No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

v.

JANICE MADRID AND RICHARD WILLIAMSON,

Respondents.

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

BRIEF FOR *AMICI CURIAE* FOURTH AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are fifty-two 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 intentionally 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 "the application of lethal force to restrain someone constitute[s] a 'seizure' within the meaning of the Fourth Amendment, even if the force does not immediately stop the person." Br. for Pet'r i. The Court ruled 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 reaching that decision, the Court drew a critical distinction between seizures effected by physical force and seizures effected by a show of authority. For the

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[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–5a.

former, the Court explained that the intentional 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 the force itself constitutes the requisite 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 of force. 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 baseline protection. These related analytical frameworks reinforce the methodology employed in *Hodari D.*

A definitive ruling that the application of physical force to restrain a suspect qualifies as a seizure would follow the clear guidance drawn from the common law. It would also correct the illogical result of the Tenth Circuit's contrary rule—namely, 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 should clarify, as a straightforward application of the common-law principles described in *Hodari D.*, that the use of deadly force to apprehend a

person falls within the scope of a Fourth Amendment seizure.

ARGUMENT

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

A. 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 officer's physical force either "terminates *or* restrains"

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[3] In fact, eighteenth- and nineteenth-century English cases made the same point 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.").

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. In these situations, the time of seizure is easily identifiable as the moment of contact.

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 asked 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 case involving show of authority.

First, the show of authority must be sufficiently clear that a reasonable person "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 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 id.* at 22–23; *see also 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" to ensure that the suspect's decision to stay put is a product of compulsion by the officer, rather than voluntary choice or other factors. *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

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[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 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.

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 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. And at the practical level, the submission requirement in show-of-authority cases demarcates the point at which a seizure has been effected.

The Court's opinion neatly separated seizure by physical force, on the one hand, from seizure by show of authority, on the other. 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. While a show of authority requires more to qualify as a seizure, the application of physical force to apprehend a suspect is sufficient.

B. Although respondents have relied on the *Hodari D.* Court's statement that an "*attempted* seizure [is not] a seizure," Br. in Opp. 11, 19, the Court's brief discussion of attempted seizures reinforces—rather than undermines—this distinction. This discussion was borne out of a disagreement between the majority and dissent about whether arrest or attempted arrest is the relevant common-law analogue for a Fourth Amendment "seizure." *See* 499 U.S. at 631–32 (Stevens, J., dissenting). In rejecting the dissent's focus on attempted arrest, the majority reasoned that an "attempted arrest" (unlike an "arrest") is not always synonymous with a "seizure." *Id.*

at 626 n.2 (majority opinion). In light of this disparity, the fact that some attempted arrests were illegal at common law was not determinative because many government actions violate the common law without also violating the Constitution. *Id.*

In so ruling, the Court recognized that the Fourth Amendment does not cover attempted seizures. *Id.* That point was dispositive on the facts of the case: where the officer did not use force and the suspect did not yield to the officer's show of authority, the common-law arrest (i.e., the seizure) never began in the first place. The ensuing chase was simply an *attempt* to bring the suspect within the officer's control. This Court's later cases have summarized the holding in *Hodari D.* the same way, explaining that "a police pursuit in attempting to seize a person does not amount to a 'seizure.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843–44 (1998).[5]

By contrast, when physical force is involved, a seizure occurs at the moment that force is applied. *Cf. Thompson v. Whitman*, 85 U.S. 457, 471 (1873) ("A seizure is a single act, and not a continuous fact."). It is wrong to suggest that events that transpire after officers successfully use physical force can convert an already-completed seizure into an attempted seizure. Here, for example, Ms. Torres's temporary escape does not somehow negate the fact that the officers shot her

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[5] The central holding in *Lewis*—that a Fourth Amendment seizure can be carried out only "*through means intentionally applied*"—is satisfied in this case. 523 U.S. at 844 (quoting *Brower v. Cty. of Inyo*, 489 U.S. 593, 597 (1989)). There is no dispute that Officers Madrid and Williamson intentionally used their weapons as a means of hampering Ms. Torres's movement.

twice beforehand. *Cf. Hodari D.*, 499 U.S. at 625 (raising the issue of a distinct, subsequent seizure where a suspect breaks away from an officer's grasp). And this Court has implied these limits on an attempted seizure: "A police officer may make a seizure by a show of authority and *without the use of physical force*, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Brendlin*, 551 U.S. at 254 (emphasis added) (citing *Hodari D.*, 499 U.S. at 626 n.2).

This conceptualization of attempted seizures is therefore consistent with the Court's decision to embrace the full scope of the common-law arrest, including the separate treatment of a seizure by physical force and a seizure by show of authority, and the distinct inquiries required for the latter.

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.* Given 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 methodology 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 some 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 Cty.*, 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.").[6]

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[6] 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.

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. 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 the use of 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 account 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." *Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (quoting *Mendenhall*, 446 U.S. at 554).[7]

In short, there are numerous connections between the way that courts treat arrest and false imprisonment under the common law. The close resemblance between

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[7] 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).

the analytical frameworks for these two acts 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 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 by asking whether there has been a physical intrusion. *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 Carpenter*, 138 S. Ct. at 2213; *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.[8] 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 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 should be 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,

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[8] 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.

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. The Tenth Circuit's decision erroneously insulates police officers' use of force to subdue suspects from constitutional scrutiny if the suspect briefly evades capture.

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 succeed in subduing the suspect. The Fourth Amendment's reach should not turn on happenstance. The Tenth Circuit's decision is both doctrinally unsound and practically unworkable.

A. Because this case concerns a threshold issue about when the Fourth Amendment is triggered, 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" are "analyzed under the Fourth Amendment"). Before the analysis may proceed to evaluate the objective reasonableness of the seizure, however, a plaintiff claiming excessive force under § 1983 must first show that a seizure of her person "took place." *See Lewis*, 523 U.S. at 843.

In holding that no seizure occurs when an officer's use of force fails to subdue a suspect, the Tenth Circuit has shielded a broad category of grave police conduct—the use of force, including deadly force, against a fleeing suspect—from all constitutional scrutiny. On that view, the officers' use 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—so long as Ms. Torres was able, even briefly, to get away. *See Carrillo-Ortiz v. N.M. State Police*, No. 18-CV-00334, 2019 WL 4393989, at *5 (D.N.M. Sept. 13, 2019) (concluding that no seizure occurred where plaintiff alleged that he was struck by ten out of seventeen bullets fired by the police because he 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 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.

Indeed, the Tenth Circuit's rule does little to advance the interests often described as underlying the Fourth Amendment. For example, the Tenth Circuit overrides the protections afforded against unjustified "governmental invasion of a citizen's personal security." *Terry*,

392 U.S. at 19. Instead, Ms. Torres (and others similarly situated) would be left with no recompense after being subject to the most severe bodily intrusion, *see Tennessee v. Garner*, 471 U.S. 1, 9 (1985), even if there is no debate that the officers acted unreasonably under the circumstances. Nor does the Tenth Circuit further the countervailing concern about discouraging police misconduct. *See Hodari D.*, 499 U.S. at 627 (discussing deterrent effect). As demonstrated by the example above, an officer's culpability does not hinge on whether her use of force had the intended effect of ceasing the suspect's movement.

B. Relatedly, the Tenth Circuit's decision muddles the straightforward guidance that the common law offers to police officers. In fashioning Fourth Amendment doctrine, courts strive to adopt "readily administrable rules." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Uncertainty simultaneously "makes it difficult for the policeman to discern the scope of his authority" and "creates a danger that constitutional rights will be arbitrarily and inequitably enforced." *Oliver v. United States*, 466 U.S. 170, 181–82 (1984). Thus, this Court has recognized the virtue in rejecting "highly sophisticated set[s] of rules" that turn on "subtle nuances and hairline distinctions" in favor of "terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged." *New York v. Belton*, 453 U.S. 454, 458 (1981) (citation omitted).

Yet the Tenth Circuit's rule incorporates all of these downsides. It dispenses with the clarity reflected in the common law on arrest (and accepted in *Hodari D.*), which holds that an officer effects a seizure when she applies physical force to apprehend a suspect. In place

of this established rule, the court has created a standard tied to the fortuity of the suspect's ability to escape, an occurrence outside the officer's control that is unknown at the time that the officer acts. The Tenth Circuit's rule fails to clarify the threshold question of when a seizure will result so that officers can appropriately structure their behavior ex ante. And the rule will result in the precise sort of line-drawing issues (about when exactly the suspect's movement has been terminated) that the law disfavors.

The varying scenarios in which these issues arise exacerbate the problems created by the Tenth Circuit's rule. When police officers use force in the course of apprehending—or attempting to apprehend—suspects, those affected individuals may bring excessive-force claims. *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)). Situations in which suspects have managed to evade law enforcement uses of force arise with fair frequency and in several contexts. Suspects may escape after being struck by bullets (as in Ms. Torres's case),[9] rammed by a vehicle, or held in an officer's grasp. *See, e.g.*, *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); *United States v. Singletary*, 37 F. Supp. 3d 601, 609 (W.D.N.Y. 2014), *rev'd and remanded*, 798 F.3d

[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).

55 (2d Cir. 2015); *Dukes v. Miami-Dade Cty.*, No. 05-CV-22665, 2007 WL 9701813, at *1 (S.D. Fla. Dec. 26, 2007). Intelligible standards on a threshold issue regarding the use of force, especially deadly force, would benefit both police officers and the citizens with whom they interact.

Finally, it is important to keep in mind that the question presented here concerns only the threshold issue about whether a Fourth Amendment seizure has occurred. 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 their split-second judgments on the scene. *See Cty. 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 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 judgment of the court of appeals should be reversed.

Respectfully submitted,

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FEBRUARY 7, 2020

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.

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