No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

v.

JANICE MADRID AND RICHARD WILLIAMSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR AMICI CURIAE FOURTH AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

GINGER D. ANDERS
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
ginger.anders@mto.com

DAVID P. THORESON
david.thoreson@mto.com
BRIAN J. SPRINGER
brian.springer@mto.com
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae *Fourth Amendment Scholars*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

INTERNATIONAL CASES

CONSTITUTIONAL PROVISIONS

TREATISES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are criminal procedure professors and scholars who teach, study, and write about the Fourth Amendment.[2] *Amici* believe this case presents fundamental issues concerning the scope of a "seizure" under the Fourth Amendment. *Amici* are of the view that a Fourth Amendment "seizure" has occurred when a suspect is shot by law enforcement yet evades arrest.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *California v. Hodari D.*, 499 U.S. 621 (1991), this Court answered the question presented in this case—namely, whether "an unsuccessful attempt to detain a suspect by use of physical force [constitutes] a 'seizure' within the meaning of the Fourth Amendment." Pet. for Cert. i. The Court held that the common law is clear that "an arrest is effected by the slightest application of physical force, despite the arrestee's escape." *Hodari D.*, 499 U.S. at 625.

In the intervening years, however, the lower courts have divided on the question. The confusion rests upon a misunderstanding of a critical distinction that the Court drew between seizures effected by physical force

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

[2] A list of *amici* is set forth in the Appendix. App., *infra*, 1a-4a.

and seizures effected by a show of authority. For the former, the Court explained that the application of physical force to apprehend a suspect is itself sufficient to establish a seizure. For the latter, the Court identified additional requirements, including that the subject actually yield to an officer's show of authority. The Court was clear that the submission requirement does not apply in cases involving physical force. And for good reason: submission is not necessary when the officer uses physical force in an attempt to capture a suspect because that force itself constitutes the exertion of control over the suspect's movement.

The Court's dichotomy between seizure by physical force and seizure by show of authority is parallel to the way other analogous claims are treated. For example, the common-law tort of false imprisonment recognizes a distinction between restraint by force and restraint by fear. Similarly, this Court has recognized that a common-law trespass, *i.e.,* a physical intrusion, qualifies as a Fourth Amendment search, but that an expectation-of-privacy test supplements that traditional understanding. These related analytical frameworks reinforce the methodology employed by the Court in *Hodari D.*

A definitive ruling that the application of physical force to restrain a suspect qualifies as a seizure would provide much-needed clarity on the frequent occasions in which police officers use force against suspects. It would also correct the illogical rule that an officer's use of force (and even deadly force, in Ms. Torres's case) to subdue a suspect falls entirely outside the ambit of Fourth Amendment scrutiny whenever the suspect happens to escape. The Court's review is warranted to decide this basic question about the scope of a Fourth

Amendment seizure and to clarify that the use of deadly force to subdue a person falls within its reach.

ARGUMENT

I. In *Hodari D.*, this Court recognized a common-law distinction between seizures effected by physical force and seizures effected by show of authority, with the latter requiring additional prerequisites.

In *Hodari D.*, this Court held that a seizure entails exertion of physical control over a person that restrains that person's movement. 499 U.S. at 624. The Court recognized a dichotomy, rooted in the common law, between seizures effected by physical force and seizures effected by a show of authority.

As the Court articulated, the analysis for seizures by physical force is straightforward: "an arrest is effected by the slightest application of physical force, despite the arrestee's escape." *Id.* at 625. The Court made the point repeatedly and emphatically. *See, e.g.*, *id.* at 626 ("[W]ith respect to application of physical force, a seizure occurs even though the subject does not yield."); *id.* ("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.* ("An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority."); *id.* at 626 n.2 ("the mere touching of a person would suffice"); *see also id.* at 645 (Stevens, J., dissenting) ("If an officer effects an arrest by touching a citizen, apparently the Court would accept the fact that a seizure occurred, even if the arrestee should thereafter break loose and flee.").

The Court had no trouble reaching this conclusion because it flowed directly from the settled common-law definition of arrest. Citing treatises and Founding-era cases, the Court explained that common-law arrest encompasses "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." *Id.* at 624 (majority opinion).[3] Even the dissenting justices agreed with the Court's interpretation of the common-law meaning of arrest. *See id.* at 630–31 (Stevens, J., dissenting) ("[I]f the officer had succeeded in touching respondent . . . — even if he did not subdue him—an arrest would have occurred."); *id.* at 631 n.5 (quoting article to the same effect).

Put another way, use of physical force to apprehend a suspect itself demonstrates the requisite exertion of physical control over the person. When an officer applies physical force to detain a suspect, the suspect's "freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). The officer's use of force restrains the suspect by hindering or impeding her movement, even if only temporarily. There is no requirement that the force successfully terminate the suspect's movement. *See Brendlin v. California*, 551 U.S. 249, 254 (2007) (stating that a seizure occurs when an

---

[3] In fact, eighteenth- and nineteenth-century English cases also made clear that physical touching constitutes a seizure of the person. *See, e.g.*, *Sandon v. Jervis* (1859) 120 Eng. Rep. 760, 762; El. Bl. & El. 942, 947 (Williams, J.) ("It is perfectly clear that . . . touching the person constitutes an arrest."); *Genner v. Sparks* (1704) 87 Eng. Rep. 928 (Q.B.) 929; 6 Mod. 173 ("[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.").

officer's physical force "terminates *or* restrains" the person's "freedom of movement" (emphasis added)). Indeed, as the Court observed in *Hodari D.*, the word "seizure" itself "readily bears the meaning of a laying on of hands or application of physical force to restrain movement." 499 U.S. at 626.

Having resolved the straightforward category of cases involving physical force, the Court turned to the facts of the case before it, which did not involve an officer's use of physical force. Instead, the question presented centered on whether a person who failed to yield in the face of an officer's pursuit had nevertheless been seized. *Id.* at 623. In other words, the Court was asked to clarify how courts should determine whether there has been a seizure in cases involving show of authority where physical force is absent. The Court made clear that these cases should be treated differently: "The narrow question before us is 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. We hold that it does not." *Id.* at 626. Specifically, the Court decided that two additional requirements must be met to ensure that the requisite exertion of control, or restraint on movement, is present in a show-of-authority case.

First, the Court described one necessary condition that a reasonable person reacting to the officer's show of authority "would have believed that he was not free to leave." *Id.* at 628 (quoting *Mendenhall*, 446 U.S. at 554).[4] This prerequisite recognizes that, in contrast to

---

[4] Although the Court in *Mendenhall* suggested that "physical touching of the person of the citizen" is just one example of a "circumstance[] that might indicate a seizure," 446 U.S. at 544, the

situations in which physical force is used to secure compliance, not every interaction between officers and citizens amounts to a seizure under the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). On the contrary, many such non-physical, non-threatening encounters can be nonintrusive, yet fruitful, means to gather information. *See Mendenhall*, 446 U.S. at 554. By objectively examining whether the officer's words, acts, and other conduct conveyed to the subject that compliance is mandatory, the not-free-to-leave inquiry "assess[es] the coercive effect of police conduct" and ensures that the suspect is being compelled (not voluntarily choosing) to stay. *Michigan v. Chesternut*, 486 U.S. 567, 573–74 (1988).

Second, the Court held that, notwithstanding the objective inquiry, a seizure has not occurred if a subject does not yield to the officer's show of authority. *Hodari D.*, 499 U.S. at 626. This compliance aspect of a seizure by show of authority comes from the common-law definition of arrest, which requires "*submission* to the assertion of authority" when physical force is absent. *Id.*; *see also id.* at 626–27 ("There can be no arrest without either touching or submission." (citation omitted)). That additional requirement makes logical sense where no force is used: if the suspect runs away, the officer has not restrained her movement. Imposing the obligation that the suspect chooses to stay put confirms that the

---

Court did not preclude the notion that physical touching may be sufficient to constitute a seizure. Even assuming there are examples of physical touching that are so incidental or minor as to not rise to the level of a "seizure," the officers' use of deadly force to prevent Ms. Torres's escape in this case would plainly constitute an adequate application of physical force to restrain her movement.

officer actually exerts some control over her. To put it in the Court's words, in contrast to an officer's use of physical force to stop a suspect, "a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee" is not a seizure. *Id.* at 626.

Importantly, throughout its discussion of the additional requirements for a seizure by show of authority, the Court was careful not to cast doubt on the clear common-law rule with respect to seizure by physical force. For example, in rejecting the dissent's effort to rely on the common law of attempted arrest, the Court explained that an "attempted arrest" (unlike an "arrest") is not synonymous with a "seizure." *Id.* at 626 n.2. For that reason, the fact that some attempted arrests were unlawful at common law did not matter because unlawful does not equate to unconstitutional. *Id.* By contrast, the Court embraced the full scope of the common-law arrest, including the notion that "the mere touching of a person would suffice." *Id.*

The upshot is that this Court in *Hodari D.* clearly delineated between seizure by physical force, on the one hand, and seizure by show of authority, on the other. While the mere application of physical force to apprehend a suspect is sufficient to effect a seizure, a show of authority requires more to reach the level of a seizure.

II. Other Fourth Amendment common-law analogues utilize a similar analytical framework to the one employed by this Court in *Hodari D.*

A. Like a common-law arrest, the common-law false imprisonment tort distinguishes between restraint by force and restraint by fear, with the latter requiring additional inquiries.

The common-law tort of false imprisonment centers on whether a person's movement has been restrained for any length of time, raising questions like those at issue in *Hodari D.* In light of these similarities, it should come as no surprise that courts at common law have developed a comparable false-imprisonment framework that treats restraint by force as different in kind from restraint by fear, where the test for restraint by fear is more stringent. These insights reinforce the appropriate methodological structure for analyzing a "seizure," particularly when the Court has already recognized false imprisonment as a proper common-law analogue for Fourth Amendment false arrest claims (albeit in the statute-of-limitations context). *See Wallace v. Kato*, 549 U.S. 384, 388–89 (2007).

In general, the tort of false imprisonment consists of any "unlawful restraint" of an individual's "personal liberty or freedom of movement" against her will. 35 C.J.S. *False Imprisonment* § 1 (2019). The tort protects the sacred "right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Johnson v. Barnes & Noble Booksellers,*

Inc., 437 F.3d 1112, 1116 (11th Cir. 2006) (quoting *Terry*, 392 U.S. at 9).

Although precise definitions of the tort differ between jurisdictions, there are two "essential elements." 35 C.J.S. *False Imprisonment* § 5 (2019). First, the plaintiff must demonstrate some "restraint" of her personal liberty or freedom of movement for any length of time. *See Sinclair Refining Co. v. Meek*, 10 S.E.2d 76, 79 (Ga. App. 1940). Second, the restraint must be "unlawful." *See, e.g., Alvarez v. Montgomery Cnty.*, 147 F.3d 354, 359 (4th Cir. 1998) ("[T]he necessary elements of a case for false imprisonment are a deprivation of the liberty of another without his consent and without legal justification." (quoting *Montgomery Ward v. Wilson*, 664 A.2d 916, 926 (Md. 1995)); *Diaz v. Lockheed Elecs.*, 618 P.2d 372, 374 (N.M. Ct. App. 1980) ("False imprisonment involves the unlawful interference with the personal liberty or freedom of locomotion of another.").

There are obvious conceptual similarities between the "restraint" that a plaintiff must demonstrate to prevail on the common-law tort of false imprisonment, and the "restraint" that a plaintiff must demonstrate to prevail on a Fourth Amendment seizure claim. Indeed, the linguistic formulations of the relevant Fourth Amendment and false-imprisonment tests both focus on whether there has been a restraint on the person's personal liberty or freedom of movement. *Compare Hodari D.*, 499 U.S. at 625 ("[A] seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" (quoting *Terry*, 392 U.S. at 19 n.16) (emphasis omitted)), *and United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (noting that a Fourth Amendment seizure results from

"meaningful interference, however brief, with an individual's freedom of movement"), *with Lukas v. J. C. Penney Co.*, 378 P.2d 717, 720 (Or. 1963) (holding that an unlawful restraint "upon another's freedom of movement" constitutes a false imprisonment), *and Diaz*, 618 P.2d at 374 ("False imprisonment involves the unlawful interference with the personal liberty or freedom of locomotion of another.").[5]

Like common-law arrest discussed in *Hodari D.*, the common-law tort of false imprisonment also draws a line between restraint by force and restraint by fear. Specifically, a plaintiff asserting a common-law claim of false imprisonment must demonstrate that the "restraint" of her personal liberty or freedom of movement resulted either from force or from fear. 35 C.J.S. *False Imprisonment* § 14 (2019). As the Supreme Court of North Carolina observed in *Hales v. McCrory-McLellan Corp.*, 133 S.E.2d 225 (N.C. 1963), a different standard applies in cases where the alleged restraint was accomplished through fear, as opposed to force:

> The essential thing is the restraint of the person. This may be caused by threats, as well as by actual force, and the threats may be by conduct or by words.

---

[5] To be sure, Fourth Amendment seizures and false imprisonments may not be completely overlapping. As commentators have cautioned, "restraint might not be exactly the same under . . . Fourth Amendment doctrine and . . . private law." William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1886 (2016). For example, physical contact may be enough under the Fourth Amendment, but not enough under tort law. *Id.* Whatever the differences between the necessary elements for these claims, the analytical models are analogous.

> If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.

Id. at 227. The court's statements divide restraint of a person "by actual force," on the one hand, from restraint of a person by "threats," on the other. *Id.*; *see also, e.g.*, *Trahan v. Bellsouth Telecomm., Inc.*, 881 F. Supp. 1080, 1084 (W.D. La.) (stating that "evidence of physical restraint or fear of physical restraint" is required for a claim of false imprisonment), *aff'd*, 71 F.3d 876 (5th Cir. 1995); *Williams v. Food Lion, Inc.*, 446 S.E.2d 221, 223 (Ga. Ct. App. 1994) ("[D]etention must have occurred whether caused by force or fear.").

By drawing this distinction, courts acknowledge that restraint by force operates on a different playing field than restraint by fear. Restraint by "force" may include, for example, the erection of a physical barrier blocking the plaintiff's freedom of movement, *see Fermino v. Fedco, Inc.*, 872 P.2d 559, 567 (Cal. 1994), or the employment of "personal violence" against the plaintiff, *Jones ex rel. Robinson v. Winn-Dixie Greenville, Inc.*, 456 S.E.2d 429, 432 (S.C. Ct. App. 1995). At least in some circumstances, the mere application of force has been held sufficient to show a "restraint" of the plaintiff's personal liberty. *See Patrick v. Esso Standard Oil Co.*, 156 F. Supp. 336, 340 (D.N.J. 1957) (noting that the "use of physical force" is sufficient, but not "necessary," to prove false arrest); *Dolgencorp, Inc. v. Pounders*, 912 So.2d 523, 527 (Ala. Civ. App. 2005) (noting that "[a]ny exercise of force" depriving a plaintiff of his or her personal liberty is sufficient to show unlawful restraint). These rulings fall in line with this Court's statement in *Hodari*

D. that any application of physical force to subdue a suspect effects a "seizure." *See* 499 U.S. at 624–25.

When a false imprisonment claim is instead based on restraint by fear, courts require the plaintiff to prove more—namely, that the plaintiff *submitted* to imprisonment because of a reasonable fear that failing to do so would lead to force. Generally, a plaintiff alleging restraint through fear must make an additional showing that the defendant "induce[d] a *reasonable apprehension*" in the plaintiff "that force [would] be used if the plaintiff [did] not submit." 35 C.J.S. *False Imprisonment* § 17 (2019) (emphasis added); *see, e.g.*, *Marcus v. Liebman*, 375 N.E.2d 486, 488 (Ill. App. Ct. 1978). Cases typically examine whether the defendant's words, acts, and gestures put the plaintiff "in fear of personal difficulty or personal injuries" if she does not comply with the defendant's commands. *Todd v. Byrd*, 640 S.E.2d 652, 659 (Ga. Ct. App. 2006), *overruled on other grounds by Ferrell v. Mikula*, 672 S.E.2d 7 (Ga. Ct. App. 2008); *see also* 35 C.J.S. *False Imprisonment* § 17 (2019).

These requirements for restraint by fear are consistent with this Court's conceptualization of a Fourth Amendment seizure through a show of authority. As in the false-imprisonment context, this species of seizure includes an additional objective element regarding a subject's submission to the officer's show of authority—more particularly, whether a reasonable person "would have believed that he was not free to leave." *Hodari D.*, 499 U.S. at 628 (quoting *Mendenhall*, 446 U.S. at 554). This objective inquiry, too, looks to factors nearly identical to those examined in false-imprisonment cases, including "the threatening presence of several officers," "the display of a weapon," "some physical touching of the

person of the citizen," and "the use of language or tone of voice." *Mendenhall*, 446 U.S. at 554.[6]

In short, there are numerous connections between the way that courts treat arrest and false imprisonment under the common law. The close resemblance between the analytical frameworks for these two torts further underscores the utility in recognizing the distinction between cases involving physical restraints and those involving psychological restraints.

B. Similar to a "seizure" under the Fourth Amendment, a "search" under the Fourth Amendment can result from a common-law trespass or from an invasion of the right to privacy.

Another useful comparator for the appropriate mode of analysis for evaluating Fourth Amendment "seizure" claims comes from the neighboring Fourth Amendment "search" context. In fact, the evolution of this Court's views on how to analyze searches under the Fourth Amendment closely mirrors the development of the

---

[6] Based on the factors outlined above, there is a supportable argument that the facts of Ms. Torres's case rise to the level of restraint by fear without even resorting to restraint by force. Under the totality of the circumstances, multiple officers wearing tactical vests with police markings approached Ms. Torres's vehicle, ordered Ms. Torres to show her hands, brandished and discharged their weapons, and struck Ms. Torres with two bullets. Regardless of how Ms. Torres actually perceived and responded to each of these acts, it is conceivable that a reasonable person in her position would have feared personal injury or difficulty if she did not comply. *See generally* 35 C.J.S. *False Imprisonment* § 17 (2019).

framework to analyze seizures under the Fourth Amendment.

In the seminal case of *Katz v. United States*, 389 U.S. 347, 353 (1967), this Court repudiated exclusive reliance on common-law trespass principles to define the scope of a Fourth Amendment search. In the era of electronic surveillance, that approach took too narrow a view of the scope of Fourth Amendment protections afforded. *See id.* ("[T]he reach of th[e] [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."). In his concurrence, Justice Harlan constructed the now-controlling two part test to determine when a Fourth Amendment search has occurred: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

However, in cases involving increasingly complicated technologies, these principles can often be challenging to apply. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2216–20 (2018) (cell-site location information); *United States v. Jones*, 565 U.S. 400, 405–11 (2012) (GPS tracking device); *Kyllo v. United States*, 533 U.S. 27, 33–40 (2001) (thermal-imaging device); *Smith v. Maryland*, 442 U.S. 735, 741–45 (1979) (pen register). Thus, on many occasions, the Court has harkened back to the well-delineated common-law rules of trespass to resolve these complex cases based on whether a physical intrusion occurred. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 7–10 (2013); *Jones*, 565 U.S. at 404–11; *see also Carpenter*, 138 S. Ct. at 2267–68 (Gorsuch, J., dissenting).

In so doing, the Court has drawn a distinction between search by trespass, *i.e.*, physical intrusion, and search by invasion of privacy. For the former category, a search lies when the government physically intrudes on a constitutionally protected area, as informed by common-law trespass principles. *Jardines*, 569 U.S. at 11. For the latter category, where physical intrusion is lacking, courts must ask additional questions to ensure that a sufficient invasion has occurred. In particular, courts look to the objective and subjective components of the reasonable-expectation-of-privacy test derived from *Katz*. *See Jones*, 565 U.S. at 405–06. In this way, the *Katz* test "supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (quoting *Jardines*, 569 U.S. at 11); *see also Jones*, 565 U.S. at 409 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

The evolution of the analytical framework for Fourth Amendment seizures has followed a similar path. In response to the real-world complexities attendant to contact between police officers and citizens, the Court crafted a standard for non-physical interactions focusing on whether "a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 553–54.[7] But as the Court later made clear in *Hodari D.*, this intricate analysis is not necessary when an officer applies physical force in an attempt to apprehend a suspect. The common law on arrest leaves no

[7] The Court in *Mendenhall* drew support for its not-free-to-leave test from *Terry*, 392 U.S. 1, which was the first decision to adopt Justice Harlan's expectation-of-privacy test.

doubt that, in that scenario, a seizure has occurred. *See Hodari D.*, 499 U.S. at 624–26. Only in the absence of such physical force do courts need to scrutinize *Hodari D.*'s objective and subjective components that dictate whether an officer's show of authority amounted to an exertion of physical control over the subject.

This mode of analysis has the additional benefit of simplifying straightforward cases. *See Jardines*, 569 U.S. at 11 ("One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."). It is indisputable that an officer conducts a search when she physically intrudes on a private citizen's property to gather evidence. It seems equally indisputable that an officer commits a seizure when she applies physical force (particularly deadly force in Ms. Torres's case) to apprehend a suspect. Both actions infringe on the people's right "to be secure in their persons, houses, papers, and effects." U.S. Const. amend. IV. Just as a common-law trespass qualifies as a Fourth Amendment search, so too should a common-law arrest qualify as a Fourth Amendment seizure, as this Court has already recognized in *Hodari D.*

III. Issues concerning police officers' use of force in an attempt to subdue suspects recur frequently, and the Tenth Circuit's decision will insulate such conduct from constitutional scrutiny.

Contrary to *Hodari D.* and the Fourth Amendment principles discussed above, the Tenth Circuit held in this case that no seizure occurred, solely because the officers' use of deadly force against Ms. Torres did not at first succeed in subduing her. But whether Ms. Torres submitted should not have been dispositive of whether

a temporary seizure occurred. The officers' use of force with the intention of detaining Ms. Torres should have been sufficient to constitute a seizure within the meaning of the Fourth Amendment. The Tenth Circuit's decision is not only wrong; it has the perverse effect of immunizing police officers' use of force—even deadly force—from all constitutional scrutiny whenever that use of force did not at first subdue the suspect. The Fourth Amendment's reach should not turn on happenstance. This Court's review is warranted.

A. The issue presented in Ms. Torres's petition is an issue of national significance. Police officers often use force in the course of apprehending, or attempting to apprehend, a suspect. When they do so, the affected individuals often may contend that the officers used excessive force. *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1125 (2008) ("Subjects of police uses of force often respond with allegations of law enforcement brutality." (footnote omitted)); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629, 631. Clear judicial guidance concerning the standards governing the use of force, especially deadly force, is critical for both police officers and the citizens with whom they interact.

Situations in which suspects have managed to evade law enforcement uses of force arise fairly frequently. The past decade has seen numerous instances in which officers have applied physical force but failed to subdue the suspect—as evidenced by the abundance of Fourth Amendment cases, both civil and criminal, presenting

such circumstances.[8] And these cases arise in a variety of contexts in which different types of force have been used. Suspects may escape after being shot (as in Ms. Torres's case), *e.g.*, *Dukes*, 2007 WL 9701813, at *1;[9] they may evade police after being rammed by a vehicle,

---

[8] *See, e.g.*, *Carrillo-Ortiz v. N.M. State Police*, No. 18-CV-00334, 2019 WL 4393989, at *5 (D.N.M. Sept. 13, 2019); *Brown v. City of Las Cruces Police Dep't*, No. 17-CV-00944, 2019 WL 3956167, at *9 (D.N.M. Aug. 21), *report and recommendation adopted in part, rejected in part*, 2019 WL 4296858 (D.N.M. Sept. 11, 2019); *Lucero Y Ruiz De Gutierrez v. Albuquerque Pub. Sch.*, No. 18-CV-00077, 2019 WL 203171, at *5 (D.N.M. Jan. 15, 2019); *United States v. Orange*, No. 17-CR-00005, 2018 WL 4691634, at *3 (S.D. Ga. Aug. 21), *report and recommendation adopted*, 2018 WL 4688726 (S.D. Ga. Sept. 28, 2018); *Farrell v. Detavis*, No. 15-CV-01113, 2016 WL 10859789, at *3 (D.N.M. Aug. 30, 2016), *rev'd sub nom. Farrell v. Montoya*, 878 F.3d 933 (10th Cir. 2017); *Estate of Alvarado v. Tackett*, No. 13-CV-01202, 2015 WL 13239184, at *6 (S.D. Cal. Apr. 27, 2015), *rev'd and remanded sub nom. Estate of Alvarado v. Shavatt*, 673 F. App'x 777 (9th Cir. 2017); *Krahn v. Meixell*, No. 10-CV-00140, 2014 WL 5840756, at *4 n.2 (D. Del. Nov. 10, 2014); *United States v. Singletary*, 37 F. Supp. 3d at 601, 609 (W.D.N.Y. 2014); *United States v. Brown*, No. 12-CR-20342, 2013 WL 489828, at *4 (E.D. Mich. Feb. 8, 2013); *Henson v. United States*, 55 A.3d 859, 866 (D.C. 2012); *Browell v. Davidson*, 595 F. Supp. 2d 907, 914 (N.D. Ind. 2009); *Brooks v. Gaenzle*, No. 06-CV-01436, 2009 WL 3158138, at *5 (D. Colo. Sept. 29, 2009), *aff'd in part, rev'd in part*, 614 F.3d 1213 (10th Cir. 2010); *New Mexico v. Garcia*, 217 P.3d 1032, 1038–39 (N.M. 2009); *United States v. Dupree*, No. 08-CR-00280, 2009 WL 2393441, at *1–2 (E.D. Pa. Aug. 4, 2009), *aff'd*, 617 F.3d 724 (3d Cir. 2010); *Dukes v. Miami-Dade Cnty.*, No. 05-CV-22665, 2007 WL 9701813, at *1 (S.D. Fla. Dec. 26, 2007).

[9] *Cf.* Michael D. White, *Hitting the Target (or Not): Comparing Characteristics of Fatal, Injurious, and Noninjurious Police Shootings*, 9 Police Q. 303, 309 (2006) (finding that only 14% of intentional firearms discharges by law enforcement officials at citizens were fatal between 1987 and 1992).

e.g., *Orange*, 2018 WL 4691634, at *3; or they may escape the officer's physical touch, *e.g.*, *Singletary*, 37 F. Supp. 3d at 609.

In light of these varying scenarios, it is imperative to clarify the threshold issue of when a "seizure" occurs. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). That issue will determine whether the officer's use of force is subject to any constitutional scrutiny at all, and whether a suspect therefore may challenge the use of force through a § 1983 claim. And as officers' use of force increases, these issues will be litigated with increasing frequency. *See, e.g.*, Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 Fla. L. Rev. 1773, 1777 (2016) (explaining that a § 1983 suit is the "primary avenue to obtain a remedy" for a police officer's use of force against a citizen). The evasion of physical force employed by law enforcement is an increasingly common occurrence that cries out for authoritative guidance from this Court.

B. Review is also warranted because the Tenth Circuit's decision threatens to immunize potentially egregious police misconduct from constitutional review. As this Court has explained, in "the context of an arrest or investigatory stop of a free citizen," the only source of "constitutional protection against physically abusive" and even deadly "governmental conduct" is "the Fourth Amendment's prohibition against unreasonable seizures of the person." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *id.* at 395 (holding that "*all* claims that law enforcement officers have used excessive force" against a "free citizen" must be "analyzed under the Fourth Amendment"). To prevail on a § 1983 claim of excessive force under the Fourth Amendment, a plaintiff must show (1) that a "seizure" of her person "took place," *see*

Lewis, 523 U.S. at 843; and (2) that the seizure was objectively "unreasonable," *Graham*, 490 U.S. at 397.

In holding that no seizure occurs when an officer's use of force fails to subdue a suspect, the Tenth Circuit has insulated a broad category of grave police conduct—the use of force, including deadly force, against a fleeing suspect—from all constitutional scrutiny. In that court's view, the officers' use even of deadly force against Ms. Torres was not a "seizure," and hence did not implicate Ms. Torres's constitutional rights under the Fourth Amendment at all. The outcome would have been no different, therefore, if the officers had shot Ms. Torres dozens of times—just so long as Ms. Torres was able, even briefly, to get away. *See Carrillo-Ortiz*, 2019 WL 4393989, at *5 (concluding that no seizure occurred where plaintiff alleged that he was struck by ten out of seventeen bullets fired by the police because plaintiff was able to drive "a short distance away").

The sweeping effect of the Tenth Circuit's ruling is a consequence of the manner in which the case was decided. Under Ms. Torres's correct assessment that she was, in fact, "seized," the analysis of her claim would have turned on an inquiry into the objective reasonableness of the officers' actions. *See Terry*, 392 U.S. at 9 ("[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." (citation omitted)). The Tenth Circuit, however, concluded that Ms. Torres failed to satisfy the threshold Fourth Amendment question of whether there was a "seizure" of her person in the first instance. In other words, Ms. Torres's case falls outside the purview of the Fourth Amendment. The court's decision thus cuts off the inquiry into the reasonableness of the officers' actions before that analysis can even be performed.

The practical effect of the Tenth Circuit's ruling will be arbitrarily asymmetrical liability for police officers' objectively unreasonable uses of physical force (and, hence, arbitrarily asymmetrical relief for suspects injured by that force). For example, suppose Officer A and Officer B employ the same objectively unreasonable force in their attempts to arrest, respectively, Suspect A and Suspect B. Officer A's application of that force fortuitously knocks Suspect A unconscious, and Suspect A is taken into custody. Officer B's application of that same force cripples Suspect B and permanently blinds her in one eye, but Suspect B manages to barely limp into a dark alley and briefly evade capture. Under the Tenth Circuit's rule, Officer A's use of force violates Suspect A's Fourth Amendment rights, but the identical use of force by Officer B does not even implicate Suspect B's Fourth Amendment rights. There is no reasoned basis for this distinction.

Ultimately, the factfinder might conclude that the officers in this case were justified in using the particular level of force they employed, based on the totality of the circumstances and the deference due an officer's split-second judgments on the scene. *See County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (2017) ("When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim."). And the officers may be immune from liability if the constitutional violation was not clearly established at the time of their conduct. *See Pearson v. Callahan*, 555 U.S. 223, 243–45 (2009). But police officers' use of force, including deadly force, should not be entirely immune from constitutional scrutiny based solely on the happenstance that the suspect is able to run away. This Court should grant certiorari

to correct the Tenth Circuit's rule, which is contrary to this Court's precedent and common sense, and which prevents courts from ever reaching those important questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GINGER D. ANDERS
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
ginger.anders@mto.com

DAVID P. THORESON
david.thoreson@mto.com
BRIAN J. SPRINGER
brian.springer@mto.com
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Amici Curiae *Fourth Amendment Scholars*

OCTOBER 4, 2019

APPENDIX

APPENDIX

List of *Amici Curiae*

This Appendix provides *amici*'s titles and institutional affiliations for identification purposes only, and not to imply any endorsement of the views expressed herein by *amici*'s institutions.

Maryam Ahranjani, Associate Professor of Law & Don L. & Mabel F. Dickason Professor, University of New Mexico School of Law

Lara Bazelon, Professor of Law; Director, Criminal Juvenile Justice Clinic; Director, Racial Justice Clinic, University of San Francisco School of Law

John H. Blume, Samuel F. Leibowitz Professor of Trial Techniques; Director of Clinical, Advocacy and Skills Programs; Director, Cornell Death Penalty Project, Cornell Law School

Gabriel "Jack" Chin, Edward L. Barrett, Jr. Chair of Law; Martin Luther King, Jr. Professor of Law; Director of Clinical Legal Education, University of California, Davis School of Law

Russell D. Covey, Professor of Law, Georgia State University College of Law

Anthony Dillof, Professor of Law, Wayne State University Law School

Jules Epstein, Professor of Law; Director of Advocacy Program, Temple University Beasley School of Law

Brian Gallini, Professor of Law; Director of Online Initiatives, University of Arkansas School of Law

Brandon L. Garrett, L. Neil Williams, Jr. Professor of Law, Duke University School of Law

Cynthia Godsoe, Professor of Law, Brooklyn Law School

Catherine M. Grosso, Professor of Law, Michigan State University College of Law

David A. Harris, Sally Ann Semenko Endowed Chair and Professor of Law, University of Pittsburgh School of Law

Janet C. Hoeffel, Catherine D. Pierson Professor of Law, Tulane University School of Law

Andrew Horwitz, Professor of Law; Assistant Dean for Experiential Education, Roger Williams University School of Law

Nicholas Kahn-Fogel, Associate Professor of Law, William H. Bowen School of Law University of Arkansas at Little Rock

Thea Johnson, Associate Professor of Law, University of Maine School of Law

Daniel T. Kobil, Professor of Law, Capital University Law School

Carrie Leonetti, Associate Professor of Law and Associate Dean Equity, University of Auckland School of Law

Ken Levy, Holt B. Harrison Professor of Law, Paul M. Hebert Law Center, Louisiana State University

Katherine Macfarlane, Associate Professor of Law, University of Idaho College of Law

Michael J.Z. Mannheimer, Professor of Law, Northern Kentucky University Salmon P. Chase College of Law

Michael Meltsner, Matthews Distinguished University Professor of Law, Northeastern University School of Law

Colin Miller, Professor of Law, University of South Carolina School of Law

Eric Miller, Professor of Law; Leo J. O'Brien Fellow, Loyola Law School, Los Angeles

Rachel Moran, Assistant Professor of Law, University of St. Thomas School of Law

Sam Newton, Assistant Professor of Law, University of Idaho College of Law

Jerry E. Norton, Professor Emeritus of Law, Loyola University Chicago School of Law

L. Song Richardson, Dean and Chancellor's Professor of Law, University of California, Irvine School of Law

Amy D. Ronner, Emeritus Professor of Law, St. Thomas University School of Law

Seth Stoughton, Associate Professor of Law, University of South Carolina School of Law

Dean A. Strang, Visiting Professor of Law, University of San Francisco School of Law

Suja A. Thomas, Peer and Sarah Pedersen Professor of Law, University of Illinois College of Law

Rodney Uphoff, Elwood L. Thomas Missouri Endowed Professor Emeritus of Law, University of Missouri School of Law

Samuel R. Wiseman, McConnaughhay and Rissman Professor of Law, Florida State University College of Law

Jonathan Witmer-Rich, Associate Dean for Academic Enrichment; Joseph C. Hostetler–Baker Hostetler Professor of Law, Cleveland Marshall College of Law

Jordan Blair Woods, Assistant Professor of Law, University of Arkansas School of Law