No. 20-1006

IN THE
SUPREME COURT of the UNITED STATES

CITY OF HAYWARD, A MUNICIPAL CORPORATION, et al.,

Petitioners,

vs.

JESSIE LEE JETMORE STODDARD-NUNEZ,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Pursuant to Supreme Court Rule 37.2(b), the International Municipal Lawyers Association ("IMLA") respectfully moves the Court for leave to file the attached amicus brief in support of Petitioners.

The Petition presents this Court with the opportunity to resolve a long-standing circuit split: Whether a victim-passenger who is unintentionally shot by a police officer during an effort to stop the vehicle's driver is "seized" for purposes of the Fourth Amendment. As the oldest and largest association of attorneys representing United States municipalities, counties, and special districts, IMLA has an interest in ensuring clarity of the law on this issue, which significantly impacts liability on public entities.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Because its members routinely face Fourth Amendment litigation, IMLA is well-suited to provide this Court with practical insight regarding the adverse impacts of this circuit split on municipalities, which include protracted litigation, increased costs, and difficulty in assessing and planning for potential liability.

IMLA timely notified the parties of its intent to submit its amicus brief more than 10 days prior to filing, and requested consent to the filing. Petitioners consented to the filing of this brief, and Respondent did not. IMLA respectfully moves the Court for leave to file the attached amicus brief in support of Petitioners.

Respectfully submitted,

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February 24, 2021

QUESTIONS PRESENTED

1. Whether an accelerating fleeing driver's sudden turn deprives a threatened shooting officer of qualified immunity?

2. Whether an unintended victim-passenger of a fleeing vehicle is "seized" for purposes of the Fourth Amendment?

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE[1/]

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Amicus curiae IMLA's members represent all levels of local government, including law enforcement agencies. IMLA and its members have an interest in ensuring clarity of the law concerning imposition of liability on public entities, which allows accurate fiscal planning, avoids prolonged litigation, and permits informed training that might avoid entanglement in litigation altogether.

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STATEMENT OF THE CASE

Amicus curiae IMLA joins in and refers to the Statement in the petition for writ of certiorari ("Pet.") at pages 5-12.

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[1/]This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution towards preparation of this brief. The parties were timely notified of IMLA's intention to file this brief. Petitioners consented to the filing of the brief, and Respondent did not.

SUMMARY OF ARGUMENT

This case presents a fundamental question that has long divided circuit courts: Whether a victim-passenger who is unintentionally shot by a police officer during an effort to stop the vehicle's driver is "seized" for purposes of the Fourth Amendment. Decisions from the First, Second, and Tenth Circuits hold that victim-passengers who are inadvertently harmed by the police do not have standing to bring a Fourth Amendment claim because they were not the target of intentional force. In stark contrast, the Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have concluded that such individuals do have a Fourth Amendment claim regardless of whether they were the object of an officer's use of force.

Here, a police officer intentionally shot at the driver of a vehicle that was directly accelerating toward him in an effort to stop the driver from running over his ride-along passenger and himself. An errant bullet accidentally shot and killed the vehicle's passenger, Shawn Joseph Jetmore Stoddard-Nunez. In the civil litigation that followed, the Ninth Circuit reversed summary judgment in Petitioners' favor, but ignored the dispositive issue squarely raised by Petitioners—that Stoddard-Nunez was not seized under the Fourth Amendment. In doing so, the court ignored the threshold issue that it needed to decide before reaching excessive force or qualified immunity, and glossed over a rupture in Fourth Amendment law as to what "seizure" means.

This Court has already recognized in *Plumhoff v. Rickard*, 572 U.S. 765, 778 n.4 (2014) that there is disagreement among the circuit courts as to whether a passenger in Stoddard-Nunez's situation can recover under a Fourth Amendment theory. That circuit split has only grown more entrenched since *Plumhoff* was decided and shows no sign of resolving itself. And because the conflict stems from competing understandings of this Court's case law, only this Court can restore

uniformity on an essential question regarding the meaning of the Fourth Amendment.

Review is also warranted because the need for clarity in the law transcends the interests of the parties. The question presented is fundamental to the Fourth Amendment. Without knowing what constitutes a "seizure," neither citizens nor police officers can know whether an "unreasonable" seizure has occurred. The issue has broad implications for both civil and criminal law. On the civil side, the standard by which officers' inadvertent application of force is judged—as a Fourth Amendment seizure or a Fourteenth Amendment substantive due process violation—hugely impacts the scope of civil liability for local government entities. And for criminal cases, a court's decision whether to suppress evidence may involve an examination of whether and when a defendant was actually seized.

This Court's intervention is needed to resolve a circuit split that is of great legal and practical importance. A local government's liability under the Fourth Amendment should not depend on geography, but that is precisely what has happened and only this Court can resolve the conflict in the circuits. It is essential that local public entities understand the nature and extent of potential liability that they face, particularly where, as here, cases involving the inadvertent application of force arise with considerable frequency. IMLA joins in Petitioners' request to grant the writ of certiorari.

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WHY REVIEW IS WARRANTED

I. The Fourth Amendment Question Presented Is The Subject Of A Persistent And Acknowledged Split Among The Courts Of Appeals.

A. The First, Second, and Tenth Circuits Hold That Victim-Passengers Inadvertently Harmed By The Use Of Force Directed At Another Party Cannot Recover Under A Fourth Amendment Theory.

Three courts of appeal have decided that victim-passengers who are harmed by a police officer's unintentional application of force do not have standing to bring a Fourth Amendment Claim. Those decisions all rely upon this Court's decision in *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), which concluded that a "seizure" under the Fourth Amendment occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*."[2/]

In *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795-96 (1st Cir. 1990), the First Circuit held that a hostage-passenger who was inadvertently shot during police pursuit of a robbery suspect was not seized for purposes of the Fourth Amendment because "[i]t is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim."

The Second Circuit adopted the same approach in *Medeiros v. O'Connell*, 150 F.3d 164, 166 (2d Cir. 1998), which involved the accidental shooting of a hostage-passenger in an attempt to stop a driver who had commandeered the vehicle. The court recognized that, under *Brower,* a Fourth Amendment seizure analysis requires consideration of who was the intended target of the force. *Id.* at 168

[2/] *Brower's* interpretation is rooted in the origins and purpose of the amendment, which were principally directed towards "writs of assistance" and "did not involve unintended consequences of government action." 489 U.S. at 596.

("[W]here the hostage is hit by a bullet intended for the hostage-taker, the mishap is the 'unintended consequence[ ] of government action,' and the governing principle is that such consequences cannot 'form the basis for a fourth amendment violation,'") alteration in original.

The Tenth Circuit came to a similar conclusion in *Childress v. City of Arapaho*, 210 F.3d 1154, 1156-57 (10th Cir. 2000), holding that two hostage-passengers in a vehicle being pursued by the police were not seized when police fired shots at the vehicle, inadvertently harming the passengers.

Courts apply the same analysis in factually analogous innocent bystander cases. For instance, while the Eighth Circuit has not addressed the question in the passenger context, it has decided that "bystanders are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout." *Moore v. Indehar*, 514 F.3d 756, 760 (8th Cir. 2008) (plaintiff "must show that [defendant] intended to seize [him] through the means of firing his weapon at [plaintiff] to establish a Fourth Amendment claim.") The Fourth Circuit came to a similar conclusion in *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991), holding that an officer firing at a vehicle did not seize a person outside the vehicle whom he inadvertently shot.[3/]

B. The Third, Sixth, Ninth, and Eleventh Circuits Embrace The Opposite Rule.

Other circuits have decided that passengers in Stoddard-Nunez's situation can recover under a Fourth Amendment theory. *See, e.g., Davenport v. Borough of Homestead*, 870 F.3d 273, 279 (3d Cir. 2017) ("[A] passenger shot by an officer

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[3/]An unpublished decision from the D.C. Circuit came to the same conclusion, in a case involving an innocent bystander inadvertently shot by an officer while sitting in her car. *Emanuel v. District of Columbia*, 224 Fed. Appx. 1, *1 (D.C. Cir. 2007) (citing *Landol-Rivera* and *Childress* with approval).

during the course of a vehicular pursuit may seek relief under the Fourth Amendment."); *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003) ("[B]ecause he did not intend to shoot [the passenger], [the officer] contends that [the passenger] did not suffer a Fourth Amendment seizure. We disagree."); *Fisher v. City of Memphis*, 234 F.3d 312, 318-19 (6th Cir. 2000)[4] ("By shooting at the driver of the moving car, [the officer] intended to stop the car, effectively seizing everyone inside, including the Plaintiff.") Decisions in these circuits generally rely on this Court's decision in *Brendlin v. California*, 551 U.S. 249, 251, 255 (2007), a suppression case which held that when a traffic stop occurs, the passenger is also seized because "during a traffic stop an officer seizes everyone in the vehicle, not just the driver."

Most recently, after the filing of Petitioners' petition, the Ninth Circuit decided in *Villanueva v. California*, __ F.3d __, 2021 WL 280756 (9th Cir. 2021) that a passenger, who was accidentally struck by a bullet intended to stop the driver of a vehicle, had a cognizable Fourth Amendment claim. The court distinguished *Childress, Medeiros,* and *Landol-Rivera* on the grounds that those cases were all pre-*Brendlin* and that they addressed a "different situation where the passenger was also a hostage and the officers were trying to rescue the passenger, not arrest him." *Id.* at *6.

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[4] *Fisher* distinguished *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000)—which held in the bystander context that "persons collaterally injured by police conduct who were not intended targets of an attempted official 'seizure'" do not have a Fourth Amendment claim—on the basis that the plaintiff in that case was not a passenger, but instead was hiding in a parked car. But this distinction does not resolve the fundamental Fourth Amendment question—what qualifies as an involuntary seizure—and if anything, compounds confusion in the law.

C. The Court Of Appeals' Confusion Is Rooted In Competing Interpretations Of This Court's Precedent.

The Ninth Circuit's suggestion in *Villanueva* that any purported circuit split has been resolved by this Court's decision in *Brendlin*, does not withstand scrutiny. If anything, the divide has only grown more entrenched since this Court first identified the split in *Plumhoff*, 572 U.S. at 778, n.4, seven years after *Brendlin* was decided.

Brendlin's conclusion that a passenger in a stopped vehicle may bring a suppression motion certainly does not bridge the divide. District courts in the First and Second Circuit have discussed and correctly rejected the notion that *Brendlin* implicitly overruled decisions in their circuits limiting the scope of the Fourth Amendment in the passenger context. *See, e.g.*, *Fagre v. Parks,* 2020 WL 1066977, *5 (D. Me. 2020), aff'd __ F.3d __ (1st Cir. 2021) ("The Supreme Court's recognition in *Brendlin* that traffic stops 'intentionally' seize all occupants of a vehicle does not mean an officer's gunshot 'intentionally' seizes a victim he or she does not aim at in the first place."); *Cox v. Village of Pleasantville*, 271 F. Supp. 3d 591, 605 (S.D.N.Y. 2017) (*Brendlin* does not "establish that the intentional use of force directed at a specific individual within the vehicle, i.e., the driver, gives rise to a Fourth Amendment claim on behalf of all of the passengers.")

Villanueva's attempted elision of the circuit split by distinguishing hostages from other passengers is also unavailing. For purposes of Fourth Amendment jurisprudence, it is a distinction without a difference. Even if officers are arguably acting on hostages' behalf by trying to liberate them, that does not change the fundamental legal question that remains unresolved—whether the unintentional application of force can nonetheless result in a seizure. *Villanueva* also disregards the basis for the First, Second, and Tenth Circuit's rulings, which was grounded in

the principle, articulated in *Brower*, 489 U.S. at 596, that the Fourth Amendment is intended to address the "'misuse of power,'" not its "accidental effects . . . ." *See, e.g.*, *Medeiros,* 150 F.3d at 169 ("We hold that no Fourth Amendment seizure occurred in the present case, because the police did not intend to restrain [the victim].") That principle is not limited to rescue attempts, which is underscored by the application of *Landol-Rivera* and *Childress* outside the hostage context. *See, e.g.*, *Fagre,* 2020 WL 1066977, *2-4 (passenger-victim was companion of driver breaking into residences); *Jurado v. Tritschler*, 2020 WL 209857, *3 (D. Colo. Jan. 14, 2020) (passenger-victim was allegedly "considered a threat" to officers).

At bottom, Fourth Amendment law in the inadvertent application of force context is riven because the Courts of Appeals have opposing views of the scope and reach of this Court's precedent. Only this Court can provide the necessary guidance to resolve such discord in the law.

II. The Question Presented Is Recurring And Spawns Protracted Litigation That Increases Costs To Public Entities, Making It Difficult To Assess And Plan For Potential Liability.

As the underlying case illustrates, resolution of this issue can have profound consequences on potential liability of public employees, and correspondingly, public employers. Persistent confusion in the law makes it difficult in many cases for public entities to assess potential liability with any degree of certainty. That is particularly true where, as here, the standard by which officers' inadvertent application of force is judged—as Fourth Amendment "unreasonable use of force" versus a Fourteenth Amendment "shock the conscience" violation—dramatically impacts the scope of civil liability for local government entities. *See Tan Lam v. City of Los Banos*, 976 F.3d 986, 1003 (9th Cir. 2020) (comparing standards and recognizing circumstances that rise to the level of a Fourth Amendment violation

may not support a Fourteenth Amendment claim, which requires evidence that the officer acted "'with a purpose to harm *unrelated to legitimate law enforcement objectives*.'")

While IMLA believes that the inadvertent application of force is more appropriately evaluated under a substantive due process framework, more than anything, there needs to be a clear rule. And if the question of whether there is a seizure turns on (1) the role of the passenger—hostage, innocent bystander, unknown passenger, or accomplice, or (2) status of the vehicle—stationary, fleeing, or presenting a direct threat to officers, it is important for local government entities to understand those distinctions as well.

Fiscal planning for litigation is difficult in the best of circumstances, with local entities having to set reserves for both liability and defense costs at the early stages of a case, but uncertainty as to something so fundamental as to whether a Fourth Amendment claim may be maintained in the first place, makes the task infinitely harder. Moreover, uncertainty in fiscal planning for litigation has a deleterious impact on the budgeting process as a whole, that affects municipal decision-making across a broad spectrum of public services. Funds that must be reserved for potential liability are necessarily unavailable for providing fire protection, road maintenance, building inspection and the like.

In addition, as the sheer volume of cases concerning the viability of Fourth Amendment claims in the victim-passenger context illustrates, uncertainty in the law spawns frequent and protracted litigation. In those jurisdictions where there is no controlling circuit precedent, the parties will necessarily have an incentive to fully litigate the issue. And even in those jurisdictions where precedent on the issue is clearer, the stakes are high enough and the distinctions drawn in the case law murky enough to prompt exhaustion of all avenues of review, whether it be seeking

en banc consideration, or, ultimately, review by this Court. The net result of this uncertainty is to drive up litigation costs as a whole, and consume already strained judicial resources.

Section 1983 litigation is a fact of life for every local public entity in the country. Rules concerning imposition of liability under section 1983 impact the day-to-day operations of local government because governmental decision-making is directly impacted by the nature and extent of potential liability. It is essential that the Court provide guidance regarding this critical question of Fourth Amendment law. Until it does so, local public entities will face uncertainty that adversely affects the ability to plan for potential liability and increases litigation costs, all to the detriment of the citizens they serve.

III. This Case Is An Ideal Vehicle To Resolve The Question Presented.

Finally, this case presents a clean vehicle to decide a critical question of Fourth Amendment law. The question presented was properly preserved and is squarely posed. The Petitioners expressly urged below that they were entitled to judgment because Stoddard-Nunez had not been "seized" within the meaning of the Fourth Amendment.

And despite the frequency with which the question presented arises, it will rarely be teed up so cleanly as in the Petition here. Many cases present messier questions of fact (where, for instance, it is disputed whether the victim-passenger was a target of the application of force). And many courts will choose to resolve excessive force cases at step two of the qualified immunity analysis (whether the right is clearly established) rather than, as the courts below did, at step one (whether there is a constitutional right at all).

Given that this issue is the subject of persistent confusion among the circuit courts, the Court should use this particularly appropriate case to decide this important question of Fourth Amendment law.

CONCLUSION

For the foregoing reasons, Amicus Curiae IMLA respectfully joins in Petitioners' request that the petition for writ of certiorari should be granted.

Respectfully submitted,

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