No. 19-292

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the unanimous Tenth Circuit panel below properly affirm summary judgment in favor of the Respondents where petitioner failed to meet her burden of showing that she was "seized" for purposes of the Fourth Amendment to the United States Constitution?

2. Should the dismissal of petitioner's Fourth Amendment claims be upheld on the alternative ground that Respondents' use of force against petitioner was reasonable under the circumstances?

3. Should the dismissal of petitioner's Fourth Amendment claims be upheld on the alternative ground that Respondents are entitled to qualified immunity because petitioner failed to meet her burden of showing that Respondents' actions violated "clearly established" law?

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STATEMENT OF THE CASE

Early in the morning on Tuesday, July 15, 2014, State Police officers went to an apartment complex in Albuquerque, New Mexico to arrest a woman, Kayenta Jackson, who was "involved with an organized crime ring" and was suspected of, *inter alia*, "having been involved in drug trafficking, murder, and other violent crimes." App. 2a, 11a. Respondents Janice Madrid and Richard Williamson were two of the State Police officers involved. App. 11a. The officers saw two individuals standing in front of the woman's apartment next to a Toyota FJ Cruiser. App. 2a. The Cruiser was backed into a parking spot, with cars parked on both sides of it. *Id.* The officers, who were wearing tactical vests with police markings, decided to make contact with the two individuals in case one was the subject of their arrest warrant. *Id.* As the officers approached the Cruiser, one of the individuals ran into the apartment, while the other individual, petitioner Roxeanne Torres, got inside the Cruiser and started the engine. *Id.* At the time, Torres was "trip[ping] . . . out" from having used meth "[f]or a couple of days." *Id.* at 2a-3a.

Officer Williamson approached the Cruiser's closed driver-side window and told petitioner several times, "Show me your hands," as he perceived petitioner was making "furtive movements . . . that [he] couldn't really see because of the [Cruiser's] tint[ed]" windows. App. 3a. Officer Madrid took up a position near the Cruiser's driver-side front tire. *Id.* She could not see who the driver was, but she perceived the driver was making "aggressive movements inside the

vehicle." *Id.* Petitioner claimed that she did not know that Williamson and Madrid were police officers, and claimed that she could not hear anything they said. *Id.* However, when she "heard the flicker of the car door" handle, she "freak[ed] out" and "put the car into drive," allegedly thinking she was being carjacked. *Id.*

When petitioner put the car in drive, Officer Williamson brandished his firearm. App. 3a. At some point, Officer Madrid drew her firearm as well. *Id.* Petitioner testified that she "stepped on the gas . . . to get away," and the officers "shot as soon as the [Cruiser] creeped a little inch or two." *Id.* Both officers testified that they believed petitioner was going to hit them with her car, and that they were in fear for their lives. *Id.* at 11a. Specifically, Officer Madrid testified that the Cruiser "drove at [her]" and she fired "at the driver through the windshield" "to stop the driver from running [her] over." *Id.* at 3a. Officer Williamson testified that he shot at the driver because he feared being "crush[ed]" between the Cruiser and the neighboring car, as well as "to stop the action of [the Cruiser] going towards [Officer] Madrid." *Id.* at 3a-4a.

Both officers fired, and two of their bullets struck petitioner—however, she did not stop or accede to the officers' show of authority even after being shot. *See* App. 4a. Instead, petitioner continued forward, driving over a curb, through some landscaping, and onto a street. *Id.* After colliding with another vehicle, petitioner stopped in a parking lot, exited the Cruiser, laid down on the ground, and attempted to "surrender" to the "carjackers" (who she believed might be in pursuit).

Id. Petitioner, who "was [still] tripping out bad," asked a bystander to call police, but she (petitioner) did not want to wait around because she had an outstanding arrest warrant. *Id.* As such, petitioner stole a Kia Soul that was left running while its driver loaded material into the trunk. *Id.* Petitioner drove approximately 75 miles west to Grants, New Mexico, and went to a hospital, where she falsely identified herself as "Johannarae C. Olguin." *See id.* Petitioner was airlifted to a hospital in Albuquerque, properly identified, and arrested by police on July 16, 2014. *Id.* Petitioner ultimately pled no contest to three crimes: (1) aggravated fleeing from a law-enforcement officer (Officer Williamson); (2) assault upon a police officer (Officer Madrid); and (3) unlawfully taking a motor vehicle. *Id.*

In October 2016, petitioner filed a civil-rights complaint in the United States District Court for the District of New Mexico against Officers Williamson and Madrid. App. 4a. In that complaint, petitioner asserted one excessive-force claim against each officer, alleging that the "intentional discharge of a fire arm [sic] . . . exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied." *Id.* Petitioner also asserted a claim against each officer for conspiracy to engage in excessive force, alleging that the officers had "formed a single plan through non-verbal communication . . . to use excessive force." *Id.* at 4a-5a.

The district court construed petitioner's complaint as asserting excessive force claims under the Fourth Amendment. App. 5a, 13a. The officers filed a motion

for summary judgment, showing that they were entitled to qualified immunity on all of petitioner's excessive force claims because, *inter alia*, the officers' use of force was reasonable under the circumstances. App. 13a. The officers further argued that petitioner's excessive force claims failed because petitioner was never seized, and without a seizure, there can be no Fourth Amendment excessive force claim. *Id.* The district court agreed that the undisputed material facts showed that petitioner was never seized, and consequently she could not prevail on her claims that the officers used excessive force in effecting a seizure. *Id.* at 13a-14a. Consequently, the district court granted the Officers' motion for summary judgment on the first prong of qualified immunity (i.e. that there had been no constitutional violation). *See id.* at 20a.

On May 2, 2019, the United States Court of Appeals for the Tenth Circuit affirmed the district court's ruling, finding that petitioner's claims failed under the first prong of the qualified immunity analysis. *See generally* App. 1a-9a. The Tenth Circuit agreed with the district court that petitioner failed to show she was seized by the officers' use of force. App. 7a. "Specifically, the officers fired their guns in response to Torres's movement of her vehicle. Despite being shot, Torres did not stop or otherwise submit to the officers' authority." *Id.* The Tenth Circuit properly looked to its prior opinion in *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-24 (10th Cir. 2010) in finding that the officers' use of force against petitioner failed to "control [her] ability to evade capture or control." *See* App. 7a-8a. Notably,

though the Tenth Circuit confined its analysis to the first prong of qualified immunity, *see* App.6a, the officers argued in the alternative that their use of force on July 15, 2014 was reasonable under the circumstances, and moreover, that no clearly established law would have put the officers on notice that their conduct on July 15, 2014 might be unconstitutional. *See generally* 10th Cir. Resp. Br., 2018 WL 5886839 (Nov. 5, 2018).

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR CANDIDATE FOR CERTIORARI BECAUSE PETITIONER HAS FAILED TO IDENTIFY ANY COMPELLING REASONS FOR REVIEWING THE TENTH CIRCUIT'S UNANIMOUS DECISION

The substance of Torres' Petition reveals that her chief complaint is merely an argument that the unanimous panel below misapplied or misinterpreted this Court's Fourth Amendment precedents. *See generally* Pet. at 15-22. Even if that argument were correct, however, this case is not one warranting review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "[T]his Court is not equipped to correct every perceived error coming from the lower federal courts." *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *see also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme*

Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari")); *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting).

"Because certiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 (2015) (quoting Sup. Ct. R. 10). The "compelling reasons" for granting certiorari include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. *Sheehan*, 135 S.Ct. at 1779. This Court's Rule 10 concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The questions presented by petitioner in the present case implicate, at most, the latter. *See Sheehan*, 135 S.Ct. at 1779. As discussed herein, the Tenth Circuit panel correctly applied this Court's Fourth Amendment precedents, as well as the Circuit's own precedents, regarding whether or not a "seizure" occurred.

A. THE TENTH CIRCUIT CORRECTLY FOUND THAT TORRES WAS NOT "SEIZED" FOR PURPOSES OF THE FOURTH AMENDMENT

The threshold inquiry in a 42 U.S.C. § 1983 suit requires that the Court "identify the specific constitutional right" at issue in a given case. *Manuel v. City of Joliet*, 137 S.Ct. 911, 920 (2017) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)). The "specific constitutional right" identified by the petitioner (in broad strokes) is the right to be free from excessive force, the most extreme form of seizure. *See generally Graham v. Connor*, 490 U.S. 386, 394 (1989). The Fourth Amendment to the United States Constitution protects against unreasonable seizures. However,

> a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement through *means intentionally applied*

(emphasis in original). *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596-97 (1986); *see also Scott v. Harris*, 550 U.S. 372, 381 (2007); *Zion v. Nassan*, 283 F.R.D. 247, 255 (W.D.Pa. 2012). "Violation of the Fourth Amendment requires an intentional acquisition of physical control" over the suspect. *Brower*, 489 U.S. at 596; *see also McCoy v. Harrison*, 341 F.3d 600, 606 (7th Cir. 2003)

(even where investigator hit plaintiff and dug his fingernails into her arm, there was "no evidence to show [investigator] intended to or did acquire physical control over [plaintiff's] person"); *Ploski v. Medenica*, ___ F.Supp.3d ___, 2019 WL 4014193, *5 (N.D. Ill. Aug. 26, 2019) (slip op.) (even after striking plaintiff, Defendant "did not physically restrain him, or otherwise act or give orders that would lead a reasonable person to believe he was not free to leave") (citing *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980)).

In order to "seize" a person, a law enforcement officer must restrain that person's liberty. *See Adams v. Springmeyer*, 17 F.Supp.3d 478, 503 (W.D.Pa. 2014) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968)); *see also U.S. v. Smith*, 633 F.3d 889, 892-93 (9th Cir. 2011). A seizure occurs only when the suspect actually submits (voluntarily or otherwise) to the police officer's assertion of force or authority. *See Brendlin v. California*, 551 U.S. 249, 254 (2007) (under the Fourth Amendment, "there is no seizure without *actual submission*") (emphasis supplied); *see also U.S. v. Smith*, 575 F.3d 308, 313 (3d Cir. 2009); *U.S. v. Griffin*, 652 F.3d 793, 798 (7th Cir. 2011); *Carlson v. Bukovic*, 621 F.3d 610, 620 (7th Cir. 2010) ("mere physical contact by an officer, although a significant factor, does not automatically qualify an encounter as a Fourth Amendment seizure"). It is axiomatic that "[w]ithout a seizure, there can be no violation of the Fourth Amendment and therefore no liability for the individual Defendants." *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015), *cert. denied*, 137 S.Ct. 197 (2016). "Additionally, without a seizure, there

can be no claim for excessive use of force in effectuating that seizure." *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998).

A person is "seized" within the meaning of the Fourth Amendment "only when, by means of physical force or a show of authority, his [or her] freedom of movement is restrained." *Mendenhall*, *supra*, 446 U.S. at 553. Even at that, the *Mendenhall* test states "a *necessary*, but not a *sufficient*, condition for seizure" (emphases in original). *California v. Hodari D.*, 499 U.S. 621, 628 (1991). "From the time of the founding to the present," the Fourth Amendment's term "seizure" has "meant a 'taking possession' " of the criminal suspect. *See Hodari D.*, 499 U.S. at 624 (internal citations omitted); *see also* Black's Law Dictionary 1564 (10th ed. 2014) (defining "seizure" as "[t]he act or an instance of taking possession of a person or property by legal right or process" and especially, "in constitutional law, a confiscation or arrest that may interfere with a person's reasonable expectation of privacy"); Am. Heritage Dictionary of the English Language 1588 (5th ed. 2011). Where a suspect does not actually submit to a law enforcement officer's assertion of authority, there is no seizure for purposes of the Fourth Amendment. *See Hodari D.*, 499 U.S. at 621 and n.2.

A seizure additionally requires that " 'the officer, by means of physical force or show of authority, has in some way *restrained the liberty* of a citizen' " (emphasis supplied). *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, *supra*, 392 U.S. at 19 n.16). The citizen's "freedom of movement" must actually be

restrained. *Brendlin*, *supra*, 551 U.S. at 254. As this Court noted in *Hodari D.*,

> 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. ("She seized the purse snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure.

Hodari D., 499 U.S. at 626-27.

Thus, harmonizing the principles from this Court's opinions in *Brower*, *Mendenhall*, *Brendlin*, *Hodari D.*, and *Bostick*, the touchstone of a seizure is that there must be a taking of possession of the suspect—i.e. the termination or physical restraint of the suspect's liberty or freedom of movement—through means intentionally applied (i.e. by the use of force or a show of authority). *See*, *e.g.*, *Mendenhall*, 446 U.S. at 553; *Brower*, 489 U.S. at 597; *Hodari D.*, 499 U.S. at 624; *see also Johnson v. City of Ferguson, Mo.*, 926 F.3d 504, 506 (8th Cir. 2019) (en banc) ("in the absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied . . . no seizure occurred"). "[T]o hold an officer personally liable for violation of the Fourth Amendment, the plaintiff must at a minimum be able to demonstrate that the officer actually terminated her freedom of movement by means of the alleged excessive force." *Schultz v. Braga*, 455 F.3d 470, 483 (4th Cir.

2006). "[A] seizure within the meaning of the Fourth Amendment *always* 'requires an intentional acquisition of physical control'" (emphasis supplied). *Schultz*, 455 F.3d at 480 (quoting *Brower*, 489 U.S. at 596); *see also Corbitt v. Vickers*, 929 F.3d 1304, 1319-20 (11th Cir. 2019). "[I]n order to establish a seizure, the object of the seizure must be stopped by the very instrumentality set in motion to effect the seizure." *Sanders v. City of Union Springs*, 207 F. App'x 960, 964 (11th Cir. Nov. 15, 2006) (unpublished) (citing *Brower*, 489 U.S. at 599).

Even where some level of force is intentionally applied by a law enforcement officer, unless that force results in the actual termination of the suspect's movement, no seizure has occurred. Indeed, "neither usage nor common law tradition makes an *attempted* seizure a seizure" (emphasis in original). *Hodari D.*, 499 U.S. at 626 n.2; *see also Brooks v. Gaenzle*, *supra*, 614 F.3d at 1221-22 ("none of our holdings suggest the mere use of physical force or show of authority alone, without termination of movement or submission, constitutes a seizure"). In *Brooks*, the Tenth Circuit properly noted that, while the Defendant Deputy's "gunshot may have intentionally struck" plaintiff, "it clearly did not terminate his movement or otherwise cause the government to have physical control over him." *Brooks*, 614 F.3d at 1224. As such, the plaintiff failed to show that the Defendants' "alleged conduct violated a constitutional right by means of 'seizure.'" *Id.* at 1225. The Tenth Circuit relied upon *Brooks* in its opinion below in this matter. *See* App. 7a.

In her petition, Torres essentially argues for a *per se* rule stating that any time a suspect is struck by a law enforcement officer, the Fourth Amendment's prohibition against unreasonable seizures is violated even if the officer's use of force does not result in the suspect stopping or otherwise acquiescing to the officer. However, this Court has previously "made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.'" *U.S. v. Drayton*, 536 U.S. 194, 201 (2002) (quoting *Florida v. Bostick*, *supra*, 501 U.S. at 439); *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). Under the circumstances of this encounter, petitioner was not seized by the two shots that struck her on July 15, 2014—she was seized only upon being arrested the next day.

Petitioner claims that "[t]he 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," i.e. petitioner suggests that these courts allow for "continuing seizure" claims under the Fourth Amendment. *See* Pet. 9. However, other circuits have properly found that this Court's jurisprudence has counseled *against* adopting a "'continuing seizure' theory of the Fourth Amendment." *See Riley v. Dorton*, 115 F.3d 1159, 1162-63 (4th Cir. 1997), *abrogated on other grounds*, *Wilkins v. Gaddy*, 559 U.S. 34 (2010); *U.S. v. Mays*, 819 F.3d 951,

955-56 (7th Cir. 2016) ("[a] Fourth Amendment seizure is 'not a continuous fact'; it is a single act that occurs at a discrete point in time") (quoting *Hodari D.*, *supra*, 499 U.S. at 625); *see also Welton v. Anderson*, 770 F.3d 670, 675 (7th Cir. 2015); *McCormick v. City of Lawrence*, 271 F.Supp.2d 1292, 1306 (D. Kan. 2003) ("[t]he court questions whether a Fourth Amendment cause of action lies in a 'continuing' seizure"). Just as there is no such thing as an "attempted seizure," there is no such thing as a "continuing seizure" under the Fourth Amendment, and petitioner was not continuously seized even after being shot on July 15, 2014.

A person has been "seized" within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, *supra*, 446 U.S. at 554. In the present case, even after being shot twice in or near Albuquerque, petitioner fled seventy-five miles west to Grants, New Mexico, i.e. she felt free to leave. To the extent that she was "seized" at the moment the two bullets struck her, petitioner broke that seizure by engaging in a headlong flight toward Grants. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) ("[h]eadlong flight . . . is certainly suggestive of [wrongdoing]"); *see also Brendlin*, *supra*, 551 U.S. at 255. Petitioner certainly was not "seized" for purposes of the Fourth Amendment after the moment Officers Madrid and Williamson fired, as she fled west. *See*, *e.g.*, *Brooks v. City of Aurora, Ill.*, 653 F.3d 478, 484-85 (7th Cir. 2011) (arrestee avoided officer's first attempt at seizure by

escaping officer's initial grasp; this brief initial grasp was not sufficient to constitute an actual seizure because it did not significantly detain the arrestee; seizure actually occurred when arrestee was incapacitated by pepper spray); *U.S. v. Hernandez*, 27 F.3d 1403, 1406-07 (9th Cir. 1994) (suspect was not seized during a struggle instigated when an officer grabbed him because the suspect escaped and ran away; "[a] seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective"); *Dockery v. Blackburn*, 911 F.3d 458, 468 (7th Cir. 2018) (reversing denial of qualified immunity where plaintiff "had not submitted to the officers' authority and was far from subdued when Sergeant Blackburn applied the Taser three more times"); *Johnson v. City of Ferguson*, *supra*, 926 F.3d at 506 (plaintiff was "neither physically restrained nor prevented from proceeding to the sidewalk in compliance with [Officer's] directive rather than fleeing as he did"); *U.S. v. Beamon*, 576 F. App'x 753, 758 (10th Cir. Aug. 13, 2014) (unpublished) (there is no Fourth Amendment seizure when officers apply physical force, if the force is insufficient to physically subdue the suspect); *see also U.S. v. Pope*, 561 F.2d 663, 668 (6th Cir. 1977) (defendant was not seized when he "broke into a run at the moment that Agent Johnson identified himself as a DEA agent"); *U.S. v. Swindle*, 407 F.3d 562, 571-73 (2d Cir. 2005) (police ordered individual to stop but the person did not comply and attempted to flee; seizure was not effectuated at the mere command to stop); *U.S. v. Nooks*, 446 F.2d 1283, 1288 (5th Cir. 1971).

Prior to July 15, 2014, courts within the Tenth Circuit properly held that no seizure takes place where a plaintiff fails to submit to an officer's show of authority or where the officer shot at the plaintiff and missed. *See*, *e.g.*, *James v. Chavez*, 830 F.Supp.2d 1208, 1242-44 (D.N.M. 2011), *aff'd*, 511 F. App'x 742 (10th Cir. Feb. 19, 2013) (unpublished) (seizure did not occur because the officer did not hit the plaintiff with his bullet and there was no evidence that the plaintiff had submitted to a show of authority); *Jones v. Norton*, 3 F.Supp.3d 1170, 1190 (D. Utah 2014), *aff'd*, 809 F.3d 564, *supra* ("[b]ecause Mr. Murray resisted Detective Norton's order and because Detective Norton's bullets missed the target (Mr. Murray), Detective Norton did not seize Mr. Murray at that point"). Contrary to what is suggested by petitioner, this is consistent with the law of the other Circuits. For example, in *Troupe v. Sarasota Cnty.*, 419 F.3d 1160 (11th Cir. 2005), *cert. denied*, 547 U.S. 1112 (2006), the Defendant Sheriff's Deputy sought to disable a fleeing vehicle by shooting at the vehicle's tire. *Troupe*, 419 F.3d at 1164. "The shot missed the tire and, apparently, did not strike anyone or anything." *Id.* The Deputy's missed shot "was not the proximate cause of any injury to" the plaintiffs. *Id.* at 1166. Nonetheless, the district court incorrectly found that the plaintiffs were "seized" under the Fourth Amendment. *Id.* In reversing that decision, the Eleventh Circuit noted that the Deputy's attempt to seize the driver by firing at the tire of the vehicle was not a seizure. *Id.* at 1167 (citing *Hodari D.*, 499 U.S. at 626 n.2); *see also McGrath v. Tavares*, 757 F.3d 20, 23-24 (1st Cir. 2014); *Lawson v. McNamara*, 438 F. App'x 113,

116 (3d Cir. July 21, 2011) (unpublished); *Estate of Rodgers v. Smith*, 188 F. App'x 175, 179-81 (4th Cir. June 26, 2006) (unpublished).

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993)—cited by petitioner, *see* Pet. 10—the plaintiff's decedent sped through a toll booth while driving an 18-wheel tractor trailer truck. *Cole*, 993 F.2d at 1330. Police officers fired shots that struck the truck's tires, radiator and window. *Id.* at 1330-31. The truck only came to a stop after a police officer, attempting to disable the truck's engine, fired a shot that struck the driver in the forehead. *Id.* at 1331. The Eighth Circuit held that the driver was seized only when he was struck by the bullet that killed him, concluding *inter alia* that the shots fired by the officers that struck the truck did not constitute a seizure because these assertions of authority failed to produce a stop. *Id.* at 1332-33; *cf. Adams v. City of Auburn Hills*, 336 F.3d 515, 519-20 (6th Cir. 2003) ("[t]he use of deadly force standing alone does not constitute a seizure, and absent an *actual physical restraint* or physical seizure, the alleged unreasonableness of the officers' conduct cannot serve as a basis for a § 1983 cause of action anchored in the Fourth Amendment" (emphasis supplied)) (quoting *Cameron v. City of Pontiac*, 813 F.2d 782, 785 (6th Cir. 1987)). Had petitioner in the present case actually stopped immediately after being shot, she might have been seized for purposes of the Fourth Amendment. *See Flores v. City of Palacios*, 381 F.3d 391, 396-97 (5th Cir. 2006) (where police officer shot at and hit arrestee's car, resulting in arrestee immediately stopping car, arrestee

was seized for purposes of the Fourth Amendment). However, those are not the facts of this case. *Cf. Reed v. Clough*, 694 F. App'x 716, 724 (11th Cir. June 2, 2017) (unpublished) (plaintiff alleged that Officer's gunshots resulted in injuries from shattered windshield glass; court found that, "[i]f supported by evidence, this allegation would raise a novel question about whether physical harm resulting from intentional police action that does not itself cause a defendant to stop constitutes a seizure") (citing *Brooks v. Gaenzle*, *supra*, 614 F.3d at 1216-25). Quite simply, *Cole* does not support petitioner.

Petitioner's reliance on *U.S. v. Dupree*, 617 F.3d 724 (3d Cir. 2010), *see* Pet. 13 n.4, is equally misplaced. In *Dupree*, the defendant was initially grabbed by a police officer but fled, discarding a gun during the chase. *Dupree*, 617 F.3d at 726. In the district court, the Government contended that, under *Hodari D.*, the defendant was not "seized" during the chase, and was only seized when he was subdued. *Id.* The district court ruled that the defendant was unlawfully seized when he was initially grabbed by the officer. *Id.* at 727. However, on appeal, the Government changed its position, admitting that the defendant was seized but relying on *Hodari D.* to argue that the exclusionary rule should not apply. *Dupree*, 617 F.3d at 730. Two of the Third Circuit panel members voted to affirm the district court's decision: of those two judges, one asserted that the Government had waived its newly-made appellate arguments, *see id.* at 725 (Hardiman, J.), and the other asserted that the defendant was unlawfully seized. *See*

generally id. at 738-42 (Fisher, J., concurring in part and concurring in the judgment). Notably, the third panel member in *Dupree* dissented, opining that "the Supreme Court's instruction in *Hodari D.* compels a reversal of the District Court's order suppressing the firearm." *Dupree*, 617 F.3d at 735 (Cowen, J., dissenting). *Dupree*'s authoritativeness on the question of whether petitioner was "seized" is, at best, questionable.

Additionally, petitioner purports to rely on the New Mexico Supreme Court's decision in *State v. Garcia*, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032. Pet. 14. First, petitioner's reliance on state case law is improper, as "the vindication of federal civil rights guaranteed by the Constitution is peculiarly subject to federal substantive law." *Martin v. Duffie*, 463 F.2d 464, 467-68 (10th Cir. 1972). Even setting that aside, the New Mexico courts have properly recognized that it is "[o]nly when the [police] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [that the Court] may conclude that a seizure has occurred." *State v. Walters*, 1997-NMCA-013, ¶ 12, 123 N.M. 88, 934 P.2d 282 (internal quotation marks and citation omitted); *see also Garcia*, 2009-NMSC-046, ¶ 37 (holding that a person is "seized" if, "in view of all the circumstances surrounding the incident, a reasonable person *would have believed that he was not free to leave*") (emphasis supplied; internal quotation marks and citation omitted). Again, as noted above, petitioner felt free to leave Albuquerque, even

after being shot twice—as such, she was not "seized" by the officers' two shots.

In sum, despite being struck by two bullets on July 15, 2014, petitioner was not "seized" by the Respondent Officers for purposes of the Fourth Amendment. Under long-standing case law from this Court as properly applied by the Tenth Circuit, a shot does not constitute a "seizure" for purposes of the Fourth Amendment unless and until the criminal suspect stops or slows down in response to that shot. Just as there is no such thing as an attempted seizure, *see Hodari D.*, *supra*, 499 U.S. at 626 n.2; *Brooks v. Gaenzle*, *supra*, 614 F.3d at 1221-22, there is no such thing as a Fourth Amendment claim based upon "attempted excessive force." At most, that is what occurred in the present case: the Officers used force but failed to effectuate an immediate seizure of the petitioner. As such, both the district court and the Tenth Circuit properly found that the Officers were entitled to qualified immunity on petitioner's Fourth Amendment excessive force claim. Certiorari should not be granted in light of the consistency of the holding below with this Court's existing precedents. There is no decision of this Court in conflict with the Tenth Circuit's holding in the case *sub judice*, or any of the other Tenth Circuit decisions identified by petitioner and her *amici*.

B. THIS COURT DOES NOT STRICTLY IMPOSE COMMON LAW PRINCIPLES IN SECTION 1983 CASES

Petitioner suggests that the Tenth Circuit's decision is at odds with the common law's definition of "arrest." *See*, *e.g.*, Pet. 1-2, 11, 15, 22. However, in *Manuel v. City of Joliet*, *supra*, this Court reiterated that "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S.Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006); *see also Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law"); *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (noting that "§ 1983 is [not] simply a federalized amalgamation of pre-existing common-law claims" and that the "federal claim created by § 1983 differs in important ways from pre-existing common-law torts"); *cf. Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring) (the federal courts are "not in the business of expounding a common law of torts"). Contrary to what petitioner suggests, *see* Pet. 26, this Court is not bound to apply the 1934 Restatement provision cited by petitioner, and should instead look to the panoply of this Court's own precedents, particularly *Brendlin*, *Hodari D.*, *Brower*, and their progeny, all of which support the Tenth Circuit's well-reasoned decision.

II. AS AN ALTERNATIVE GROUND FOR AFFIRMANCE, THE FORCE USED BY THE OFFICERS WAS OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES

This Court may consider alternative grounds for affirmance of the Tenth Circuit's judgment. *See U.S. v. Tinklenberg*, 563 U.S. 647, 661 (2011) (citing *U.S. v. Nobles*, 422 U.S. 225, 242, n.16 (1975)); *see also Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1654 (2018) ("we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below") (citing *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984)). In the present case, two alternative grounds exist for affirming the dismissal of petitioner's Fourth Amendment claims: first (as discussed herein), even assuming that petitioner was "seized" when she was shot, the force used by Officers Madrid and Williamson was reasonable under the circumstances. Second, as discussed *infra*, Officers Madrid and Williamson were and are entitled to dismissal of petitioner's claim on the second prong of qualified immunity, namely, that no clearly established law exists that is particularized to the facts of this case.

"A seizure results in a constitutional violation only if it is unreasonable." *Nelson v. City of Davis*, 685 F.3d 867, 878 (9th Cir. 2012). Even assuming *arguendo* that the Officers "seized" petitioner when they shot and struck her, their use of force was reasonable under the circumstances. The reasonableness of an officer's conduct must be assessed "from the perspective of a reasonable officer on the scene," recognizing the fact that

the officer may be "forced to make split second judgments" under stressful and dangerous conditions. *Holland v. Harrington*, 268 F.3d 1179, 1188 (10th Cir. 2001). The Fourth Amendment standard requires inquiry into the factual circumstances of every case; relevant factors include the crime's severity, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest. *Id.*

It is well settled that a police officer's use of force is to be "assessed from the perspective of a reasonable officer on the scene making a split-second judgment under tense, uncertain, and rapidly evolving circumstances without the advantage of 20/20 hindsight." *See Burgess v. Fischer*, 735 F.3d 462, 473 (6th Cir. 2013); *accord Graham v. Connor*, *supra*, 490 U.S. at 396; *see also Pasco v. Knoblauch*, 566 F.3d 572, 580 (5th Cir. 2009). This Court has cautioned judges against "second guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012); *see also Maney v. Garrison*, 681 F. App'x 201, 222 (4th Cir. Mar. 9, 2017) (unpublished) ("we do not engage in 'unrealistic second-guessing' of action taken in swiftly developing situations") (citing *U.S. v. Sharpe*, 470 U.S. 675, 686 (1985)). The Court must consider only the facts known to the officer "when the conduct occurred." *Saucier v. Katz*, 533 U.S. 194, 207 (2001).

Moreover, under 42 U.S.C. § 1983, the plaintiff must show that the force purposely or knowingly used against her was objectively unreasonable to prevail on

an excessive force claim. *See Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2470 (2015). When conducting this inquiry, "the 'reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Estate of Larsen v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008) (quoting *Graham*, 490 U.S. at 396). The ultimate determination is whether, from the perspective of a reasonable officer on the scene, the totality of the circumstances justified the use of force. *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015). In the qualified immunity context, an officer's on-scene judgment regarding the level of force that is necessary need not be correct—in retrospect the force may seem unnecessary—as long as it is reasonable. *Id.*

Neither of the Respondent Officers' actions constituted "excessive force" for purposes of the Fourth Amendment. This Court has clarified the qualified immunity analysis for excessive force claims: while still recognizing that *Graham v. Connor* contemplates a Fourth Amendment right to be free from excessive force during an arrest, a court must look at whether the particular conduct of police constituted a clearly established violation of plaintiff's constitutional rights. A plaintiff may not simply cite to a general right to be free from excessive force; they must identify case law finding a constitutional violation under the particular circumstances of the case. *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004) (per curiam); *see also White v. Pauly*, 137 S.Ct. 548, 552 (2017) (per curiam). Moreover, "qualified immunity does not require that

the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat." *Wilson v. Meeks*, 52 F.3d 1547, 1553-54 (10th Cir. 1995); *cf. Pride v. Does*, 997 F.2d 712, 717 (10th Cir. 1993) ("the relevant question for the court is not whether [the suspect] acted in a threatening manner but whether [the officer] reasonably believed so"); *Mecham v. Frazier*, 500 F.3d 1200, 1202-05 (10th Cir. 2007) (reversing denial of officers' motion for summary judgment based on qualified immunity and finding officers' use of force objectively reasonable where officers, while investigating suspect driving on suspended license, used pepper spray and physical force to remove suspect who refused repeated commands to exit her car, and put her on the ground and handcuffed her).

Even where they shot at—and hit—petitioner, the Officers' use of force was not "excessive" for purposes of the Fourth Amendment. On July 15, 2014, Officers Williamson and Madrid approached petitioner's car in an effort to determine whether she was the subject of their outstanding warrant. When the officers attempted to initiate contact, petitioner nearly hit them with her car. Officer Madrid, in particular, was standing at petitioner's front tire. It is well-established that, if an officer "has probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent [the suspect's] escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *see also Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1155 (10th Cir. 2010); *Cutchin v. D.C.*, 369

F.Supp.3d 108, 125-26 (D.D.C. 2019) (plaintiff's volitional movement after his detention entitled officers to use reasonable force to prevent him from escaping). In *Brosseau v. Haugen*, *supra*, a criminal suspect fled a police officer on foot, entered a Jeep, and started the engine. *Brosseau*, 543 U.S at 196. The officer drew her gun and fired at the plaintiff, not because she believed herself to be in immediate danger, but rather because she believed that there were other persons who might be in the area who might be in danger. *See id.* at 196-97. This Court found that when an officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to herself or to others, it is not unconstitutionally unreasonable to prevent escape by using deadly force. *See id.* at 197 (citing *Tennessee v. Garner*, 471 U.S. at 11).

Again, the touchstone of the Fourth Amendment is reasonableness. It is unquestionably reasonable for police to move quickly if delay "would gravely endanger their lives or the lives of others." *See City and Cnty. of San Francisco v. Sheehan*, *supra*, 135 S.Ct. at 1775 (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967)). The Constitution is not blind to "the fact that police officers are often forced to make split-second judgments." *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014). The federal courts are reluctant to second-guess the seasoned judgment of a police officer, instead deferring to the practical realities of police work and the ability of skilled officers to detect criminal activity a layperson might not. *See generally Terry v. Ohio*, *supra*, 392 U.S. 1 (1968); *Wheeler v. City of*

Macon, 52 F.Supp.2d 1372, 1377 (M.D.Ga. 1999). Under the circumstances, it was reasonable for Officers Madrid and Williamson to fire at petitioner, and as such, the officers remain entitled to qualified immunity and dismissal of petitioner's claims.

III. THE RESPONDENT OFFICERS REMAIN ENTITLED TO QUALIFIED IMMUNITY, AS NO CLEARLY ESTABLISHED LAW WOULD HAVE PUT THE CONSTITUTIONAL QUESTION IN THIS MATTER BEYOND DEBATE

As noted above, in their response brief filed in the Tenth Circuit, Officers Madrid and Williamson showed that, not only was petitioner not "seized" for purposes of the Fourth Amendment, petitioner failed to meet her burden of supplying "clearly established" law supporting her Fourth Amendment claim. To support a clearly established constitutional right, "existing precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *D.C. v. Wesby*, 138 S.Ct. 577, 591 n.8 (2018); *see also Cole v. Carson*, 935 F.3d 444, 460 n.4 (5th Cir. 2019) (Jones, J., dissenting). However, this Court has assumed without deciding that "a controlling circuit precedent could constitute clearly established federal law." *See Sheehan*, *supra*, 135 S.Ct. at 1776; *see also Carroll v. Carman*, 574 U.S. 13, 17 (2014); *Reichle v. Howards*, 566 U.S. 658, 665-66 (2012); *City of Escondido*

v. Emmons, 139 S.Ct. 500, 503 (2019). The Tenth Circuit has stated that the "clearly established" law standard "requires either that there is a Supreme Court or Tenth Circuit decision on point, or that the 'clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'" *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017) (quoting *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011)); *see also Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012). Consequently, the unanimous Tenth Circuit panel below properly looked to its own published opinions, particularly *Brooks v. Gaenzle*, *supra*, as well as the court's later opinion in *Farrell v. Montoya*, 878 F.3d 933 (10th Cir. 2017), to find that petitioner was not "seized." *See generally* App. 7a-9a.

Tellingly, at no time has petitioner identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation "under similar circumstances." *Wesby*, *supra*, 138 S.Ct. at 591 (citing *White v. Pauly*, *supra*, 137 S.Ct. at 552); *see also Anderson v. Creighton*, *supra*, 483 U.S. at 640 ("our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense"). The burden is—and always has been—on petitioner to identify a case where police officers acting under similar circumstances as Officers Madrid and Williamson were held to have violated the Fourth Amendment. *See White*, 137 S.Ct. at 552; *see also Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th

Cir. 2017); *Hess v. Ables*, 714 F.3d 1048, 1051 (8th Cir. 2013).

In *Pickens v. Aldaba*, 136 S.Ct. 479 (2015), this Court vacated a judgment of the Tenth Circuit, *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), and remanded "for further consideration in light of" *Mullenix v. Luna*, 136 S.Ct. 305 (2015). The Tenth Circuit then properly reversed its prior decision denying qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016). Following remand from this Court, the Tenth Circuit held "that the three law-enforcement officers [we]re entitled to qualified immunity because they did not violate clearly established law." *Aldaba*, 844 F.3d at 871. The Tenth Circuit did "not decide whether they acted with excessive force," but still "reverse[d] the district court's judgment and remand[ed] with instructions to grant summary judgment in favor of the three law-enforcement officers." *Id.* The Tenth Circuit had erred in its prior opinion "by relying on excessive-force cases markedly different from this one." *Id.* at 876. "[N]one of those cases remotely involved a situation" as that presented in the *Aldaba* case: "three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment." *Id.* Similarly, in *McKnight v. Petersen*, 137 S.Ct. 2241 (2017), this Court vacated a judgment of the Ninth Circuit, *Petersen v. Lewis Cnty.*, 663 F. App'x 531 (9th Cir. Oct. 3, 2016) (unpublished), and remanded for further consideration in light of *White v. Pauly*, *supra*. On

remand, the Ninth Circuit found that, even if the Defendant Officer had acted unreasonably, the plaintiff "failed to identify any clearly established law putting [Defendant] on notice that, under these facts, his conduct was unlawful." *Petersen v. Lewis Cnty.*, 697 F. App'x 490, 491 (9th Cir. Sep. 22, 2017) (unpublished).

Last year, in *Kisela v. Hughes*, 138 S.Ct. 1148 (2018), this Court did not (and did not need to) decide whether the Defendant violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that was not at all evident on the facts before this Court—Defendant Kisela was at least entitled to qualified immunity. *Kisela*, 138 S.Ct. at 1152. Similarly, in the present case, even assuming *arguendo* that Officers Madrid and Williamson seized petitioner in violation of the Fourth Amendment when they shot her, petitioner has failed to identify any particularized case law that squarely governs the facts presented here. *Kisela*, 138 S.Ct. at 1153; *see also City of Escondido v. Emmons*, *supra*, 139 S.Ct. at 503, *on remand*, *Emmons v. City of Escondido*, 921 F.3d 1172 (9th Cir. 2019).

As in *Aldaba* and *Kisela*, the cases relied upon by petitioner and her *amici* "differ too much from this one, so reading them would not apprise every objectively reasonable officer" that their actions would amount to excessive force. *Aldaba*, 844 F.3d at 877. As in these cases and *Petersen*, petitioner has failed to identify the required clearly established law putting the Officers on fair notice that their conduct was unlawful. None of the

cases cited by petitioner would have advised "every reasonable official" that their actions would amount to excessive force under the Fourth Amendment. *See id.* Petitioner cannot and does not point to a single case where police officers in the position of Officers Williamson and Madrid, in similar circumstances, violated the Fourth Amendment. On the "clearly established" prong alone, the officers remain entitled to qualified immunity as against petitioner's Fourth Amendment claims in this case. *See Reese v. Cnty. of Sacramento*, 888 F.3d 1030, 1040 (9th Cir. 2018) ("[n]one of Reese's cases 'squarely govern' the situation that Rose confronted such that they would have given Rose clear warning that his use of deadly force was objectively unreasonable") (citing *Mullenix v. Luna*, *supra*, 136 S.Ct. at 310) (quotation marks omitted); *see also Davenport v. Borough of Homestead*, 870 F.3d 273, 281-82 (3d Cir. 2017).

Strikingly, if petitioner is correct that there is a circuit split on the issue presented in this case, Officers Madrid and Williamson are all the more entitled to qualified immunity. *See*, *e.g.*, *Cooper v. Rutherford*, 503 F. App'x 672, 676 (11th Cir. Oct. 12, 2012) (unpublished) ("[t]he existing case law regarding whether Appellees were seized for the purposes of the Fourth Amendment is far from settled, as evidenced by the varying decisions from our sister circuits analyzing similar situations") (collecting cases); *Gardner v. Board of Police Comm'rs, for Kansas City, Mo.*, 641 F.3d 947, 952-53 (8th Cir. 2011). Reasonable police officers are not expected to conduct "an exhaustive study of

case law" in connection with their day-to-day operations. *See Meehan v. Thompson*, 763 F.3d 936, 946 (8th Cir. 2014). In sum, it would not have been clear to Officers Madrid and Williamson that firing at petitioner on July 15, 2014 was a violation of petitioner's clearly established constitutional rights. Even if petitioner was "seized" for purposes of the Fourth Amendment, the dismissal of her claims should be upheld on the alternative ground that the Officers are entitled to qualified immunity.

IV. PETITIONER AND HER *AMICI* IMPROPERLY DEMAND THAT THIS COURT OVERRULE DECADES' WORTH OF FOURTH AMENDMENT AND QUALIFIED IMMUNITY PRECEDENTS

Petitioner's *amicus*, the Cato Institute, suggests that, "even in cases where a seizure is found to have occurred, the doctrine of qualified immunity may prevent a plaintiff from recovering based on little more than chance." For their part, the *amici* Fourth Amendment Scholars argue "the Tenth Circuit's decision threatens to immunize potentially egregious police misconduct from constitutional review." Additionally, petitioner's *amicus* the Rutherford Institute closes its own brief by claiming that "[t]he expansion of qualified immunity has already stacked the deck against § 1983 claims." It is clear that petitioner and her *amici* seek to overturn wholesale the Tenth Circuit's well-reasoned opinion, upending decades of this Court's precedents in the process. The position advocated by

petitioner and her *amici* would, if adopted by this Court, "undermine the values qualified immunity seeks to promote." *D.C. v. Wesby*, *supra*, 138 S.Ct. at 589 (quoting *Ashcroft v. al-Kidd*, *supra*, 563 U.S. at 735). "[I]t is hard to imagine that any immunity threshold should hold law enforcement to a higher standard than judges when it comes to interpreting the law." *Melton v. Phillips*, 875 F.3d 256, 268 (5th Cir. 2017) (Costa, J., concurring). This Court has repeatedly stressed that lower courts "should think hard, and then think hard again," before addressing both qualified immunity and the merits of an underlying constitutional claim. *Wesby*, 138 S.Ct. at 589 n.7 (quoting *Camreta v. Greene*, 563 U.S. 692, 707 (2011)). This Court should reject the call from the petitioner's *amici* to upend decades' worth of settled precedents. *Cf. Wonsey v. City of Chicago*, ___ F.3d ___, 2019 WL 5152849, *4 (7th Cir. Oct. 15, 2019) (slip op.).

"[T]he Constitution does not demand an individually effective remedy for every [alleged] constitutional violation." *See Zehner v. Trigg*, 133 F.3d 459, 462 (7th Cir. 1997); *see also Estate of Thomas v. Fayette Cnty.*, 194 F.Supp.3d 358, 380 n.21 (W.D.Pa. 2016) (it is "not uncommon . . . that a constitutional right may be violated without any redress or legal remedy. An individual may violate a plaintiff's constitutional right, but *liability* often depends upon meeting a 'fault' requirement or getting past various 'immunity' doctrines") (emphasis in original). "It is a familiar (though not always well understood) argument that qualified immunity enables government officers to go about

their business without debilitating fear of damages liability." John C. Jeffries, Jr., *The Right–Remedy Gap in Constitutional Law*, 109 Yale L.J.87, 90 (1999). "The threat of overdeterrence . . . justifies limiting damage recoveries in order to protect the legitimate but nonconstitutional interests at stake in the business of government." *Id.* Notably, "[t]he values served by the doctrine of qualified immunity are not limited to easing the ordinary, workaday business of government, but extend as well to the domain of constitutional rights." *Id.*

Petitioner's *amicus*, the Rutherford Institute, suggests that petitioner will be without any remedy if her Section 1983 Fourth Amendment claims are not reinstated. Even assuming *arguendo* that Section 1983 is the preferred vehicle for plaintiffs seeking compensation in officer-involved shootings, the "Constitution is not the only source of American law." *Kingsley v. Hendrickson*, *supra*, 135 S.Ct. at 2479 (Scalia, J., dissenting). Of course, as *amicus* also admits, plaintiff can proceed under New Mexico state law. Notably, New Mexico courts, "unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280, 287; *Handmaker v. Henney*, 1999-NMSC-043, ¶ 21, 128 N.M. 328, 992 P.2d 879 (noting that "the policy in New Mexico disfavor[s] summary judgment"); *Pharmaseal Labs., Inc. v. Goffe*, 1977-NMSC-071, ¶ 9, 90 N.M. 753, 568 P.2d 589 ("[s]ummary judgment is a drastic remedy to be used with great caution"). In this case, petitioner's claims

under New Mexico state law remain, and may proceed to trial in spite of the Tenth Circuit's proper ruling that the Officers are entitled to qualified immunity on petitioner's federal civil rights claims. *See generally Reese v. Cnty. of Sacramento*, *supra*, 888 F.3d at 1037-45 (affirming ruling that deputy was entitled to qualified immunity on plaintiff's Fourth Amendment excessive force claim but reversing grant of summary judgment on plaintiff's claim under California state statute). This Court must not overturn decades' worth of its own precedents in the interest of reinstating petitioner's preferred cause of action.

Even if its wisdom could be questioned, the doctrine of qualified immunity "has been developed for quite some time, and its contours are fairly clear." Lael Weinberger, *Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity*, 84 U. Chi. L. Rev. 1561, 1577 (2017) (citing David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 35-47 (1989)). The test for qualified immunity has been essentially the same for nearly forty years. "Readers of the Court's decisions know that the focus is on whether a reasonable person would find a right to be 'clearly established.'" Weinberger, 84 U. Chi. L. Rev. at 1577 (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

Essentially, the petitioner asks this Court to overrule or limit its prior decision in, *inter alia*, *Hodari D.*, *Brendlin*, and *Brower*, *supra*, while petitioner's *amici*

suggest that this Court eschew the doctrine of qualified immunity altogether, overturning decades of precedent in the process. "Overruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015). *Stare decisis* "is a vital rule of judicial self-government," *see Johnson v. U.S.*, 135 S.Ct. 2551, 2563 (2015), and is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). Application of the doctrine is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *Stare decisis* teaches that this Court should exercise the authority to "undecide" its prior rulings sparingly. *Kimble*, 135 S.Ct. at 2415. This Court should flatly decline to undo its qualified immunity precedents here.

CONCLUSION

The Tenth Circuit's unanimous decision below is consistent not only with this Court's Fourth Amendment and qualified immunity precedents, but with opinions in similar cases issued by the Fourth, Seventh, and Eleventh Circuits, as well as the Eighth Circuit sitting en banc. Petitioner has not provided this Court with any compelling reason for disturbing the Tenth Circuit's well-reasoned opinion.

This Court should deny the petition for a writ of certiorari in its entirety and affirm the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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