3. IMLA's amicus activity in *Caniglia v. Strom* and *Torres v. Madrid* was previously summarized in prior *Municipal Lawyer* articles, but those articles were written before the Court's decisions.
4. Caniglia v. Strom, 593 U.S. __, p. 4 (2021)
5. *Id.*
6. *Id.* at 3.
7. *Id.*
8. Caniglia v. Strom, 593 U.S. __, p. 3-4 (2021) (Alito J., concurring); Caniglia v. Strom, 593 U.S. __, p. 4-5 (2021) (Kavanaugh J., concurring).
9. *Id.* at 3 (Alito J., concurring)
10. *Id.*
11. *Id.* at 4.
12. *Id.* at 4-5.
13. Caniglia v. Strom, 593 U.S. __ (2021) (Roberts C.J., concurring)
14. *Id.* at 4-5. (Kavanaugh J., concurring).
15. *Id.* at 5.
16. To review a copy of IMLA's amicus brief, please visit: https://www.supremecourt.gov/DocketPDF/20/20- 157/169238/20210217174516662_20-157%20Korzen%20Amicus%20Brief%20ALL%20FINAL%20pdfapdf.pdf
17. Caniglia v. Strom, 593 U.S. __, p. 2 (2021) (Kavanaugh J., concurring).
18. Justice Barrett did not take part in the decision as it was argued before she was on the bench.
19. *Torres v. Madrid,* 592 U.S. __, p. 1 (2021).
20. *Id.* at 10-11. The Court's opinion discusses numerous historical decisions, including a discussion about a 1605 English common law case involving the Countess of Rutland who was deemed arrested by a "serjeant-at-mace" when he touched her with a mace.
21. *Id.* at 5.
22. *Id.*
23. *Id.* at 8.
24. *Id.* at 10.
25. Torres v. Madrid, 592 U.S. __, p. 1 (2021) (Gorsuch J., dissenting).
26. Cortesluna v. Leon, 979 F.3d 645, 653 (9th Cir. 2020)
27. *Id.* at 653-54.
28. *Id.* at 655.
29. *Id.* at 661 (9th Cir. 2020) (Collins J., dissenting).
30. *Id.*
31. https://www.supremecourt.gov/DocketPDF/20/20-1539/180902/20210603185141261_20-1539%20Amicus%20CA%20State%20Sheriffs.pdf



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