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 United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

In this case, Petitioner asserted that she drove her vehicle at or in the direction of two New Mexico State Police officers because she thought they were carjackers. In fear for their lives, the officers fired several shots at Petitioner, two of which struck her. Petitioner did not stop, slow down, or otherwise accede to the officers' attempt to gain control over her. Instead, Petitioner sped away from the scene, stole another person's vehicle, and drove over seventy-five miles west, evading capture until the following day. In Petitioner's ensuing excessive force claim under 42 U.S.C. § 1983, both the district court and the United States Court of Appeals for the Tenth Circuit correctly found that Respondents did not "seize" Petitioner, as Respondents did not acquire physical control over her. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989).

The question presented is:

Does the intentional application of physical force against a criminal suspect, by itself, constitute a "seizure" within the meaning of the Fourth Amendment where the force itself does not result in the acquisition of physical control, possession, or custody of the suspect?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Early in the morning on Tuesday, July 15, 2014, NMSP officers went to an apartment complex in Albuquerque, New Mexico to serve an arrest warrant on Kayenta Jackson, who was "involved with an organized crime ring" and was suspected of, *inter alia*, "having been involved in drug trafficking, murder, and other violent crimes." App. 2a, 11a; *see also* JA 70-71. Jackson was also associated with several individuals who had violent histories. JA 42-43, 96-97. Respondents Janice Madrid and Richard Williamson were two of the officers involved in attempting to arrest Jackson. App. 11a. At approximately 6:30 in the morning, Officers Madrid and Williamson drove by Jackson's apartment complex. *See* JA 46. When they did so, they saw Petitioner Roxanne Torres and another person standing outside of Jackson's apartment, next to a Toyota FJ Cruiser. App. 2a; JA 46-47. The Cruiser was backed into a parking spot, with cars parked on both sides of it. App. 2a. The officers were unsure at that time whether Petitioner was the subject of the arrest warrant issued for Jackson. JA 49; *see also* JA 68. The officers—who were wearing tactical vests with badges that clearly identified them as police officers—decided to make contact with Petitioner to confirm whether she was Jackson or, if not, to see if she had any information concerning Jackson's whereabouts. App. 2a, 11a; JA 47, 50-51, 56, 91. As the officers approached, Petitioner got inside the Cruiser and started the engine. App. 2a.

Officer Williamson approached the Cruiser's closed driver-side window and told Petitioner several

times, "Show me your hands," as he perceived Petitioner was making "furtive movements . . . that [he] couldn't really see because of the [Cruiser's] tint[ed]" windows.[1] App. 3a; *see also* JA 103. Officer Madrid took up a position near the Cruiser's driver-side front tire. App. 3a. She could not see who the driver was, but she perceived the driver was making "aggressive movements inside the vehicle." *Id.*; *see also* JA 54-55. Petitioner "freak[ed] out" and "put the car into drive," allegedly thinking she was being carjacked. App. 3a.

Officer Madrid was positioned very close to Petitioner's car, by the front wheel of the FJ Cruiser. *See* JA 21, 23, 39, 113. Petitioner put the car into drive, and Officer Madrid perceived that Petitioner was driving at her. *See* JA 23, 52, 55, 60. As Petitioner put the car in drive, both officers drew their firearms. *See* App. 3a. Both Officers believed that Petitioner was going to hit them with her car, and that they were in fear for their lives. App. 11a; *see also* JA 52-53, 63, 102. Specifically, Officer Madrid testified that the Cruiser "drove at [her]" or "lung[ed] at [her]," and she fired "at the driver through the windshield" "to stop the driver from running [her] over." App. 3a; *see also* JA 63. Officer Williamson, who was next to Petitioner's driver-side door,

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[1] A seizure must be analyzed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" based upon "facts known to the officers." *United States v. Paetsch*, 782 F.3d 1162, 1174 (10th Cir. 2015) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Alabama v. White*, 496 U.S. 325, 330 (1990)); *see also State v. White*, 2013-Ohio-51, ¶ 73, 988 N.E.2d 595, 617 (citing *Schultz v. Braga*, 455 F.3d 470, 477 (4th Cir. 2006)).

see JA 62, shot at Petitioner because he feared being "crush[ed]" between the Cruiser and the neighboring car, as well as "to stop the action of [the Cruiser] going towards [Officer] Madrid." App. 3a-4a; *see also* JA 97-100.

Both officers fired their duty weapons, and two of their bullets struck Torres—however, she did not stop or even slow her driving after being shot. *See* App. 4a. Instead, Petitioner continued forward, driving over a curb, through some landscaping, and onto a street. *Id.* After colliding with another vehicle, Petitioner stopped in a parking lot, exited the Cruiser and attempted to "surrender" to the "carjackers" (who she believed might be in pursuit). *Id.* Petitioner, who "was tripping out bad" after having used meth "[f]or a couple of days," *see* App. 3a-4a, alleges she asked a bystander to call police, but she (Petitioner) did not want to wait around because Petitioner herself had an outstanding arrest warrant. App. 4a. As such, Petitioner stole a Kia Soul that was left running while its driver loaded material into the trunk. *Id.*; *see also* JA 27.

After having 1) fled from the initial scene of the shooting and 2) stolen another individual's running vehicle, Petitioner drove over 75 miles west to Grants, New Mexico, and went to the Cibola General Hospital. *See generally* App. 4a; JA 30-35. Notably, Petitioner first noticed that she had been shot when she arrived in Grants. JA 30-31. Petitioner was airlifted to a hospital in Albuquerque, identified, and arrested by police the following day. App. 4a; JA 33. Petitioner ultimately pled no contest to three crimes: (1) aggravated fleeing

from a law enforcement officer (Officer Williamson); (2) assault upon a police officer (Officer Madrid); and (3) unlawfully taking a motor vehicle. App. 4a.

Over two years later, on October 21, 2016, Petitioner—relying exclusively on federal law—filed a civil rights complaint in the United States District Court for the District of New Mexico against Officers Williamson and Madrid. *See generally* JA 4-10. In that complaint, Petitioner asserted one excessive-force claim against each officer, alleging that the "intentional discharge of a fire arm [sic] . . . exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied." *See id.*; *see also* App. 4a. Petitioner also asserted a claim against each officer for conspiracy to engage in excessive force, alleging that the officers had "formed a single plan . . . to use excessive force." App. 4a-5a.

The district court construed Petitioner's complaint as asserting excessive force claims under the Fourth Amendment. App. 5a, 13a. The officers filed a motion for summary judgment, showing that they were entitled to qualified immunity on all of Petitioner's excessive force claims because, *inter alia*, Petitioner was never seized, and without a seizure, there can be no Fourth Amendment excessive force claim. App. 13a. The district court agreed that the undisputed material facts showed that Petitioner was never seized, and consequently, she could not prevail on her claims that the officers used excessive force in effecting a seizure. *Id.* at 13a-14a. Consequently, the district court granted the Officers' motion for summary judgment, and

dismissed Petitioner's claims, on the grounds that there had been no constitutional violation. *See id.* at 20a.

On May 2, 2019, the United States Court of Appeals for the Tenth Circuit affirmed the district court's ruling, finding that Petitioner's claims failed under the first prong of the qualified immunity analysis. *See generally* App. 1a-9a. The Tenth Circuit agreed with the district court that Petitioner failed to show she was seized by the Officers' use of force. App. 7a. "Specifically, the officers fired their guns in response to Torres's movement of her vehicle. Despite being shot, Torres did not stop or otherwise submit to the officers' authority." *Id.* For the reasons discussed herein, this Court should affirm the Tenth Circuit's ruling.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

From the time of the founding of this nation to the present day, the Fourth Amendment's term "seizure" has meant intentionally taking possession, custody, or control of a person. *See*, *e.g.*, *Brower v. Cnty. of Inyo*, 489 U.S. 593, 396 (1989); *California v. Hodari D.*, 499 U.S. 621, 624 (1991). Petitioner Roxanne Torres was not seized by either of the Respondents, New Mexico State Police Officers Janice Madrid and Richard Williamson. While both Respondents shot at Petitioner as she drove her vehicle near them, none of Respondents' gunshots (even the two that struck her) stopped Petitioner's movement, or otherwise caused Respondents

to be able to take possession, custody, or control of Petitioner.

On July 15, 2014 at approximately 6:30 a.m., police officers, including Madrid and Williamson, planned to conduct surveillance on an apartment. The suspected resident of the apartment, Kayenta Jackson, had a felony warrant out for her arrest, and she was implicated in a larger racketeering ring. When the officers drove by that morning, a man and a woman were seen outside of Jackson's apartment, and the door to Jackson's apartment was ajar. The officers decided to attempt to contact them, as it was possible that the woman was Jackson or that these persons may have information concerning Jackson's whereabouts.

As the officers drove into the apartment parking lot, the people standing outside spotted them. The woman, later identified as Petitioner, ran into a nearby Toyota FJ Cruiser. The Cruiser was backed into a parking space directly in front of the suspect's apartment. Officers Madrid and Williamson approached Petitioner's vehicle to determine whether she was Kayenta Jackson or, if not, to inquire as to whether she had information concerning Jackson's whereabouts. Madrid was positioned in front of Petitioner's vehicle and Williamson was at the driver's side door when Petitioner started the Cruiser's engine. Petitioner revved her car engine and sped out of the parking space, placing the officers in fear for their lives. Madrid and Williamson fired at Petitioner, who drove over a curb and through a landscaped area to escape. Despite her left arm allegedly being paralyzed by two gunshots, Petitioner

did not pause, even momentarily. Apparently unaware that she had been shot, Petitioner continued her flight, collided with a motorist, then stole another vehicle, which she drove to the city of Grants, New Mexico, approximately seventy-five miles away. Petitioner was not arrested by law enforcement until the following day.

The United States Court of Appeals for the Tenth Circuit correctly found that Petitioner was not "seized" by Respondents' gunfire for purposes of the Fourth Amendment to the United States Constitution. In petitioning this Court for a writ of certiorari, Petitioner asserted that this case exposed an intractable circuit split as to whether an unsuccessful attempt to detain a suspect by use of physical force constitutes a "seizure" within the meaning of the Fourth Amendment. Petitioner has since re-framed the question as follows: "[d]oes the application of lethal force to restrain someone constitute a 'seizure' within the meaning of the Fourth Amendment, even if the force does not immediately stop the person?" However, this Court's existing case law (in particular, *Brower*) has already answered this question: for a seizure to have occurred, a law enforcement officer must acquire physical control over the suspect, through means intentionally applied, such that the suspect does not feel free to leave. Consequently, this Court should affirm the Tenth Circuit's decision.

ARGUMENT

I. THIS COURT'S CONSISTENT CASE LAW SUPPORTS THE TENTH CIRCUIT'S CORRECT CONCLUSION THAT PETITIONER WAS NOT SEIZED FOR PURPOSES OF THE FOURTH AMENDMENT

A. Under This Court's *Mendenhall* Test, Petitioner was Not Seized

The Fourth Amendment protects against both unreasonable searches and unreasonable seizures. U.S. Const. amend. IV. This Court has stated that "not every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618 (1989). In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court noted that "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. 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" (emphasis added). *Terry*, 392 U.S. at 19 n.16. Over a decade later, in *United States v. Mendenhall*, 446 U.S. 544 (1980), Justice Stewart, writing for himself and then-Justice Rehnquist, first transposed this analysis into a test to be applied in determining whether "a person has been 'seized' within the meaning of the Fourth Amendment." *See Mendenhall*, 446 U.S. at 554.

The *Mendenhall* test provides that the police can be said to have seized an individual "*only if*, in view of

all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554 (emphasis added); *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *id.* at 577 (Kennedy, J., concurring); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 514 (Blackmun, J., dissenting). As noted in *California v. Hodari D.*, *supra*, the "*Mendenhall* test" was adopted by this Court in later cases. *See Hodari D.* 499 U.S. at 627-28 (citing *Michigan v. Chesternut*, 486 U.S. at 573; *INS v. Delgado*, 466 U.S. 210, 215 (1984)).

A person is "seized" within the meaning of the Fourth Amendment "only when, by means of physical force or a show of authority, his [or her] freedom of movement is restrained." *Mendenhall*, 446 U.S. at 553. The person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; *see also Ploski v. Medenica*, 2019 WL 4014193, *5 (N.D. Ill. Aug. 26, 2019) (unpublished) (even after striking plaintiff, Defendant "did not physically restrain him, or otherwise act or give orders that would lead a reasonable person to believe he was not free to leave") (citing *Mendenhall*, 446 U.S. at 554). Justice Stewart's *Mendenhall* test, from the allegedly seized person's view of their freedom to leave, states "a *necessary*, but not a *sufficient*, condition for seizure" (emphases in original). *Hodari D.*, 499 U.S. at 628. A seizure requires that " 'the officer, by means of physical force or show of authority, has in some way *restrained the liberty* of a citizen' " (emphasis added) *Florida v.*

Bostick, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, *supra*, 392 U.S. at 19 n.16); *see also Oglesby v. Lesan*, 929 F.3d 526, 532 (8th Cir. 2019); *Bradford v. Wiggins*, 516 F.3d 1189, 1196 (10th Cir. 2008); *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004). The citizen's "freedom of movement" must actually be physically restrained or controlled for a seizure to occur. *Brendlin v. California*, 551 U.S. 249, 254 (2007); *see also Brower v. Cnty. of Inyo*, *supra*, 489 U.S. at 595.

"[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Chesternut*, 486 U.S. at 573; *see also Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (a police officer seizes a person by "restrain[ing] the freedom of [the] person to walk away" or by using deadly force to apprehend the person) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Mendenhall*, 446 U.S. 544); *see also id.* at 31 (O'Connor, J., dissenting) ("[a]bsent apprehension of the suspect, there is no "seizure" for Fourth Amendment purposes. I doubt that the Court intends to allow criminal suspects who successfully escape to return later with § 1983 claims against officers who used, albeit unsuccessfully, deadly force in their futile attempt to capture the fleeing suspect"). Notably, in *Mendenhall*, Justice Stewart held that an officer's subjective intent to detain is not determinative of whether a "seizure" occurred within the meaning of the Fourth Amendment. *Mendenhall*, 446 U.S. at 554 & n.6; *see also New York v. Quarles*, 467 U.S. 649, 656 n.6

(1984). The Tenth Circuit has faithfully followed this Court's direction in *Mendenhall*, noting that "'a person is "seized" only when, by means of physical force or a show of authority, *his freedom of movement is restrained.*'" *Brooks v. Gaenzle*, 614 F.3d 1213, 1219 (10th Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011) (quoting *Mendenhall*, 446 U.S. at 553 (emphasis added)).

In the present case, there was no sign that Petitioner's freedom of movement was restrained as she fled, without pause, from the scene. In evaluating this issue, the Tenth Circuit looked to its prior opinion in *Brooks v. Gaenzle* and found that the officers' use of force against Petitioner failed to "control [her] ability to evade capture or control." *See* App. 7a-8a. Despite Respondents' intent to stop Petitioner from striking them with her vehicle, Respondents' gunshots did not stop or seize Petitioner. Even after being shot twice in Albuquerque, New Mexico, Petitioner (who had an outstanding arrest warrant herself) fled the shooting scene, stole another individual's running vehicle, and drove over seventy-five miles west of Albuquerque. Based upon the undisputed facts of this case, and the Petitioner's own description of the events, Petitioner felt free to leave and was not restrained. Petitioner unquestionably engaged in a headlong flight toward Grants, New Mexico, an hour away from where she was actually shot. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[h]eadlong flight . . . is certainly suggestive of [wrongdoing]"); *see also Brendlin v. California*, *supra*, 551 U.S. at 255. Even assuming *arguendo* that Petitioner truly believed that she was fleeing from

"carjackers," this Court's opinion in *Wardlow* does not distinguish between purportedly "innocent" flight and guilty flight. Petitioner simply did not stop after she was shot, and therefore was not seized.

Moreover, one can understand how the officers responded with gunfire when Petitioner drove at them with her vehicle while they were dressed in tactical gear that was clearly marked to identify them as police. Petitioner nearly ran the officers over, and later pled no contest to assault upon a police officer and aggravated fleeing from a law enforcement officer. At no time at the scene did Petitioner or the officers act as though Petitioner was seized. Even after being shot, Petitioner drove to an entirely different city (approximately the distance from this Court to Harpers Ferry, West Virginia) before she even realized she was shot. Ultimately, the officers' interpretation of Petitioner's conduct, and their intent to detain the Petitioner, is not determinative of whether she felt free to leave. Petitioner's own statements and conduct illustrate that she felt free to leave, and suggest that she did not perceive herself as being "seized" by the officers' shots.

B. This Court's Fourth Amendment Standards Show That There Can Be No Seizure Without Acquisition of Control

In order to "seize" a person, a law enforcement officer must restrain that person's liberty. *Terry v. Ohio*, *supra*, 392 U.S. at 19 n.6; *see also*, *e.g.*, *United States v. Smith*, 633 F.3d 889, 892-93 (9th Cir. 2011). A person is

"seized" by the police—and thus entitled to challenge the government's action under the Fourth Amendment—when the officer, " 'by means of physical force or show of authority,' " terminates or restrains his freedom of movement, *Florida v. Bostick*, *supra*, 501 U.S. at 434 (quoting *Terry*, 392 U.S. at 19 n.16), "*through means intentionally applied*." *Brower v. Cnty. of Inyo*, *supra*, 489 U.S. at 597 (emphasis in original). Under this rubric, a seizure occurs only when the suspect actually submits (voluntarily or otherwise) to the police officer's use of force or assertion of authority; mere physical contact by the officer is not enough to effectuate the seizure. *See Brendlin v. California*, *supra*, 551 U.S. at 254; *see also United States v. Smith*, 575 F.3d 308, 313 (3d Cir. 2009); *United States v. Griffin*, 652 F.3d 793, 798 (7th Cir. 2011); *Carlson v. Bukovic*, 621 F.3d 610, 620 (7th Cir. 2010) ("mere physical contact by an officer, although a significant factor, does not automatically qualify an encounter as a Fourth Amendment seizure").

In *Brower v. Cnty. of Inyo*, this Court held that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, nor even "whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement." *Brower*, 489 U.S. at 596-97; *see also Scott v. Harris*, 550 U.S. 372, 381 (2007) (citing *Brower* with approval to decide whether fleeing suspect was seized when officer rammed

suspect's vehicle). In *Brower*, the petitioners' decedent was killed when the stolen car he had been driving at high speeds to elude pursuing police crashed into a police roadblock created by an unilluminated 18-wheel tractor-trailer placed across a roadway on a curve, with headlights allegedly directed to blind the driver so that a crash was alleged to be unavoidable. *See Brower*, 489 U.S. at 594. A divided panel of the Ninth Circuit affirmed the dismissal of the petitioners' Fourth Amendment claim on the basis that no "seizure" had occurred. *See Brower v. Inyo Cnty.*, 817 F.2d 540, 545-46 (9th Cir. 1987). This Court granted certiorari "to resolve a conflict between that decision and the contrary holding of the Court of Appeals for the Fifth Circuit" in *Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985). *Brower*, 489 U.S. at 595. In reversing the Ninth Circuit and analyzing the seizure issue before this Court, Justice Scalia (writing for this Court's majority) noted that "a roadblock is not just a significant show of authority to induce a voluntary stop, but *is designed to produce a stop by physical impact* if voluntary compliance does not occur" (emphasis supplied). *Id.* at 598.

Brower unequivocally held that a "[v]iolation of the Fourth Amendment requires an intentional *acquisition of physical control*" over the suspect (emphasis added). *Brower*, 489 U.S. at 596;[2] *see also McCoy v.*

[2] The concurrence in *Brower* attempted to dismiss this Court's crucial holding as mere dicta. *See Brower*, 489 U.S. at 600 (Stevens, J., concurring). However, that assertion is incorrect—the use of a physical barrier to attain control over (i.e., to seize) the petitioners' decedent was at the heart of the issue ruled upon by the majority. *See id.* at 599 ("according to the allegations of the

Harrison, 341 F.3d 600, 606 (7th Cir. 2003) (even where investigator hit plaintiff and dug his fingernails into her arm, there was "no evidence to show [investigator] intended to or did acquire physical control over [plaintiff's] person"); *Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999); *Harrison v. City of Corning*, 2016 WL 5871369, *4 (W.D.N.Y. Oct. 7, 2016) (unpublished); *Travis v. City of Glenn Heights, Tex.*, 2013 WL 5508662, *2 (N.D. Tex. Oct. 3, 2013) (unpublished) ("[a] seizure of the person occurs if there is *actual physical restraint* by an officer or a citizen submission to a governmental show of authority") (emphasis added) (citing *California v. Hodari D.*, *supra*, 499 U.S. at 624-26). Petitioner here was not seized under the *Brower* standard.

1. The Court's Decisions Comport With The Historical, and Common Sense, Understanding of The Term "Seizure"

"From the time of the founding to the present, the Fourth Amendment's term 'seizure' has "meant a 'taking possession' " of the criminal suspect. *Hodari D.*, *supra*, 499 U.S. at 624 (internal citations omitted); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 471 (1874) ("seizure is a single act"; "[p]ossession, which follows seizure, is continuous"); *see also Manuel v. City of Joliet*, 137 S.Ct. 911, 927 (2017) (Alito, J., dissenting) ("[t]he term 'seizure' applies most directly to the act of taking a person into custody or otherwise depriving

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complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped").

the person of liberty"); Black's Law Dictionary 1631 (11th ed. 2019) (defining "seizure" as "[t]he act or an instance of taking possession of a person or property by legal right or process" and especially, "in constitutional law, a confiscation or arrest that may interfere with a person's reasonable expectation of privacy"); American Heritage Dictionary of the English Language 1588 (5th ed. 2018). Dictionary definitions from around the time of the adoption of the Fourth Amendment are in accord. *See*, *e.g.*, 1 S. Johnson, A Dictionary of the English Language (6th ed. 1785) (defining "seizure" as "the act of taking forcible possession"); *see also Manuel*, 137 S.Ct. at 927.

2. Without a Seizure, There Can Be No Fourth Amendment Violation

The touchstone of a seizure is that there must be a taking of control of the suspect—i.e., the termination or physical restraint of the suspect's liberty or freedom of movement—through means intentionally applied (i.e., by the use of force or a show of authority). *See*, *e.g.*, *Mendenhall*, *supra* 446 U.S. at 553; *Brower*, *supra*, 489 U.S. at 597; *see also Johnson v. City of Ferguson*, 926 F.3d 504, 506 (8th Cir. 2019) (en banc) ("in the absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied . . . no seizure occurred"). In an excessive force case such as this one, "to hold an officer personally liable for violation of the Fourth Amendment, the plaintiff must at a minimum be able to demonstrate that the officer actually terminated her

freedom of movement by means of the alleged excessive force." *Schultz v. Braga*, 455 F.3d 470, 483 (4th Cir. 2006). "[A] seizure within the meaning of the Fourth Amendment *always* 'requires an intentional acquisition of physical control' " (emphasis supplied). *Schultz*, 455 F.3d at 480 (quoting *Brower*, 489 U.S. at 596); *see also Corbitt v. Vickers*, 929 F.3d 1304, 1319-20 (11th Cir. 2019). "[I]n order to establish a seizure, the object of the seizure *must be stopped* by the very instrumentality set in motion to effect the seizure" (emphasis supplied). *Sanders v. City of Union Springs*, 207 F. App'x 960, 964 (11th Cir. 2006) (unpublished) (citing *Brower*, 489 U.S. at 599).

Even where some level of force is intentionally applied by a law enforcement officer, unless that force results in the actual termination of the suspect's movement, no seizure has occurred. *See Brooks v. Gaenzle*, *supra*, 614 F.3d at 1221-22 (the "mere use of physical force or show of authority alone, without termination of movement or submission," does not constitute a seizure); *Adams v. City of Auburn Hills*, 336 F.3d 515, 519-20 (6th Cir. 2003) ("[t]he use of deadly force standing alone does not constitute a seizure, and absent an *actual physical restraint* or physical seizure, the alleged unreasonableness of the officers' conduct cannot serve as a basis for a § 1983 cause of action anchored in the Fourth Amendment" (emphasis added)) (quoting *Cameron v. City of Pontiac*, 813 F.2d 782, 785 (6th Cir. 1987)); *cf. Reed v. Clough*, 694 F. App'x 716, 724 (11th Cir. 2017) (unpublished) (plaintiff alleged that officer's gunshots resulted in injuries from

shattered windshield glass; court found that, "[i]f supported by evidence, this allegation would raise a novel question about whether physical harm resulting from intentional police action that does not itself cause a defendant to stop constitutes a seizure") (citing *Brooks*, 614 F.3d at 1216-25). Where a seizure by use of physical force is attempted, but fails, there is no seizure. *See*, *e.g.*, *Brooks v. City of Aurora, Ill.*, 653 F.3d 478, 484-85 (7th Cir. 2011) (arrestee avoided officer's first attempt at seizure by escaping officer's initial grasp; the brief initial grasp was not sufficient to constitute an actual seizure because it did not significantly detain the arrestee; seizure actually occurred when arrestee was incapacitated by pepper spray); *United States v. Hernandez*, 27 F.3d 1403, 1406-07 (9th Cir. 1994) (suspect was not seized during a struggle instigated when an officer grabbed him because the suspect escaped and ran away; "[a] seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective"); *Dockery v. Blackburn*, 911 F.3d 458, 468 (7th Cir. 2018) (reversing denial of qualified immunity where plaintiff "had not submitted to the officers' authority and was far from subdued when Sergeant Blackburn applied the Taser three more times"); *Johnson v. City of Ferguson*, *supra*, 926 F.3d at 506 (plaintiff was "neither physically restrained nor prevented from proceeding to the sidewalk in compliance with [Officer's] directive rather than fleeing as he did"); *United States v. Beamon*, 576 F. App'x 753, 758 (10th Cir. 2014) (unpublished) (there is no Fourth Amendment seizure when officers apply physical force, if the force is insufficient to physically

subdue the suspect). Had Petitioner Torres actually stopped immediately after being shot, she would likely have been considered seized for purposes of the Fourth Amendment. *See Flores v. City of Palacios*, 381 F.3d 391, 396-97 (5th Cir. 2006) (where police officer shot at and hit arrestee's car, resulting in arrestee immediately stopping car, arrestee was seized for purposes of the Fourth Amendment). However, those are not the facts of this case.

In sum, despite being struck by two bullets on July 15, 2014, Petitioner was not "seized" by the Respondent Officers for purposes of the Fourth Amendment. Under long-standing case law from this Court, a law enforcement officer's gunshot does not constitute a "seizure" for purposes of the Fourth Amendment unless and until the criminal suspect stops movement in response to that shot. That is simply not what happened here. Petitioner hypothesizes that, under the black-letter law as set forth by Respondents, "if the passenger of a car is shot dead without reason . . . her family will have no Fourth Amendment remedy if the driver of the car keeps going." Pet. Br. 45.[3] Of course, that is not what happened in the present case, and application of the Fourth Amendment to those facts is not being decided today. Petitioner may only litigate what happened to her, and under the facts of *this* case, she simply was not subjected to a Fourth Amendment seizure. *See INS v.*

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[3] This Court has expressed no view on whether a passenger struck by a police officer's bullet may recover under a Fourth Amendment theory. *See Plumhoff v. Rickard*, 572 U.S. 765, 778 n.4 (2014).

Delgado, *supra*, 466 U.S. at 221 (citing *Florida v. Royer*, *supra*, 460 U.S. 491; *Mendenhall*, *supra*, 446 U.S. 544). Because she was not seized, Petitioner has no claim under the Fourth Amendment.[4]

II. *HODARI D.* DOES NOT DICTATE THE OUTCOME OF THIS CASE

Throughout her opening brief, Petitioner relies almost exclusively on this Court's opinion in *California v. Hodari D.*, *supra*, and the common law authorities cited therein. *See generally* Pet. Br. 13-27, 30-34. Based upon dicta from *Hodari D.*, Petitioner unabashedly asks this Court to adopt the purported common law rule suggesting that an unsuccessful use of force is nonetheless an "arrest" (and thus, a "seizure" for purposes of the Fourth Amendment). *See* Pet. Br. 39. This Court should reject that invitation. First, *Hodari D.* is factually inapposite from this case. In *Hodari D.*, a juvenile fled upon seeing a police car, and a chase ensued. *Hodari D.*, 499 U.S. at 622-23. When he saw a police officer almost upon him, the juvenile threw away a bag that turned out to contain narcotics, and the officer then tackled him. *Id.* at 623. The state court held that the juvenile had been "seized" when he saw the officer

[4] As noted above, the shooting incident underlying this case occurred on July 15, 2014. Petitioner did not file her Complaint until October 21, 2016, over two years later. *See* JA 1. New Mexico has a two-year statute of limitations for tort claims against government actors. NMSA 1978, § 41-4-15(A) (1977). Petitioner did not include any pendant state tort claims (such as battery) in her Complaint, *see generally* JA 4-10, nor could she, as any such claims would have been untimely.

running towards him, even though the officer did not exercise control over the juvenile's movements at that point. *Id.* This Court disagreed.

Hodari D. did not involve a use of physical force; the only question before this Court was whether or not the state court correctly held that the juvenile was seized when he threw the drugs away after seeing the officer, notwithstanding the fact that he was in full flight. In analyzing whether the officer's "show of authority" constituted a seizure, this Court began with the recitation of common law principles on which Petitioner Torres now heavily relies, stating that "the word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Hodari D.*, 499 U.S. at 626; *see also* Pet. Br. 9-10, 13, 26-27, 31-32. Petitioner ignores the fact that, in determining that a seizure did not occur until the physical act of tackling the suspect, this Court observed the common law connotation of the word "seizure" meant not merely to grasp or apply physical force, but to actually bring an object within physical control. *See Hodari D.*, 499 U.S. at 624.

A. The Tenth Circuit Properly Evaluated Contradictory Statements in *Hodari D.* Nearly a Decade Before Issuing Its Opinion In This Case

When viewed in a vacuum, the foregoing portions of *Hodari D.* appear to contradict each other. Although

a comparison of these excerpts could lead to some confusion, it would be too far-reaching—and would lead to absurd results—to read *Hodari D.* as standing for the proposition that every time an officer slightly touches an individual, the person has been seized. *See Touzin v. Patriarca*, 2013 WL 6051062, *5 (S.D. Fla. Nov. 14, 2013) (unpublished). Indeed, the Tenth Circuit implicitly recognized in *Brooks v. Gaenzle*, *supra*, 614 F.3d at 1221—relied on by the Circuit in deciding the instant case, *see* App. 7a-8a—that *Hodari D.* must be "read in context and its entirety" in order not to confuse its dicta with its holding. The Tenth Circuit's decision in *Brooks v. Gaenzle*[5] aptly dissected the apparent tension between *Hodari D.* and *Brower v. Cnty. of Inyo*, *supra*. *See United States v. Beamon*, 2013 WL 12085684, *4 (D.N.M. Mar. 11, 2013) (unpublished), *aff'd*, 576 F. App'x 753, *supra*.

In *Brooks*, the plaintiff was arrested after police officers discovered him allegedly burglarizing a home. *Brooks*, 614 F.3d at 1215. As the suspected burglar was climbing a fence to escape the property, the officers shot and struck him. *Id.* Despite being shot, he continued to climb the fence and escaped. *Id.* He commenced a civil action under Section 1983, arguing that the shooting amounted to an unlawful seizure. In determining whether or not a seizure actually occurred, the Tenth Circuit considered and applied, *inter alia*, this Court's opinions in *Terry v. Ohio*, *United States v. Mendenhall*, and *Tennessee v. Garner*, *supra*, and

[5] Then-Judge Neil Gorsuch was a member of the Tenth Circuit panel that decided *Brooks*.

concluded based upon these cases that a seizure "requires restraint of one's freedom of movement and includes apprehension or capture by deadly force." *See Brooks*, 614 F.3d at 1219. However, *Terry*, *Mendenhall*, and *Garner* "do not stand for the proposition . . . that use of deadly force alone constitutes a seizure. Instead, it is clear restraint of freedom of movement must occur." *Brooks*, 614 F.3d at 1219. Then, relying on *Brower v. Cnty. of Inyo*, *supra*, the Tenth Circuit decided that even though a bullet had hit the plaintiff, he was not seized within the meaning of the Fourth Amendment, noting that a violation of the Fourth Amendment requires an intentional acquisition of physical control. *Brooks*, 614 F.3d at 1220. While it was clear that the gunfire which struck plaintiff Brooks "was intentional and intended to stop him," Brooks "was not stopped by the very instrumentality set in motion for that purpose and, instead, he continued to flee and elude authorities." *Id.* Under the circumstances, the Tenth Circuit correctly ruled that law enforcement authorities did not gain intentional acquisition of physical control over Mr. Brooks. *Id.*

As does Petitioner here, the plaintiff in *Brooks* relied on the suggestion in *Hodari D.* that "laying on of hands or application of physical force to restrain movement," *see Hodari D.*, 499 U.S. at 626, constitutes a seizure, even when such physical contact is ultimately unsuccessful.[6] Observing the tension between this

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[6] *See also* Pet. for Writ of Certiorari, *Brooks v. Gaenzle*, 2010 WL 4494145, *12-13 (Nov. 5, 2010). This Court denied plaintiff Brooks' petition as noted above.

language and this Court's ultimate holding in *Hodari D.*, the Tenth Circuit explained that the *Hodari D.* Court had discussed and contrasted the common law definitions of "seizure" and "arrest" in the context of the "narrow question" before it. *Brooks*, 614 F.3d at 1220. To take this Court's language out of context, as the plaintiff did in *Brooks* and as Petitioner Torres does here, is to ignore the fact that this portion of *Hodari D.* amounted to no more than "common law dicta."[7] *Brooks*, 614 F.3d at 1220. Moreover, it is illogical to say that where an officer yells "Stop in the name of the law!" and the fugitive keeps running, it is not a seizure; but if that same fugitive is also shot, and still keeps running and escapes, they are seized. The only approach that makes sense is that a seizure occurs with submission to authority, voluntarily or involuntarily. If the person does not stop, they are not seized.

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[7] The Tenth Circuit declined to address Brooks' argument (similar to the argument made by Petitioner here) that pained or slowed movement was sufficient to constitute a seizure, as such argument was made for the first time on appeal and was otherwise not supported by citation or legal authority. *Brooks*, 614 F.3d at 1224-25. The Circuit, observing the absurd result of a strict application of Brooks' seizure analysis, noted that a seizure would not occur if an officer used a hand grenade in an attempt to stop a successfully fleeing suspect but the suspect was not physically touched. *See id.* at 1223 n.7. However, a seizure would be said to have occurred if the officer threw and hit the suspect with a snowball with the intent of stopping the same successfully fleeing suspect. *Id.* The simpler, and more logical, test to establish a Fourth Amendment seizure should remain that as set out by this Court in *Brower*: that there has been a seizure if and only if there is a termination of the freedom of the suspect. Petitioner Torres fails, just as much as the plaintiff in *Brooks* failed, to satisfy that test.

B. The *Hodari D.* Language Relied Upon By Petitioner is Dicta

A comparison of *Hodari D.* and this Court's other cases addressing the definition of a seizure compels the conclusion the Tenth Circuit reached in both the case *sub judice* and *Brooks*: that the language Petitioner relies upon is mere dicta that references common law principles, not constitutional ones. Just months after deciding *Brower v. Cnty. of Inyo*, this Court repeated the general proposition that a Fourth Amendment seizure occurs whenever government actors have "in some way restrained the liberty of a citizen." *Graham v. Connor*, *supra*, 490 U.S. 386, 395 n.10 (1989). Nothing in the *Hodari D.* discussion indicated any intent to overrule *Brower* or *Graham*. Notably, as this Court later clarified, the holding in *Hodari D.* centered on the proposition "a police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment," and its common law discussion merely illustrated the principle "attempted seizures" are beyond the Fourth Amendment's scope. *Cnty. of Sacramento v. Lewis*, *supra*, 523 U.S. 833, 844-45 & n.7 (1998).

The facts of *Hodari D.* did not involve an officer's touching the suspect in any way. Indeed, the *Hodari D.* Court's physical force seizure reference appears to have been offered merely as a contrast to the question of whether Hodari was seized solely by show of authority. Thus, to the extent *Hodari D.* observed that a mere touching constituted an arrest, such holding was an isolated comment and non-binding dicta as it was

unnecessary to the result. The lower courts have properly recognized as much. *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") (citation omitted); *cf. Johnson v. State*, 689 So.2d 376, 377-78 (Fla. Ct. App. 1997); *see also* Respondent's Brief in Opp. to Pet. for Writ of Certiorari, *Brooks v. Gaenzle*, 2010 WL 5089145, *16-17 (Dec. 9, 2010). Where, as here, the plaintiff's claim is based on the allegation that she was restrained by physical means rather than by a show of authority, the common law rule articulated in *Hodari D.* has no relevance. *See Lara v. Cnty. of San Mateo*, 163 F.Supp.2d 1107, 1110 (N.D. Cal. 2001).

As the statements in *Hodari D.* regarding an officer's unsuccessful attempt to use physical force were not rooted in the facts of that case, and were not otherwise essential to this Court's holding, they are clearly non-binding dicta. *See*, *e.g.*, *In re Tuttle*, 291 F.3d 1238, 1242 (10th Cir. 2002) ("dicta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand") (internal quotation marks omitted); *see also* Michael Abramowicz &

Maxwell Stearns, *Defining Dicta*, 57 Stan.L.Rev. 953, 1065 (2005) ("[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are *based upon the facts of the case*, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta) (emphasis added); Black's Law Dictionary, *supra*, at 569 (quoting Wm. M. Lile et al., *Brief Making and the Use of Law Books* 307 (3d ed. 1914) ("a dictum is by definition no part of the doctrine of the decision"). This Court has repeatedly held that it is not bound by dicta, particularly where more complete argument demonstrates that the dicta is not correct. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"); *Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935) (rejecting, under *stare decisis*, dicta "which may be followed if sufficiently persuasive but which are not controlling")); *see also Printz v. United States*, 521 U.S. 898, 963 (1997) (Stevens, J., dissenting) ("[i]t is, of course, beyond dispute that we are not bound by the dicta of our prior opinions") (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) ("invoking our customary refusal to be bound by dicta")); *Kerry v. Din*, 575 U.S. 86, 135 S.Ct. 2128, 2134 (2015) (plurality opinion) ("this Court is not bound by dicta, especially dicta that have been repudiated by the holdings of our subsequent cases"). The dicta of *Hodari D.* is not binding on this Court. In a case like this, the *stare decisis* effect of *Brower* and its progeny should control the outcome.

III. THOSE CASES THAT CONSIDERED SEIZURE BY PHYSICAL FORCE, PARTICULARLY *BROWER*, CONTROL THE OUTCOME OF THIS CASE

Unlike in *Hodari D.*, this Court's decision in *Brower* directly considered the issue of seizure by physical force. This Court's actual constitutional holding in *Brower*, not the common law dicta from *Hodari D.* cited by Petitioner, sets the standard for defining whether or not a "seizure" occurs for purposes of the Fourth Amendment in cases involving some form of physical force. *See*, *e.g.*, *In re City of Philadelphia Litigation*, 158 F.3d 711, 721 (3d Cir. 1998)[8] ("In *Brower*, the Supreme Court set forth the current standard for evaluating Fourth Amendment seizures"); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990);[9] *City of El Centro v. United States*, 922 F.2d 816, 822-23 (Fed. Cir. 1990); *Seekamp v. Michaud*, 109 F.3d 802, 806 (1st Cir. 1997); *Medeiros v. O'Connell*, 150 F.3d 164, 167-68 (2d Cir. 1998); *Howerton v. Fletcher*, 213 F.3d 171, 175 n.4 (4th Cir. 2000); *Childress v. City of Arapaho*, 210 F.3d 1154, 1156-57 (10th Cir. 2000); *Dunigan v. Noble*, 390 F.3d 486, 492 (6th Cir. 2004); *Henry v. Purnell*, 501 F.3d 374, 380-31 (4th Cir. 2007); *Eldredge v. Town of Falmouth*, 622 F.3d 100, 105 (1st Cir. 2011); *Gardner v. Bd. of Police Comm'rs, for Kansas City*, 641 F.3d 947, 951 (8th Cir. 2011); *Gorman v. Sharp*, 892

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[8] Then-Judge Samuel Alito was a member of the panel that decided this case.

[9] Then-Chief Judge Stephen Breyer was a member of the panel that decided this case.

F.3d 172, 174-75 (5th Cir. 2018); *see also Andrade v. City of Burlingame*, 847 F.Supp. 760, 764 (N.D. Cal. 1994), *aff'd sub nom. Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 869 (1996). For a seizure to occur, there must be an intentional acquisition of physical control, with the officer restraining the freedom of a person to get away. *See McCoy v. Harrison*, *supra*, 341 F.3d at 605 (quoting *Brower*, 489 U.S. at 593; *Tennessee v. Garner*, *supra*, 471 U.S. at 7); *see also Cameron v. City of Pontiac*, *supra*, 813 F.2d 782, 785-86 (6th Cir. 1987) (finding that even with use of deadly force, where there was no actual physical seizure, "the alleged unreasonableness of the officers' conduct cannot serve as a basis for a § 1983 cause of action anchored in the Fourth Amendment," even though the suspect died from other causes independent of the officers' use of deadly force while fleeing);[10] *Harmon v. City of Pocatello*, ___ F.Supp.3d ___,

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[10] While the question presented in this case does not, *per se*, involve an analysis of the reasonableness of the Respondents' conduct, Petitioner and some of her *amici* have suggested that the gunshots fired by the Officers were unreasonable. This is patently incorrect: when (as here) an officer has probable cause to believe that a suspect poses an imminent threat of serious physical harm to the officer or others, deadly force is reasonable. *Tennessee v. Garner*, *supra*, 471 U.S. at 11. Vehicle-inflicted harm against law enforcement is "severe." *See*, *e.g.*, *Lytle v. Bexar Cnty.*, 560 F.3d 404, 412 (5th Cir. 2009). This case is ultimately about the imminent threat of severe physical harm a suspect posed as her vehicle approached an officer standing near it, and the officers' split-second reaction to that assault. *Cf. Estate of Shaw v. Sierra*, 2009 WL 10703108, *3 (N.D. Tex. Sep. 1, 2009) (unpublished); *Mazoch v. Carrizales*, 733 F. App'x 179, 183 (5th Cir. 2018) (unpublished) ("[e]ven when viewing the facts in the light most favorable to Mazoch, we find that Officer Carrizales faced a situation in which

2020 WL 104677, *12 (D. Idaho Jan. 7, 2020) (slip op.) ("a touch, grasp, or brushing is not a seizure unless it subjects a person to 'governmental termination of freedom of movement through means intentionally applied' . . . or in some way restrains his or her physical

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her partner was out of sight, possibly under the still-running vehicle controlled by the same person who had placed the officers in potentially grave danger just seconds before").

Additionally, despite the fact that the Tenth Circuit did not address this question, *see* App. 6a, Petitioner twice suggests that Respondents "had no reason whatsoever to shoot" her and that they may have "violated clearly established law in doing so." *See* Pet. Br. 12, 45. Petitioner can make no such showing: for purposes of Respondents' qualified immunity defense, "existing precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also White v. Pauly*, 137 S.Ct. 548, 552 (2017). This Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 591 n.8 (2018). However, this Court has assumed without deciding that "a controlling circuit precedent could constitute clearly established federal law." *See*, *e.g.*, *Carroll v. Carman*, 574 U.S. 13, 17 (2014); *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019). Petitioner sought a writ of certiorari from this Court on the grounds that there was a circuit split on the issue presented in this case. As discussed above, virtually every circuit analyzing whether a seizure occurred via the use of force has looked to this Court's decision in *Brower* to supply the framework for that analysis. That said, assuming *arguendo* that a circuit split did exist on this issue, Officers Madrid and Williamson would be entitled to qualified immunity. *See*, *e.g.*, *Cooper v. Rutherford*, 503 F. App'x 672, 676 (11th Cir. Oct. 12, 2012) (unpublished) ("[t]he existing case law regarding whether Appellees were seized for the purposes of the Fourth Amendment is far from settled, as evidenced by the varying decisions from our sister circuits analyzing similar situations") (collecting cases); *Gardner v. Bd. of Police Comm'rs, for Kansas City*, *supra*, 641 F.3d at 952-53.

liberty") (quoting *Brower*, 489 U.S. at 596-97, and citing *Terry v. Ohio*, *supra*, 392 U.S. at 19).

Then, in *Brendlin v. California*, *supra*—decided sixteen years after *Hodari D.*, this Court repeated its holding in *Brower* and clarified: "A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin*, 551 U.S. at 254. As this Court observed in *Brendlin*, "a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Id.* at 262. In its opinion in this case below, the Tenth Circuit—relying primarily upon *Brooks v. Gaenzle*—reached the only conclusion possible from this Court's Fourth Amendment authorities: "some form of intentional acquisition of physical control, through termination of movement by physical force or submission to a show of authority, must occur in flight cases for a seizure to occur." *Brooks*, 614 F.3d at 1221; *see also id.* at 1223 ("as other Supreme Court precedent further instructs, such physical touch (or force) must terminate the suspect's movement, and, alternatively, any show of authority (without touch) must cause submission"); App. 8a ("the officers' use of deadly force against Torres failed to 'control [her] ability to evade capture or control' ") (quoting *Brooks*, 614 F.3d at 1223). For this reason, the Tenth Circuit properly held in each case that a seizure had not occurred, notwithstanding the fact that in each case a police officer had struck the plaintiff

with a bullet, because the gunshot did not stop either plaintiff from fleeing. *See Brooks*, 614 F.3d at 1224-25 (noting that, while the Defendant Deputy's "gunshot may have intentionally struck" plaintiff, "it clearly did not terminate his movement or otherwise cause the government to have physical control over him" and thus, plaintiff failed to show that the Defendants' "alleged conduct violated a constitutional right by means of 'seizure' "); App. 8a.

Since deciding *Hodari D.*, this Court has never utilized the physical force dicta from that case to decide whether a "seizure" occurred by use of physical force. By contrast, this Court has since cited with approval the seizure definition in *Brower*. In *Scott v. Harris*, *supra*, this Court emphasized the "termination" of freedom aspect of the *Brower* seizure analysis, noting that the "question in *Brower* was whether a police roadblock constituted a seizure under the Fourth Amendment." *Scott*, 550 U.S. at 384 n.10. In deciding that question, the relative culpability of the parties is irrelevant. A seizure occurs when the police are responsible for the termination of a person's movement, *id.* (quoting *Harris v. Coweta Cnty., Ga.*, 433 F.3d 807, 816 (11th Cir. 2005) (quoting in turn *Brower*, 489 U.S. at 595)), regardless of the reason for the termination. *Scott*, 550 U.S. at 584 n.10. As in *Scott* and other cases involving the use of physical force, *Brower* supplies the relevant rule of decision here.

A. The Search Clause Jurisprudence Cited by Petitioner Has No Bearing on the Issue Raised in This Case

Much of the case law cited in Petitioner's brief (specifically, those cases analyzing whether an unreasonable "search" occurred for Fourth Amendment purposes) is inapposite. This Court has recognized that the Fourth Amendment's Search Clause is wholly distinct from the Seizure Clause, such that courts applying these clauses must understand they provide different protections against government conduct. *See Segura v. United States*, 468 U.S. 796, 806 (1984) ("[d]ifferent interests are implicated by a seizure than by a search"); *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (a Fourth Amendment search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed," while a Fourth Amendment seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property"). While the Search Clause protects an individual's expectation of privacy, the Seizure Clause relates, in pertinent part, to freedom of *movement*. *See United States v. Va Lerie*, 424 F.3d 694, 701 (8th Cir. 2005) (en banc) (quoting *Jacobsen*, 446 U.S. at 113 n.5); *see also Skinner v. Ry. Labor Executives' Ass'n*, *supra*, 489 U.S. at 616 ("[t]he initial detention necessary to procure . . . evidence may be a seizure of the person if the detention amounts to a meaningful interference with his freedom of movement. Obtaining and examining the evidence may also be a search if doing so infringes an expectation of

privacy that society is prepared to recognize as reasonable") (citations omitted).

Nonetheless, Petitioner relies heavily on a series of Fourth Amendment search cases, in particular, *United States v. Jones*, 565 U.S. 400 (2012). *See* Pet. Br. 9, 14, 15, 16, 27, 36. Central to this Court's decision in *Jones* was the finding of a property interest, *see El-Nahal v. Yassky*, 835 F.3d 248, 254 (2d Cir. 2016); *United States v. Sweeney*, 821 F.3d 893, 899-900 (7th Cir. 2016), which is not implicated in the present case. Because Government agents had physically intruded on Jones's Jeep, which was "beyond dispute . . . an 'effect' as that term is used in the [Fourth] Amendment," *Jones*, 565 U.S. at 404, to plant and employ a tracking device, this Court concluded that it need not consider the reasonable-expectation-of-privacy approach in determining whether Jones was subject to a search. *See generally id.* at 405-11. Applying the property-based approach, this Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitute[d] a 'search.'" *Id.* at 404. Thus, Jones was subject to a search because the Government installed a GPS device on his vehicle in order to obtain information, on a vehicle that, while registered to his wife, he exclusively drove and in which (as the Court took pains to note) he "had at least the property rights of a bailee" at the time the Government installed the tracking device. *Id.* at 404 n.2. The framework of *Jones* has no application to Petitioner's seizure-of-a-person claim here. *Cf. United States v. Caira*, 833 F.3d 803, 808 (7th

Cir. 2016) ("Justice Scalia's lead opinion [in *Jones*] applied a framework that is not relevant here). Petitioner's reliance upon *Carpenter v. United States*, 138 S.Ct. 2206 (2018), *see* Pet. Br. 15, is equally misplaced. *See United States v. Wellbeloved-Stone*, 777 F. App'x 605, 607 (4th Cir. 2019) (unpublished) (declining to apply the narrow holding of *Carpenter* to defendant's claim that he had a reasonable expectation of privacy in his internet protocol address and subscriber information).

Similarly, *Schmerber v. California*, 384 U.S. 757 (1966) and *Winston v. Lee*, 470 U.S. 753 (1985), cited by Petitioner, *see* Pet. Br. 27-28, do not support Petitioner's arguments here. In *Schmerber*, this Court considered the question of whether the State had violated the Fourth Amendment when it compelled an individual suspected of driving while intoxicated to submit to a blood test. This Court noted that "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber*, 384 U.S. at 769-70. Because in *Schmerber* the administration of the subject blood test involved an intrusion into an area of the body in which the suspect retained a personal security interest or an expectation of privacy, the Fourth Amendment's protection applied and a search warrant issued upon probable cause was required absent some exigent

circumstances. *See id.* The medical intrusions at issue in *Schmerber* were conducted for inculpatory and incriminatory purposes—collecting evidence to prosecute a suspect—rather than a heat-of-the-moment act of self-defense.

This Court returned to the question of physically invasive medical procedures under the Fourth Amendment in *Winston v. Lee*, when it considered the reasonableness of a compelled surgical procedure to recover a bullet from beneath the skin of a robbery suspect. *Winston*, 470 U.S. at 755. While this Court's decisions in *Schmerber* and *Winston* help delineate the contours of an individual's right to be free from unreasonable invasive medical procedures, which amounted to *searches*, they do not speak to the *seizure* by use of force issues raised in the present case. *See Sullivan v. Bornemann*, 384 F.3d 372, 376-77 (7th Cir. 2004) (plaintiff did not argue that defendants used excessive force in restraining him—instead, plaintiff "base[d] his Fourth Amendment argument on search-and-seizure cases [including *Schmerber* and *Winston*] examining physically invasive procedures used to retrieve evidence from the person of the defendant"); *cf. United States v. Husband*, 226 F.3d 626, 631 (7th Cir. 2000).

Finally, *Byrd v. United States*, 138 S.Ct. 1518 (2018), another search case cited by Petitioner, *see* Pet. Br. 36, likewise does not aid her here. In *Byrd*, this Court held that a defendant who had not signed a rental car agreement may still have a legitimate privacy expectation in the rental car to challenge its search. *Byrd*, 138 S.Ct. at 1529-30. This Court held

that the "mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Id.* at 1531. Drawing from property principles not applicable in the present case, this Court reasoned that "[o]ne of the main rights attaching to property is the right to exclude others, and, in the main, one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Id.* at 1527 (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (internal quotation marks omitted)). Even granting that Petitioner cites the foregoing cases for the proposition that this Court often looks to the common law in deciding Fourth Amendment cases, it does not help Petitioner's cause because, as discussed immediately below, the common law does not determine the outcome of this case.

B. The Common Law Principles Espoused by Petitioner Do Not Control This Court's Analysis of Whether a "Seizure" Occurs for Purposes of the Fourth Amendment

Petitioner's heavy reliance on eighteenth- and nineteenth-century common law principles regarding arrests, *see generally* Pet. Br. 16-23, is wholly misplaced in the context of the present case. While it is true that this Court has often looked to the common law in evaluating Fourth Amendment claims, this Court "has not simply frozen into constitutional law those law enforcement practices that existed at the

time of the Fourth Amendment's passage." *Tennessee v. Garner*, *supra*, 471 U.S. 1, 13 (1985) (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)). In particular, "the common-law rules of arrest developed in legal contexts that substantially differ from" the context of the present case. *Payton*, 445 U.S. at 591. Notably, scholars dispute the proper interpretation of the English authorities that were the historical basis for the Fourth Amendment. *Minnesota v. Carter*, 525 U.S. 83, 99-100 (1998) (Kennedy, J., concurring) (citing *Payton*, 445 U.S. at 592).[11]

While the common law can be interesting, and sometimes informative as to issues before this Court, it is certainly not dispositive. *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 748 (2008) (finding "evidence as to the geographic scope of the writ [of habeas corpus] at common law informative" but "not dispositive"); *cf. United States v. Eurodif S.A.*, 555 U.S. 305, 310 n.10 (2009) ("[c]ommon law definitions do not necessarily control the meaning of terms in modern trade laws; we merely mean to show the long pedigree of the distinction relied upon by the Commerce Department"); *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) (while this Court has "observed that our determinations as to the scope of official immunity are made in the light of the 'common-law tradition,' . . . we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often

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[11] *See also* Orin Kerr, *Originalism and the Fourth Amendment*, available at http://volokh.com/2013/08/19/originalism-and-the-fourth-amendment-2/ (last accessed Feb. 28, 2020).

arcane rules of the common law") (citation omitted); *Manuel v. City of Joliet*, *supra*, 137 S.Ct. at 921 (reiterating that "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components'"); *McDonough v. Smith*, 139 S.Ct. 2149, 2156 (2019) (same); *Briscoe v. LaHue*, 460 U.S. 325, 355 n.15 (1983) (Marshall, J., dissenting) (noting that "federal common law diverged from state common law as to witness immunity"). As is pertinent here, federal common law (particularly this Court's case law regarding the use of physical force to effectuate a seizure) has long since diverged from the English common law and other centuries-old authorities cited by Petitioner.[12]

Eight years after *California v. Hodari D.* was decided, in *Wyoming v. Houghton*, 526 U.S. 295 (1999), Justice Scalia (writing for the majority as he did in both *Brower* and *Hodari D.*) noted that, in determining

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[12] Strikingly, during the formative years of the law of arrest, the apprehension of criminals by private individuals (as opposed to publicly-employed police officers) was the norm. *See Stevenson v. State*, 287 Md. 504, 517, 413 A.2d 1340, 1347 (Md. Ct. App. 1980). While "(t)he Crown appointed sheriffs and constables among whose manifold duties was that of arresting wrongdoers . . . the principal burden of keeping the peace lay on the community as a whole." *Id.* (quoting Warner, *Investigating the Law of Arrest*, 31 J.Crim.L.C. & P.S. 111, 112 (1940)). With the advent of police forces, as we today know them, in the late eighteenth and early nineteenth centuries, came a corresponding change in the principles of arrest. *Stevenson*, 413 A.2d at 1348 (citing Hall, *Legal & Social Aspects of Arrest Without a Warrant*, 49 Harv.L.Rev. 566, 580-83 (1936)).

whether a particular governmental action violates the Fourth Amendment, this Court inquires "first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Houghton*, 526 U.S. at 299 (citing *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Hodari D.*, 499 U.S. at 624). Where that inquiry yields no answer, this Court "must evaluate the search or seizure under traditional standards of reasonableness." *See Houghton*, 526 U.S. at 299-300 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995)). In his concurring opinion in *Houghton*, Justice Breyer astutely noted that "history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question." *Houghton*, 526 U.S. at 307 (Breyer, J., concurring). Moreover, as stated by the Court in *Hodari D.*, "neither usage nor common-law tradition makes an attempted seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions." *Hodari D.*, 499 U.S. at 626 n.2 (alterations omitted); *see also Brooks v. Gaenzle*, *supra*, 614 F.3d at 1221; *United States v. Beamon*, *supra*, 2013 WL 12085684 at *5.

Despite Petitioner's fervent and repeated assertions to the contrary, the terms "arrest" and "seizure" are not synonymous. "The Fourth Amendment, of course, does not by its terms proscribe false arrests; it proscribes 'unreasonable . . . seizures.'" *Posr v. Doherty*, 944 F.2d 91, 97 (2d Cir. 1991); *see also Christopher v. Nestlerode*, 373 F.Supp.2d 503, 516 (M.D. Pa.

2005) ("[w]hen an 'arrest' occurs—and when an officer may properly invoke this authority—is *not* governed by the Constitution, which notably does not define or use the term") (emphasis in original). "[J]ust as not every encounter between a citizen and the police is a seizure . . . not every seizure is an arrest." *Posr*, 944 F.2d at 97 (citing *Terry v. Ohio*, *supra*, 392 U.S. at 13); *see also Christopher*, 373 F.Supp.2d at 516 n.24 ("arrests and seizures are somewhat like squares and rectangles: an 'arrest' is invariably a 'seizure' but a 'seizure' is not always an 'arrest' "); *cf. Roberts v. Roberts*, 1998 WL 151773, *11 (D. Mass. Mar. 17, 1998) (unpublished) ("common sense tells us that a police officer, though authorized to make arrests, does not 'seize' every person he or she casually touches").[13] Ultimately, the definition of seizure should comport with common

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[13] Petitioner cites two early state constitutions as additional support for her false equation of the terms "arrest" and "seizure." *See* Pet. Br. 9, 17. However, the majority of state or colonial constitutions that preceded the adoption of the Fourth Amendment used the terms "seize" or "seizure" (and not arrest) in proscribing oppressive government conduct (as does the Fourth Amendment itself). *See* Va. Decl. of Rights of 1776, § 10 (stating that "general warrants . . . to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted"); Pa. Decl. of Rights of 1776, art. X ("the people have a right to hold themselves . . . free from search and seizure. . . . "); Del. Decl. of Rights of 1776, § 17 ("all warrants without oath to search suspected places, or to seize any person or his property, are grievous and oppressive; and all general warrants to . . . apprehend all persons suspected, without naming or describing . . . any person in special, are illegal and ought not to be granted"); Md. Decl. of Rights of 1776, art. XXIII; N.C. Decl. of Rights of 1776, art. XI.

sense and common understanding. *See Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring).

Even accepting, for purposes of argument only, Petitioner's faulty premise that the term "seizure" should be equated with the term "arrest," the complete definition and longtime understanding of the latter term wholly undercuts Petitioner's arguments. "An 'arrest' is the detaining of a person, the obtaining of the *actual physical control and custody of him* and retaining it against his will and without his consent under some real or assumed authority" (emphasis added). *Jacques v. Sears, Roebuck & Co.*, 30 N.Y.2d 466, 472, 285 N.E.2d 871, 877 (1972) (citing 1 Alexander, *The Law of Arrest*, p. 353 (1974)); *Baltimore & Ohio Ry. Co. v. Strube*, 111 Md. 119, 127, 73 A. 697, 700 (Md. Ct. App. 1909) ("[a]n arrest is the seizing of a person *and detaining him in the custody of the law*") (emphasis added); *see also Christopher*, *supra*, 373 F.Supp.2d at 516 n.24 ("an 'arrest' is normally defined under common law and state law as physically taking a person into custody"); *Long v. Ansell*, 63 App.D.C. 68, 71, 69 F.2d 386, 389 (D.C. Ct. App.) ("it appears that the word 'arrest' has a well-defined meaning. There must be some detention of the person to constitute arrest"), *aff'd*, 293 U.S. 76 (1934). Even the English common law cited by Petitioner recognized that an arrest or detention ended with custody. *See*, *e.g.*, *Simpson v. Hill* (1795) 170 Eng. Rep. 409 ("[t]he merely giving a person in charge to a peace officer, *where the officer never takes the person of the defendant into custody*, is not an imprisonment") (emphasis supplied); *Williams & Jones & Others* (1736) 95

Eng. Rep. 193, 194 ("if a bailiff comes into a room, and tells the defendant he arrests him, and locks the door, that is an arrest, for he is in custody of the officer").

"[T]he word 'arrest' is derived from the French word *arreter*, which means to stop, to detain, to hinder, to obstruct." *Jacques*, 30 N.Y.2d at 472-73; *see also Posr v. Doherty*, 944 F.2d at 97; *United States v. Scott*, 149 F.Supp. 837, 840 (D.D.C. 1957); *Hart v. Flynn's Ex'r*, 8 Dana 190, 190-91, 38 Ky. 190 (Ct. App. 1839) ("[a]n arrest is a restraint of the person (taking the party into actual custody). . . . Arrest signifies a restraint of the person, a restriction of the right of locomotion"); *French v. Bancroft*, 1 Metc. 502, 504, 42 Mass. 502 (1840) ("[b]y 'arrest' is to be understood to take the party into custody. An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty"); *Rhodes v. Walsh*, 55 Minn. 542, 552, 57 N.W. 212, 215 (1893). "Restraint" of one's liberty or movement is a "[p]rohibition of action" or "holding back." Black's Law Dictionary, *supra*, at 1571; *see also* American Heritage Dictionary of the English Language, *supra*, at 1497 (to "restrain" is "[t]o hold back or keep in check" or "control"). Notably, this Court has found an arrest based upon the concept of deprivation of freedom: "[w]hen the officers interrupted the two men *and restricted their liberty of movement*, the arrest, for purposes of this case, was complete" (emphasis added). *Henry v. United States*, 361 U.S. 98, 103 (1959). Thus, whether a law enforcement officer's action is termed an "arrest" or a "seizure," it is only complete when the action restrains or restricts the suspect's movement. It is beyond

argument that the New Mexico State Police officers' gunshots did not restrict Petitioner's movement or liberty here, as she fled 75 miles from Albuquerque to Grants, New Mexico even after being shot, and was not arrested until a full day later, when she was taken to a hospital in Albuquerque.

"[I]n our tripartite system of government," it is emphatically the duty of this Court to "say 'what the law is.'" *Boumediene*, *supra*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2098 (2019) (Thomas, J., concurring) ("[i]t is our job to say what the law is"). As noted in earlier consideration of Fourth Amendment case law, this Court has been consistent in stating what the law regarding seizures is, and the Tenth Circuit's decision below and other relevant Circuit decisions have conformed with those tenets for decades. Because of sweeping changes in both legal and technological contexts, blind reliance on the common law rules cited by Petitioner "would be a mistaken literalism that ignores the purposes of a historical inquiry." *See Tennessee v. Garner*, *supra*, 471 U.S. at 13. The fact pattern presented by the case *sub judice*—police officers shooting at a suspect fleeing in a motor vehicle—would have been foreign to (and indeed, would have confused) anyone alive at the time of the Fourth Amendment's ratification. *Cf. Collins v. Virginia*, 138 S.Ct. 1663, 1676 (2018) (Thomas, J., concurring). The sole issue presented in this appeal—whether or not the Petitioner was seized when she was shot as she sped away from Respondents—"is not one that can

be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted." *Payton v. New York*, *supra*, 445 U.S. at 598. Put another way, this "simply is not a case in which the claimant can point to 'a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.' " *Atwater v. Lago Vista*, 532 U.S. 318, 345 (2001) (quoting *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting); *see also Virginia v. Moore*, 553 U.S. 164, 170-71 (2008). As such, this Court should reject wholesale the common law argument advanced by Petitioner Torres.

IV. PETITIONER HAS NOT IDENTIFIED ANY JUSTIFICATION FOR OVERRULING THIS COURT'S USE-OF-FORCE FOURTH AMENDMENT SEIZURE CASES

In truth, what Petitioner asks this Court to do (by demanding that it rewind the clock to the eighteenth century and ignore decades of its own jurisprudence), is to overrule or severely limit its prior decisions in, *inter alia*, *Terry*, *Brower*, *Brendlin*, and *Scott*, and replace them with the dicta of *Hodari D*. However, *stare decisis* requires this Court to follow its own Fourth Amendment cases which directly and thoughtfully considered the pertinent constitutional seizure issues actually presented, not overrule those precedents. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992); *see also Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2408-09 (2015). Overruling precedent "is never a small matter" and

always requires "special justification—over and above the belief that the precedent was wrongly decided." *Kimble*, 135 S.Ct. at 2409; *see also Franchise Tax Bd. of California v. Hyatt*, 139 S.Ct. 1485, 1504-05 (2019) (Breyer, J., dissenting). *Stare decisis* "is a vital rule of judicial self-government," *see Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015), and is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014); *see also Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2189 (2019) (Kagan, J., dissenting). Application of the doctrine is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *Stare decisis* teaches that this Court should exercise the authority to "undecide" its prior rulings sparingly. *Kimble*, 135 S.Ct. at 2415.

Stare decisis is a "principle of policy" that balances several factors to decide whether the scales tip in favor of overruling precedent. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 363 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). Among these factors are the "workability" of the standard, "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). In the present case, Petitioner has failed to show how the *Brower* standard is unworkable or outdated, and Petitioner has not shown that *Brower* and

its progeny were poorly-reasoned. As such, Petitioner has failed to identify any special justification for departing from them. This Court should flatly decline to undo over five decades' worth of Fourth Amendment use of force precedents here. It should affirm the Tenth Circuit's opinion below, which via its reliance on its earlier decision in *Brooks v. Gaenzle*, *supra*, directly applied the principles in *Brower*, *Terry*, *Mendenhall*, and *Garner*, and gave careful consideration to—then properly rejected—the dicta and unpersuasive arguments now repeated by Petitioner here.

CONCLUSION

Despite what she now claims, *see* Pet. Br. 39-40, Petitioner does indeed argue for a *per se* rule based upon ancient common law stating that any time a suspect is physically touched by a law enforcement officer, the Fourth Amendment's prohibition against unreasonable seizures is violated even if the officer's use of force does not result in the suspect stopping or otherwise acquiescing to the officer. However, this Court has previously "made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.'" *United States v. Drayton*, 536 U.S. 194, 201 (2002) (quoting *Florida v. Bostick*, *supra*, 501 U.S. at 439); *see also Michigan v. Chesternut*, *supra*, 486 U.S. at 573. Under the circumstances of this encounter, Petitioner was not seized by the two shots that struck her on July

15, 2014—she was seized only upon being arrested the next day.

This Court's decision in *Brower v. County of Inyo*—and not the dicta from *California v. Hodari D.* on which Petitioner and her *amici* almost exclusively rely—provides the appropriate framework for proper Fourth Amendment seizure analysis in cases where some level of force is actually utilized. Applying those precedents to this case, the conclusion is inescapable that there was no seizure. It is axiomatic that "[w]ithout a seizure, there can be no violation of the Fourth Amendment and therefore no liability for the individual Defendants." *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015), *cert. denied*, 137 S.Ct. 197 (2016). "Additionally, without a seizure, there can be no claim for excessive use of force in effectuating that seizure." *See Cnty. of Sacramento v. Lewis*, *supra*, 523 U.S. 833, 843-44 (1998). The Tenth Circuit's decision was consistent with *Brower* as well as this Court's opinions in *Terry*, *Brendlin*, *Mendenhall*, and *Scott*.

This Court says what the law is, not what English judges two centuries removed from the facts of this case might say based upon factual scenarios unimaginable at that time. It is impossible to believe that a person in the eighteenth century that attacked a peace officer with a deadly weapon (which a car unquestionably is) would ever have claimed that being shot in response, and then eluding capture, amounted to an actual seizure. This Court has amply and repeatedly spoken on the proper standard for analyzing seizure by the use or attempted use of physical force. Petitioner

cannot show that she was seized by Respondents' use of force, particularly where she engaged in headlong flight and evaded capture by law enforcement until the following day. Under well-established Fourth Amendment standards, and as a matter of common sense, Petitioner was not seized by Respondents on July 15, 2014.

This Court should affirm the decision of the Tenth Circuit Court of Appeals in all respects.

Respectfully submitted,

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