No.

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

v.

JANICE MADRID AND RICHARD WILLIAMSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Police officers shot Petitioner, but she drove away and temporarily eluded capture. In this excessive force suit, the district court granted summary judgment for the officers on the ground that no Fourth Amendment "seizure" occurred. The Tenth Circuit affirmed, reasoning that an officer's application of physical force is not a seizure if the person upon whom the force is applied is able to evade apprehension.

The question presented is:

Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a "seizure," as the Tenth Circuit and the D.C. Court of Appeals hold?

RELATED PROCEEDINGS

Torres v. Madrid, No. 16-cv-01163 (D.N.M. Sept. 22, 2017) (motion to dismiss).

Torres v. Madrid, No. 16-cv-01163 (D.N.M. Aug. 30, 2018) (summary judgment).

Torres v. Madrid, No. 18-2134 (10th Cir. May 2, 2019) (appeal from final judgment).

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INTRODUCTION

This case presents a fundamental question about when persons are deemed seized under the Fourth Amendment. For more than two centuries, the common law has been clear that an arrest—the "quintessential" seizure of a person under the Fourth Amendment, *California v. Hodari D.*, 499 U.S. 621, 624 (1991)—may be effectuated by a physical touching, however slight, as long as the contact is meant to restrain. *See Genner v. Sparks* (1704) 87 Eng. Rep. 928 (Q.B.) 929; 6 Mod. 173 (per curiam) ("[I]t was agreed, that if here he had but touched the defendant even with the end of his finger, it had been *an arrest*."). Under the decision below, however, physical contact is not sufficient; a suspect must submit to that physical force before a seizure can be deemed to occur. Under this view, a suspect who is shot, tased, or beaten by a police officer, but who is able, even if only temporarily, to drive, run, or limp away has not been seized at all, and the Fourth Amendment does not apply.

Here, police officers shot Roxanne Torres twice as she sat in her car. Ms. Torres drove away and checked herself into a hospital. Had Ms. Torres been shot in Alabama or Arkansas instead of Albuquerque (or even just across the street in New Mexico state court), that shooting would have been a seizure, and she would have had the chance to show in a civil damages action that the shooting was unreasonable. Instead, she was foreclosed from even trying to make that case because the Tenth Circuit—in conflict with three other courts of appeals and a state court of last resort—held that no seizure had occurred in the first

place, such that the Fourth Amendment had nothing to say about her case, because even though she was shot she continued driving away from police officers before she was ultimately taken into custody.

The Tenth Circuit—joined by the D.C. Court of Appeals—reads this Court's cases to hold that, even where police officers intentionally apply physical force, there is no seizure if the suspect is able for a time to evade capture. In direct contrast, the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court, hold that the common-law definition of arrest still governs: A suspect is seized when *either* she submits to the authority of law enforcement (for example, by remaining at the scene or ceasing flight in response to a verbal command) *or* when a law enforcement official makes physical contact with the suspect with the intent to restrain her, whether or not that physical contact is immediately successful in immobilizing the person.

This split—over the meaning of "seizure," a basic Fourth Amendment term—is deep, well-entrenched, and shows no signs of resolving itself. The question presented "occur[s] with considerable frequency." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4 (5th ed. 2018). Regardless of whether a suspect is shot, tased, or beaten, and regardless of whether a suspect moves to suppress evidence or instead tries to hold police accountable through an excessive force suit, courts must decide as a threshold matter whether and when a seizure has occurred. And because the conflict stems from competing understandings of this Court's case law, only this

Court can restore uniformity on a fundamental question regarding the meaning of the Fourth Amendment.

The Tenth Circuit is also wrong. When the police intentionally shoot you and bullets enter your body and tear through your flesh, of course you are seized. As this Court made clear in *Hodari D.*, at common law, "[t]o constitute an arrest, however—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, *whether or not it succeeded in subduing the arrestee*, was sufficient." Likewise "[t]he 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*." 499 U.S. at 624, 626 (emphases added). The Founders could never have imagined that when the constable deliberately shoots you with his musket, you're not seized.

The issue of what constitutes a "seizure" in this setting is of fundamental importance, both legally and practically, and this case squarely presents it. The petition for writ of certiorari should be granted and the decision below reversed.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not officially reported but may be found at 769 F. App'x 654 (10th Cir. 2019). Pet. App. 1a-9a. The opinion of the district court granting summary judgment to respondents is not officially reported but may be found at 2018 WL 4148405. Pet. App. 10a-20a. The opinion

of the district court denying respondents' motion to dismiss is not officially reported but may be found at 2017 WL 4271318. Pet. App. 21a-31a.

JURISDICTION

The Tenth Circuit entered judgment on May 2, 2019. Pet. App. 1a. On July 15, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE[1]

The Police Shoot Petitioner, But She Drives Away And Temporarily Evades Capture

Early in the morning on July 15, 2014, four New Mexico State Police officers were watching an apartment complex in Albuquerque, New Mexico, in an effort to serve an arrest warrant on a woman named Kayenta Jackson. Pet. App. 2a, 10a-11a. Respondents Janice Madrid and Richard Williamson were two of those officers. *Id.*

Petitioner Roxanne Torres was in a Toyota with the motor running at the same apartment complex, having just dropped off a friend. Pet. App. 2a. She had backed into her parking spot, and there were cars on either side of her. *Id*.

Officers Madrid and Williamson parked their unmarked patrol car near Ms. Torres's vehicle. Pet. App. 11a. The officers were wearing tactical vests and dark, marked clothing, but Ms. Torres was unable to read the markings on the clothing and so was unaware that the two individuals approaching her were police. Pet. App. 2a, 11a, 22a.

Officers Madrid and Williamson attempted to open the locked door of the car in which Torres was

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[1] Because this case was decided at summary judgment, the facts and inferences are viewed in the light most favorable to Ms. Torres as the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

sitting. Pet. App. 11a, 22a-23a. One of them stood at her driver's side window, and the other at the front tire of her car. Pet. App. 3a, 11a. The officers claim they shouted to Ms. Torres to open her car door. Pet. App. 11a. Ms. Torres, however, was unable to hear or understand what the officers were saying. Pet. App. 3a, 11a.

Instead, Ms. Torres thought she was the victim of an attempted carjacking, so she drove forward. Pet. App. 3a. Both officers testified at their depositions that they believed Ms. Torres was going to hit them with her car, although neither officer was in front of the vehicle at the time Ms. Torres accelerated. Pet. App. 3a-4a, 11a.

Officers Madrid and Williamson both fired their weapons at Ms. Torres as she drove away. Pet. App. 3a-4a. Thirteen 9 mm rounds hit Ms. Torres' vehicle. Ms. Torres was struck twice, in the back. Pet. App. 4a, 23a. Despite her bullet wounds, Ms. Torres did not stop the car. Pet. App. 4a. She continued to drive forward until she left the apartment complex. Pet. App. 4a, 11a. She then drove to a commercial area, where she briefly lost control of her car, and ultimately drove away in a different car that had been left running in a parking lot. Pet. App. 4a, 11a-12a. Ms. Torres continued to drive to Grants, New Mexico, where she went to a hospital for treatment. Pet. App. 4a, 12a.

She sustained injuries that included disfiguration and scarring. Pet. App. 24a.[2]

Petitioner Sues, The District Court Holds There Was No Seizure, And The Tenth Circuit Affirms

Ms. Torres filed a civil rights complaint in federal court against Madrid and Williamson, alleging excessive use of force in violation of the Fourth Amendment. Pet. App. 4a-5a, 12a-13a. She alleged that the officers' intentional discharge of their weapons exceeded the degree of force that reasonable, prudent law enforcement officers would have applied under the circumstances, and sought relief under 42 U.S.C. § 1983.

The district court granted summary judgment for the officers, on the ground that the Fourth Amendment was not implicated because Ms. Torres had not been seized. Pet. App. 2a, 20a.[3] The court stated that a seizure requires the "'intentional acquisition of physical control.'" Pet. App. 17a (quoting *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir.

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[2] The following day, Ms. Torres was charged with several offenses. Ms. Torres later pleaded no contest to aggravated fleeing from a law enforcement officer, assaulting an officer, and car theft. Pet. App. 4a, 12a.

[3] The district court had earlier denied a motion to dismiss based on *Heck v. Humphrey*, 512 U.S. 477 (1994), explaining that "[e]ven if the Court considers the plea agreement attached to defendants' motion, it is not evident, based solely on the pleadings and the plea agreement, that the unlawful actions attributed to Officers Madrid and Williamson in Ms. Torres's complaint necessarily would render Ms. Torres's assault and aggravated fleeing convictions invalid." Pet. App. 28a-29a.

2000)). It held that, given that the officers' bullets did not stop Ms. Torres—because she continued to drive away, even after being shot—there was no seizure, and "[w]ithout a seizure, there can be no claim for excessive use of force." *Id.* (quoting *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015)).

The Tenth Circuit affirmed, agreeing with the district court that Ms. Torres was not "seized" by the officers' use of deadly force. Pet. App. 7a-8a. The court ruled that "[t]hese circumstances are governed by *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010), where this court held that a suspect's continued flight after being shot by police negates a Fourth Amendment … claim." Pet. App. 7a. "This is so," the court continued, "because 'a seizure requires restraint of one's freedom of movement,'" and "[t]hus, an officer's intentional shooting of a suspect does not effect a seizure unless the 'gunshot … terminates[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him.'" Pet. App. 7a-8a (quoting *Brooks*, 614 F.3d at 1219, 1224). "Here," the Tenth Circuit elaborated, "the officers' use of deadly force against Torres failed to 'control [her] ability to evade capture or control,'" Pet. App. 8a (quoting *Brooks*, 614 F.3d at 1223), and "[b]ecause Torres managed to elude police for at least a full day after being shot, there is no genuine issue of material fact as to whether she was seized when Officers Williamson and Madrid fired their weapons into her vehicle." *Id.* "Without a seizure," the court concluded, "Torres' excessive-force claims … fail as a matter of law." *Id.*

REASONS FOR GRANTING THE WRIT

The decision below reaffirms a clear split in the courts of appeals and state courts of last resort. The Eighth, Ninth, and Eleventh Circuits, and the New Mexico Supreme Court, hold that a person is "seized" for Fourth Amendment purposes when a law enforcement officer applies physical force with the intent to stop her, even if the person continues for a time to evade capture. In stark contrast, the Tenth Circuit and the D.C. Court of Appeals disagree, and hold that an officer's use of force effects a seizure only if it succeeds in stopping the person. The Tenth Circuit's position is seriously awry, and reflects confusion regarding the proper reading of this Court's precedents. This case presents an ideal vehicle for resolving the issue, and this Court should grant certiorari to resolve this acknowledged split on a question of profound legal and practical significance.

I. The Question Presented Is The Subject Of A Persistent And Acknowledged Split Among The Courts Of Appeals And State Courts Of Last Resort.

A. The Eighth, Ninth, and Eleventh Circuits, and the New Mexico Supreme Court, hold that an application of physical force is a seizure, even if the suspect temporarily evades capture.

Three courts of appeals and one state supreme court hold that law enforcement officers' intentional application of force to a person effects a seizure,

whether or not the force is successful in preventing the person from fleeing.

The Eighth Circuit holds that a seizure occurs when an officer applies physical force. In *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995), police officers maced an individual and chased and hit him with a squad car, but the person managed to vault over the squad car and get away. *Id.* at 468-69. The officers then maced him again, but he continued to elude capture. *Id.* The individual was not halted until the officers eventually shot and killed him. *Id.* In considering the estate's excessive force action under 42 U.S.C. § 1983, the Eighth Circuit explained that a seizure "is 'effected by the slightest application of physical force' despite later escape." *Id.* at 471 (quoting *Hodari D.*, 499 U.S. at 625). Applying that definition, the Eighth Circuit concluded that the victim "was twice seized in a potentially unreasonable manner." He was seized "first, when [the officers] attempted to hit [him] with the squad car"—even though he continued his flight—and "second, when [he] was ultimately shot," and the court went on to analyze the reasonableness of each of the two seizures. *Id.*; *see Cole v. Bone*, 993 F.3d 1328, 1332 (8th Cir. 1993) ("[A] seizure occurs only when the pursued citizen is physically touched by the police or when he submits to a show of authority by the police."). The court added that "[a]lthough the police may [also] be said to have seized Ludwig by twice applying mace (i.e., applying physical force although unsuccessful), we hold that they violated no clearly established right by macing Ludwig." 54 F.3d at 471.

The Eighth Circuit has since adhered to its view that the intentional application of physical force by

law enforcement officers is a seizure even if the person upon whom the force is applied is not immediately halted. *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1208 (8th Cir. 2013) ("At common law, it was perfectly clear that touching the person constituted an arrest. … Because the Supreme Court has directed us to apply this common law dichotomy to seizure of the person under the Fourth Amendment, we similarly require either physical force or, where that is absent, submission to the assertion of authority." (emphasis omitted)); *Moore v. Indehar*, 514 F.3d 756, 758-59 (8th Cir. 2008) (seizure occurred when plaintiff was hit by officer's bullet, even though he continued to flee and was not arrested until arriving at the emergency room).

The Ninth Circuit has defined seizure in the same way, in a case where campus police fired pepperballs (rounds containing pepper spray launched from a paintball gun) to disperse a student gathering, hitting plaintiff in the eye. *Nelson v. City of Davis*, 685 F.3d 867, 873-74 (9th Cir. 2012). In an ensuing civil damages action, the court concluded that plaintiff was seized within the meaning of the Fourth Amendment because he submitted to the officers' show of authority when he dropped to the ground, remained there for 15 minutes, and then was driven to a hospital. *Id*. at 874-76. But the court held in the alternative that "[e]ven in the absence of [plaintiff's] submission, the government's intentional application of force to [plaintiff] was sufficient to constitute a seizure." *Id*. at 876 n.4. The court elaborated that, "[a]s the Supreme Court has made clear, the mere assertion of police authority, without the application of force, does not constitute a

seizure unless an individual submits to that authority. Conversely, when that show of authority includes the *application of physical force*, a seizure has occurred even if the object of that force does not submit." *Id. (*citation and brackets omitted*).*

The Eleventh Circuit has adopted the same approach. In *Carr v. Tatangelo*, plaintiff was shot in the abdomen during a standoff with police, but managed to run away and was eventually apprehended at his house across the street. 338 F.3d 1259 (11th Cir. 2003). In a suit under 42 U.S.C. § 1983, the Eleventh Circuit rejected the argument that there was no seizure because plaintiff was not stopped by the bullet. *Id.* at 1268. Quoting *Hodari D.*, 499 U.S. at 626, the Eleventh Circuit held: "An intentional seizure of a person 'readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.'" 338 F.3d at 1268. The court reiterated that "although [the plaintiff] was not immediately stopped by the bullet from [the officer's] gun, he nevertheless was seized within the meaning of the Fourth Amendment when the bullet struck or contacted him." *Id.* The Eleventh Circuit has since reaffirmed its definition of the term "seizure," holding that "[b]ecause [the plaintiff] was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure.... The fact that [the plaintiff] was not taken into custody immediately following the shooting is immaterial."

Vaughan v. Cox, 343 F.3d 1323, 1329 & n. 5 (11th Cir. 2003).[4]

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[4] Opinions of least three other circuits reflect a similar understanding of seizure. The Third Circuit addressed a scenario where a police officer grabbed the defendant's arm, but the defendant broke free and fled, dropping a gun en route. *United States v. Dupree*, 617 F.3d 724, 726-27 (3d Cir. 2010), Though the government had argued at the suppression hearing that the defendant was not "seized, within the meaning of the Fourth Amendment, when … [the officer] grabbed [him] for a mere two seconds before [he] broke away and attempted to flee," it acknowledged on appeal that a seizure had occurred. *Id*. at 727. A concurring Third Circuit opinion described the government's concession as "wise[]." *Id*. at 738 (Fisher, J., concurring); *see also United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006) ("when a seizure is effected by even 'the slightest application of physical force,' it is immaterial whether the suspect yields to that force."). The Sixth Circuit has similarly determined that a jury could find the plaintiff was seized when he was struck by a beanbag propellant, even though he got to his feet and (under instructions) walked down the block to meet another officer. *Ciminillo v. Streicher*, 434 F.3d 461, 466 (6th Cir. 2006); *see also Slusher v. Carson*, 540 F.3d 449, 455 (6th Cir. 2008) (jury could conclude plaintiff was "'seized' when she was physically grabbed" by officer seeking to retrieve a document in her possession). And the Seventh Circuit stated in *Acevedo v. Canterbury* that "[i]t is true that language in some of our previous decisions might, out of context, lend itself to th[e] interpretation" "that physical force alone cannot constitute a seizure," "[b]ut the Supreme Court has held otherwise." 457 F.3d 721, 724-25 (7th Cir. 2006); *see also United States v. Griffin*, 652 F.3d 793, 799 n.1 (7th Cir. 2011) ("The Supreme Court explained that a seizure through use of force occurs the moment force is applied."); *Tom v. Voida*, 963 F.2d 952, 957 (7th Cir. 1992) (plaintiff was seized when officer giving chase "overtook him on the ice and physically touched him," even though plaintiff did not submit and they continued to fight).

The New Mexico Supreme Court has likewise held that a suspect needn't be stopped by physical force for the application of force to constitute a seizure. In *State v. Garcia*, 217 P.3d 1032 (N.M. 2009), a police officer pepper sprayed a suspect, who continued fleeing but dropped a package of cocaine. The defendant moved to suppress the evidence of the cocaine, and the New Mexico Supreme Court granted the motion: The officers used force, and "[u]nlike assertion-of-authority cases, there is no need for a defendant to demonstrate submission in cases of physical force." *Id.* at 1038. In so ruling, the New Mexico Supreme Court reversed the New Mexico Court of Appeals, which had concluded that the defendant was not seized because "there was no indication that Defendant was affected or even deterred to the slightest degree" by the pepper spray. *Id.* (brackets omitted). The New Mexico Supreme Court explained that "[t]o ascertain whether the officer's application of pepper spray to Defendant's body was physical force sufficient to constitute a seizure, it is irrelevant whether Defendant's movement was restrained, affected, or deterred"; here, the "[d]efendant demonstrated that he was seized by showing that he was pepper sprayed, regardless of his subjective reaction." *Id.*

B. The Tenth Circuit and the D.C. Court of Appeals hold directly to the contrary.

The Tenth Circuit and the D.C. Court of Appeals embrace the opposite rule.

The Tenth Circuit in this case determined that "an officer's intentional shooting of a suspect does not effect a seizure unless" the gunshot stops the suspect,

and there was therefore no seizure here "[b]ecause Torres managed to elude police for at least a full day after being shot." Pet. App. 7a-8a.

The decision below explicitly follows and applies the holding of *Brooks*, 614 F.3d 1213, where the plaintiff was shot while running away, but managed to climb a fence and flee the scene. In the context of a subsequent civil suit, the plaintiff argued that the use of deadly force against him was sufficient to establish a seizure. The Tenth Circuit disagreed: "Instead, it is clear restraint of freedom of movement must occur." *Id.* at 1219. The Tenth Circuit acknowledged this Court's statements in *Hodari D.* "point[ing] out [that the] common law defined 'arrest' as the 'application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee,' including 'the laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful,'" *id.* at 1220 (quoting *Hodari D.*, 499 U.S. at 624, 626), but it characterized that language as "common law dicta." *Id.* at 1220. "[W]hen read in context and its entirety, *Hodari* clarifies that a seizure cannot occur unless a show of authority results in the suspect's submission." *Id.* at 1221. If there were any doubt, the Tenth Circuit continued, *Brendlin v. California*, 551 U.S. 249 (2007), "further clarified" that "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." *Id.* (quoting *Brendlin*, 551 U.S. at 254).

The Tenth Circuit in *Brooks* thus held that no seizure had occurred because the plaintiff was able to continue his flight. In so holding, the Tenth Circuit expressly acknowledged that it was breaking ranks with the Eleventh Circuit's decision in *Carr*, which it characterized as "appl[ying] the same dicta [from *Hodari D.*] to conclude a bullet striking a suspect constituted a seizure, even though he was not stopped by the bullet but continued to flee." 614 F.3d at 1221. The Tenth Circuit has since reiterated its rule in additional published opinions. *See, e.g.*, *Farrell v. Montoya*, 878 F.3d 933, 939 (10th Cir. 2017) (finding no seizure where officers shot at van containing plaintiff and his family, "because the van continued its departure").

The D.C. Court of Appeals likewise held that a suspect was not seized for Fourth Amendment purposes when a police officer "reached out and grabbed [defendant's] arm," but the individual "was able to wiggle out of" his jacket and "took off running." *Henson v. United States*, 55 A.3d 859, 862-63 (D.C. 2012). When the individual was finally stopped, the officers found a firearm in his waistband. *Id.* at 863. After charges were filed, the defendant moved to suppress the firearm, arguing that he was seized when the officer grabbed his arm.

The D.C. Court of Appeals rejected the argument. Embracing the Tenth Circuit's analysis in *Brooks*, the court acknowledged "language in *Hodari D.* which might suggest that a seizure occurs when[] an officer applies force, even though he does not succeed in stopping the suspect," but stated that "this language … is about the historical, common law definition of seizure

and therefore is not dispositive of the constitutional question of when an individual is seized for purposes of the Fourth Amendment." *Id.* at 864. The D.C. Court of Appeals ultimately held that "there is little justification for assigning constitutional relevance to whether an officer attempts to detain an individual by a show of authority or through an unsuccessful application of physical force"; in both cases, the individual must show that the attempt was successful. *Id.* at 865. Because in the case at hand the defendant had temporarily gotten away, there was thus no seizure, and the Court of Appeals therefore denied the suppression motion. In its ruling, in addition to endorsing and following the Tenth Circuit's decision in *Brooks*, the court also acknowledged its departure from the Eighth Circuit's decision in *Ludwig*. *Id.*

The Tenth Circuit and D.C. Court of Appeals are thus in direct conflict with the Eighth Circuit, the Ninth Circuit, the Eleventh Circuit, and the New Mexico Court of Appeals on the question presented in this case.

II. The Decision Below Is Wrong.

A. The decision below misapprehends this Court's precedents.

When police officers shoot or otherwise intentionally apply physical force on a person—that is a seizure under the Fourth Amendment. This Court acknowledged as much in *Hodari D.*, explaining that "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence … [is] the mere grasping or application of physical force with lawful

authority, whether or not it succeeded in subduing the arrestee." 499 U.S at 624. The Court in *Hodari D.* reiterated the point: "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." *Id.* at 626.

The Tenth Circuit's contrary ruling is at odds with *Hodari D.* Police there chased a suspect on foot. 499 U.S. at 623. Shortly before the officers caught up with and handcuffed him, the suspect tossed away a small rock of cocaine. *Id.* In responding to criminal charges, the suspect argued that the cocaine should be suppressed as the fruit of an unlawful seizure: At the moment the officer began to give chase, the suspect argued, he made a show of authority designed to stop the suspect's flight, which was sufficient to constitute a seizure. "The narrow question" before the Court in *Hodari D.*, then, was "whether, with respect to a show of authority *as with respect to application of physical force*, a seizure occurs even though the subject does not yield." 499 U.S. at 626 (emphasis added).

The Court at the outset thus posited two different kinds of seizures of a person under the Fourth Amendment: seizures achieved by applying physical force, and seizures effected by means of a show of authority. And crucially, the Court explained that a seizure is effectuated either by "physical force ... or, *where that is absent*, submission to the assertion of authority." *Hodari D.*, 499 U.S. at 626 (emphasis omitted and added).

In resolving the question before it, the Court in *Hodari D.* made clear that no submission was required for seizures effectuated by the application of physical force. Indeed, as we have shown, the Court emphasized that, at common law, "[t]o constitute an arrest," "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence," "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient," and likewise "[t]he 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." 499 U.S. at 624, 626.

The Tenth Circuit believed that, because no physical force was directly at issue in *Hodari D.*, the Court's language about physical-force seizures was dicta. *See Brooks*, 614 F.3d at 1220. But that is an incorrect reading of this Court's opinion. As shown above, the whole thrust of this Court's analysis was to draw a distinction between two types of seizures of a person—physical-force seizures, and show-of-authority seizures—and to explain that the latter, *unlike* the former, require the suspect to yield.

The Tenth Circuit not only misread *Hodari D.*, but it was confused about other decisions of this Court as well. Like *Hodari D.*, those precedents have drawn a distinction between, on the one hand, intentional use of physical force to apprehend someone, and, on the other hand, commanding someone to stop by a show of authority, without applying force at all. For a seizure to occur, submission is required in the latter category, but not in the former. The Tenth Circuit's

position mistakenly construes language in this Court's opinions to mean that an officer's intentional application of physical force is not a seizure if the person upon whom the force is applied is able for a time to elude capture.

For example, in *Brower*, decided two years before *Hodari D.*, the Court stated that a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). The Tenth Circuit interpreted *Brower* to mean that there must be a submission to authority for a seizure to occur, even where the seizure is effected by means of physical force. *Brooks*, 614 F.3d at 1221. But *Brower* involved a fleeing suspect who was killed when the car he was driving collided with a roadblock police erected to stop him. 489 U.S. at 594. There was no dispute that the suspect was physically controlled when he crashed into the roadblock. *Id.* The Court simply highlighted that the fact that the roadblock was *intentionally* placed by police to stop the suspect was sufficient to establish a seizure. *Id.*

The Tenth Circuit's reliance on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), is inapposite too. *See Brooks*, 614 F.3d at 1221. A police car there chased a motorcycle until it crashed, and then accidentally skidded into the downed passenger, killing him. 523 U.S. at 843-44. The passage quoted by the Tenth Circuit—discussing the contention that "the Fourth Amendment should cover not only seizures, but also failed attempts to make a seizure," *id.* at 844-45 & n.7—rejects only an argument that the victim had been seized during the actual chase, *before* the

motorcycle ran him over. The crucial point there for Fourth Amendment purposes was that the physical force in that case—the ultimate collision—was accidental, not intentional, and therefore could not qualify as a seizure for that reason. *Id.*

Brendlin v. California is inapt as well. 551 U.S. 249 (2007). The defendant in that case was a passenger in a car that the police stopped because its registration tags had expired. During the stop, the police arrested the defendant after discovering that he was in violation of parole conditions. *Id.* at 252. The question was whether a car's passengers, as opposed to just the driver, are seized under the Fourth Amendment when a police officer makes a traffic stop. The Court held that when law enforcement officers stop a vehicle by a show of authority, a seizure is effectuated with respect to all the vehicle's occupants, not just the driver, and passengers can therefore challenge the stop's constitutionality. *Id.* at 257. Because *Brendlin* involved a show-of-authority-stop—the officers deployed no physical force—it has no bearing on when physical force constitutes a seizure. And despite the broad phrasing of the language quoted by the Tenth Circuit—that there is "no seizure without actual submission," *id.* at 254—the Court in context was referring to show-of-authority seizures, and not physical-force seizures.

This Court has assumed that someone who is shot or who otherwise has physical force intentionally applied to him by a law enforcement officer is thereby seized within the meaning of the Fourth Amendment. *See, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam) (assuming plaintiff had been seized within

the meaning of the Fourth Amendment when he was shot by an officer, even though the plaintiff's car continued to travel for a considerable distance before hitting a spike strip, colliding with a median, and rolling over multiple times). And for good reason. As the Court explained in *Hodari D.*, the intentional application of physical force has long been deemed sufficient to constitute an arrest at common law, whether or not it succeeds in subduing the arrestee, and the term "seizure" in the Fourth Amendment naturally encompasses the same meaning, including in circumstances when the use of force is not immediately successful in effecting detention. 499 U.S. at 624, 626. The Tenth Circuit nevertheless misunderstood this Court's precedents to stand for the proposition that an officer's intentional application of physical force is not a seizure if the person upon whom the force is applied is able for a time to evade apprehension. This case provides this Court with a needed opportunity to clarify that, under *Hodari D.* and its other decisions, an officer has seized you when he intentionally shoots or otherwise applies physical force upon you, and what transpires after that point does not change that result.[5]

[5] Of course, as the Court in *Hodari D.* also stressed, "[t]o say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, [the officer] had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest." 499 U.S. at 625.

B. The decision below is at odds with the common law.

The Tenth Circuit's approach to the question presented also defies its common law backdrop.

The Court in *Hodari D.* "consulted the common-law to explain the meaning of seizure," and under *Hodari D.*, 499 U.S. at 624 & n.2, "the Fourth Amendment's prohibition of 'unreasonable seizures,' insofar as it applies to seizure of the person, preserves for our citizens the traditional protections against unlawful arrest afforded by the common law." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting).

The sources collected by *Hodari D.* confirm that, at common law, an arrest could be effectuated by the slightest physical contact. *Hodari D.*'s analysis began with early cases, which explain that "'an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.'" 499 U.S. at 624 (quoting *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862)). Early legal commentaries, *Hodari D.* added, define "arrest" similarly:

> There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that pur-

> pose, although he does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, "If the bailiff had touched him, that had been an arrest…."

Id. at 625 (quoting A. Cornelius, *Search & Seizure* 163-64 (2d ed. 1930)).[6]

Dictionary definitions going back to the Founding era are to the same effect. *See* B. Abbott, *Dictionary of Terms & Phrases Used in American or English Jurisprudence* 84-85 (1879) ("An arrest is the taking, seizing, or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest."); Noah Webster, *An American Dictionary of the English Language* 76 (1828) ("An arrest is made by seizing or touching the body."); Samuel Johnson, *A Dictionary of the English Language* (1768) (defining arrest to mean "to lay hands on").

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[6] *See also id.* (quoting Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 206 (1940) ("[I]f the officer pronounces words of arrest without an actual touching and the other immediately runs away, there is no escape (in the technical sense) because there was no arrest. It would be otherwise had the officer touched the arrestee for the purpose of apprehending him, because touching for the manifested purpose of arrest by one having lawful authority completes the apprehension, 'although he does not succeed in stopping or holding him even for an instant.'")).

Cases from the time of the Founding to the present reflect the same view. English cases explain that "the law is that, if the officer is near enough to the debtor to touch him, and does touch him, and gives him notice of the writ, it is an arrest." *In Sandon v. Jervis & Dain* (1859) 120 Eng. Rep. 760, 762 (per curiam).[7] Early cases from American courts further buttress this understanding. The Court of Appeals of Law of South Carolina, for example, considered a lower court judge's decision that, absent submission, "to constitute an actual arrest, there must be some corporal touching." *McCracken v. Ansley*, 35 S.C.L. 1, *3 (1849). That definition, the appellate court explained, was "very nearly in the words of Blackstone, who says there must be some corporal seizing or touching of the body; and to the same effect are the definitions of

[7] *See also, e.g.*, *Moore v. Moore* (1858) 53 Eng. Rep. 538, 540 ("A capture requires either a touch or something approaching to it, or else a statement to the prisoner that he must consider himself in custody and the prisoner obeying and following the officer, which would amount to the same thing."); *Aga Kurboolie Mahomed and Others v. The Queen on the Prosecution of Mahomed Kuli Mirza* (1843) 18 Eng. Rep. 459, 460 ("[I]n order to constitute a lawful arrest, one of two things is necessary—either that the Bailiff or his assistant have laid hold of or touched the person meant to be arrested; or that the person, upon being informed of the Bailiff's business, has submitted and gone with the Bailiff, without resistance or flight."); *Nicholl v. Darley* (1828) 148 Eng. Rep. 974, 975 ("[T]hough the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him."); *Genner v. Sparks* (1704) 87 Eng. Rep. 928 (Q.B.) 929; 6 Mod. 173 (per curiam) ("[I]t was agreed, that if here he had but touched the defendant even with the end of his finger, it had been an arrest.").

other elementary writers, and the Lexicographers." *Id.* at *5.

This common law understanding of arrest was codified in the 20th century. The *Restatement (First) of Torts* § 112 (1934) contemplates two modes for an arrest—an arrest by confinement and an arrest by touching—which map onto the two types of seizures depicted in *Hodari D.* As the Maryland Court of Appeals put it: "It is generally recognized that an arrest is the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested." *Bouldin v. State*, 350 A.2d 130, 133 (Md. 1976).

In short, the common law of arrest reinforces the conclusion that an officer's application of physical force that is meant to restrain a person is a seizure, and whether the person was able temporarily to get away is not a part of the inquiry.

III. The Question Presented Is Important And Recurring, And Its Resolution Below Is Troubling.

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, courts must know what constitutes a "seizure" when resolving excessive

force claims under 42 U.S.C. § 1983. Likewise, in criminal cases, a court's decision whether to suppress evidence may involve an examination of whether and when a defendant was actually seized. Ultimately, because disputes regarding excessive force and the admissibility of evidence resulting from seizures "occur with considerable frequency … the fundamental question of what it takes to constitute a 'seizure' within the meaning of the Fourth Amendment is a question of real importance." LaFave, *supra*, § 9.4.

As shown above, the question presented arises repeatedly in the courts of appeals and also in state courts. District courts around the country also routinely consider the issue in a variety of factual settings. *See, e.g.*, *Yelverton v. Vargo*, 386 F. Supp. 2d 1224 (M.D. Ala. 2005) (assessing whether pepper spray constituted a seizure when it did not slow down plaintiff's flight); *United States v. Parker*, 214 F. Supp. 2d 770 (E.D. Mich. 2002) (assessing whether pat down search constituted a seizure for suppression purposes when defendant subsequently fled); *Lansdown v. Chadwick*, 152 F. Supp. 2d 1128 (W.D. Ark. 2000) (assessing whether plaintiff, who broke free of police officer's grasp, was seized for purposes of excessive force claim).

Yet because courts have split over how to resolve the question, police officers have no clear guidance on what constitutes a seizure. Most dramatically, as noted above, whether evidence is ultimately suppressed after a police encounter in New Mexico may turn on whether the case is prosecuted in state or federal court; under Tenth Circuit law, tasing a suspect who continues to flee after force is applied does not

implicate the Constitution, whereas that same conduct in New Mexico state courts is constitutional only if reasonable. As this Court has admonished, it is critical that police officers know the scope of their constitutional authority, *see, e.g.*, *New York v. Belton*, 453 U.S. 454, 459-60 (1981), and the current state of affairs makes that impossible.

Indeed, the decision below creates skewed incentives for police conduct. Under its view of the Fourth Amendment, whether a seizure is deemed to have occurred when an officer applies force depends not on the actions of the officer, but rather on the reactions of the suspect. The officer who unnecessarily slams a suspect with a squad car is not less culpable because, as in *Ludwig*, the suspect is able to keep running, whereas others perhaps would be instantly killed or immobilized. *See Ludwig*, 54 F.3d at 465. But, under the rule below, the constitutionality of the officer's actions in applying force turns on the response of the suspect rather than on the officer's conduct. Moreover, an officer who shoots, tases, or beats up a suspect may avoid an excessive force claim or the consequences of the exclusionary rule by claiming that the suspect, even if only briefly, was not immediately halted by the use of force. *See* LaFave, *supra*, § 9.4(d) n.239. State courts have noted such untoward consequences in interpreting their own constitutions. *See State v. Beauchesne*, 868 A.2d 972, 978-79 (N.H. 2005) (collecting cases).

The Tenth Circuit's rule also leads to absurd, hair-splitting inquiries. If police shoot a suspect but thereby only slow him down without stopping him, is he seized? *See Brooks*, 614 F.3d at 1217. What about

an ongoing struggle between an officer and a suspect—at what moment during the altercation is the suspect brought under control so as to effectively constitute a seizure? *See Dupree*, 617 F.3d at 726. And what if the suspect takes 10 steps before stopping—was he nevertheless seized by the physical force? What about 20 steps? Under the correct rule, all of these cases would result in the same, appropriate conclusion: the suspect is seized where intentional physical force is applied to the person, even if the force is not successful in immediately apprehending him. The Tenth Circuit's view, by contrast, entails fine distinctions that make little if any real-world sense.

The core of the Fourth Amendment is personal security. *Brown v. Texas*, 443 U.S. 47 (1979). A rule that the police can shoot someone—repeatedly—with impunity, so long as the person who is shot can temporarily limp, stagger, or drive away, is at odds with that core value. And because the split here turns on divergent understandings of this Court's precedents, only this Court can step in to correct this flawed interpretation of Fourth Amendment law.

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

Finally, this case presents an ideal vehicle for resolving this basic Fourth Amendment question.

The question presented was properly preserved and is squarely posed. Ms. Torres expressly urged below that the officers seized her when they shot her, notwithstanding that she temporarily eluded apprehension. Pet. App. 4a-5a, 12a-13a. And the sole basis

for denying Ms. Torres relief before both the district court and the Tenth Circuit was that she had not been "seized" within the meaning of the Fourth Amendment. Pet. App. 7a-9a, 13a-14a.

Despite the frequency with which the question presented arises, it will rarely be teed up so cleanly as in this petition. Suppression motions and excessive force claims—the two most common settings in which the question presented can be raised—are rare in comparison to the overall universe of police-civilian encounters that involve a use of force. Many cases also present far closer or messier questions of fact (where, for instance, a suspect is stopped, but only momentarily, by the use of physical force). And many courts will choose to resolve excessive force claims 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).

The Tenth Circuit has directly and explicitly answered the question. Its resolution conflicts with the holdings of other courts of appeals and a state supreme court, misapprehends this Court's precedents, and is inconsistent with common law precepts. This case presents a clean vehicle to decide a critical question of Fourth Amendment law. This Court should grant certiorari and reverse.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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