No. 20-1006

In The
Supreme Court of the United States

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

Petitioners,

v.

JESSIE LEE JETMORE STODDARD-NUNEZ,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves the fatal and unreasonable shooting of Respondent/Plaintiff's brother Shawn Joseph Jetmore Stoddard-Nunez by City of Hayward police officer Manual Troche. At the time of the shooting, the driver of the car in which Shawn was a passenger, was suspected of driving while intoxicated, committing the traffic infraction of failing to fully stop at a stop sign and was moving slowly out of a parking lot exit and never swerving such that the officer was not in danger. The questions presented are:

1. Whether the Court of Appeals correctly held that fact issues preclude summary judgment regarding Petitioners' qualified immunity defense because there is evidence that it was unreasonable for the police officer to shoot at a slow-moving vehicle that was not a threat to him or anyone else, including shooting into the side of the vehicle as it passed him and into the back of the vehicle when it was past him.

2. Whether this Court has established that an unintended victim-passenger in a motor vehicle who has been shot by an officer intending to stop the vehicle has been seized for purposes of the Fourth Amendment.

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INTRODUCTION

Petitioner Officer Manuel Troche argued that the Court of Appeals failed to follow the mandates of this Court with respect to qualified immunity, by viewing the legal issue at a high level of generality. That is simply not true. The Court of Appeals addressed a specific question, particularized to the facts of this case, namely whether a police officer may fire his weapon at a moving vehicle when the vehicle does not pose a danger to the officer or others. On that issue, numerous Ninth Circuit decisions from 1996 to the present, as well as the law in at least seven other Circuits, have clearly established that an officer may not fire at a moving vehicle when the vehicle does not pose a danger to the officer or others. The Court of Appeals found that there were genuine issues of material fact with respect to (1) whether the operator of the vehicle drove it at the officer; (2) whether the officer continued to fire at the vehicle as it passed him; and (3) whether the officer fired at the side and rear of the vehicle. Given that, the court properly remanded the case for determination of those facts.

The Petition improperly described the facts favorably to the officer and failed to set them forth in the light most favorable to Respondent Stoddard-Nunez, the party against whom summary judgment was sought. As a result, the Petition ignored the genuine disputes of material fact that required remand and failed to acknowledge that in the light most favorable to respondent, the facts established that the officer did fire at a moving vehicle after it had passed his

position and when it was not a danger to the officer or others.

The Petition inaccurately asserted that there is a split in the Circuits on whether a passenger in a vehicle who has been shot by an officer firing to stop the vehicle has been seized within the meaning of the Fourth Amendment. That issue has been settled by the decisions of this Court in *Brendlin v. California*, 551 U.S. 249 (2007) (when police stop a vehicle, whether by physical force or a show of authority, a passenger is seized), and *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989 (2021) (a person is seized when shot by an officer with the intent to restrain him).

STATEMENT OF FACTS

Petitioner Troche's Statement of Facts, contrary to the well-established rules that govern summary judgment proceedings, *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 550 (2017); *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam), is written entirely from the perspective of the Petitioner and fails to set forth the facts in the light most favorable to Respondent Jesse Lee Jetmore Stoddard-Nunez, the party against whom summary judgment was sought. Petitioner has disregarded the ruling of the Ninth Circuit Court of Appeals that there were genuine issues of material fact as to: (1) whether the operator of the vehicle in which Shawn Joseph Jetmore Stoddard-Nunez ("Stoddard-Nunez" or "Decedent") was shot was driving his vehicle at Officer

Manuel Troche ("Petitioner" or "Troche"); (2) whether Troche continued to fire his gun at the vehicle as it passed him; and (3) whether Troche fired his gun at the side and rear of the vehicle. 817 Fed.Appx. 375, 377-78. When the evidence on these issues is considered in the light most favorable to Respondent, the argument in the petition for certiorari collapses.

The following facts were undisputed. On March 3, 2013, City of Hayward Police Officer Troche shot and killed Decedent, the brother of Jessie Lee Jetmore Stoddard-Nunez ("Respondent"). At approximately 3 a.m. on that date, Troche, accompanied by a civilian ride-along, Russell McLeod ("McLeod"), began following a Honda automobile driven by Arthur Pakman ("Pakman"), in which Stoddard-Nunez was a passenger. ER 332-33, 438-39, 670-77.[1] McLeod was the brother of one of Troche's fellow police officers and former partners. ER 424-25. Troche was following the Honda only to investigate possible drunk driving due to the way the driver was operating the car and committing motor vehicle offenses. ER 335, 339, 439, 444. After a period of time, the Honda turned into an empty parking lot on the south side of the street, parked facing the building on the left side of the lot, and Troche followed the Honda into the lot, stopping his police car in the driveway entrance, perpendicular to the Honda. ER 341, 448, 697, 699-701, 706.

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[1] References to "ER" are to the Excerpts of Record filed with the Ninth Circuit.

Taking the facts in the light most favorable to Respondent, the remainder of the pertinent facts are as follows. When Troche began following the Honda, he did not turn on his emergency lights or sirens. ER 446. He did not turn them on at any point as he followed the Honda on Hayward city streets, nor did he inform Hayward Police dispatch that he was following the car. ER 309, 340, 343, 394-95, 439, 445-46. Officer Troche, who was responsible for maintaining control over the ride-along, did not give McLeod any instructions about what he intended to do with the Honda or how McLeod could maintain his safety, contrary to the City's Ride-Along Policy. ER 439, 445, 517-20.

Troche did not turn on his siren when he brought his patrol car to a stop. ER 303-04, 309, 450. Troche shone the driver's side spotlight on the Honda and stepped out the patrol car. ER 303, 451-52. The patrol car's headlights were also pointed at the Honda, such that the spotlight was shining right into the Honda driver's face. ER 466-67; 508-09. This would have made it difficult or impossible for Pakman and Stoddard-Nunez to observe any police insignias on the patrol car's doors. Indeed, the patrol car spotlight is intended to provide officers with a tactical advantage because the person who has the light shining in their face has a hard time seeing the officer or any objects behind the spotlight. ER 471-72.

Troche stepped out of the patrol car with his gun drawn. ER 466. McLeod also exited the patrol car, leaving both driver and passenger side doors of the patrol car open. ER 464-68. Troche had his gun out, despite

believing the Honda had only committed motor vehicle infractions and had not committed any felonies. ER 447, 466.

With gun in hand and pointed at the car, Troche yelled, "Turn the fucking car off," but, contrary to Petitioner's Statement of Facts, *he failed to identify himself as a police officer*. His ride-along McLeod, who was standing right there, did not hear Troche identify himself. ER 300. In addition, Pakman was interrogated shortly after the incident and stated that he did not know the men in the parking lot were the police. Int., 7:40, 13:14.[2] Pakman maintained that he was simply trying to get away because he was being shot at. Int., 8:22.

Troche notified dispatch that he had pulled over a suspicious vehicle but did not indicate that the vehicle or its occupants had refused any orders, tried to flee or were dangerous. ER 453. Troche continued to yell at the driver to turn off the car and show his hands, for what he estimated to be a minute. ER 460-62.

The Honda was still running with the two occupants inside. ER 458. Pakman and Stoddard-Nunez never acknowledged Troche. ER 300-01, 322. The two continuously looked straight ahead at the building in front of them. *Id.* Pakman never looked at Troche and

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[2] References to "Int." are to the video of the Pakman interrogation, which may be accessed at United States District Court, Northern District of California, Case 18-16403, Dkt. # 113 (Plaintiff's Notice of Manual Filing). ER 935. See also, 817 Fed.App. at 377.

did not make any physical movements to acknowledge Troche's presence. ER 301, 317; 454-55. Pakman and Stoddard-Nunez never talked and Pakman never turned to look at his passenger. ER 510-11. Troche did not see anything in anyone's hands. ER 458.

Troche continued to yell orders for the driver to turn off the car and show his hands. ER 460-61. Troche believed both the passenger and driver were detained when the Honda stopped. ER 486. Neither the driver nor the passenger expressed any animus toward Troche or McLeod. ER 322. Troche walked from the driver's side of his vehicle to the right toward the fence to see the Honda's license plate and then back to the passenger side of the patrol car where McLeod was standing. ER 464-66, 590.

The Honda reversed in a motion similar to a three-point turn. ER 469-70. The back of the Honda was now against a fence at the back of the lot and its front headlights were facing toward Troche and McLeod, the parking lot driveway and Fletcher Lane. ER 469-70, 473. Similar to what Pakman must have experienced, the glare from the Honda's headlights made it difficult for Troche to see what was taking place behind the headlights, inside the Honda. ER 472-73. Troche then radioed that the car was coming at him *before* the Honda started moving toward the patrol car and Fletcher Lane. ER 473-74.

Troche yelled, "Don't do it, turn off the car." ER 304. The Honda was positioned such that if it drove straight, it would come out of the lot by way of the

driveway and onto the street. ER 473. The only driveway-opening wide enough for the Honda to exit the parking lot was adjacent to the passenger side of the patrol car. ER 304, 590. Indeed, McLeod logically concluded that the largest point of exit for the Honda to turn onto Fletcher Lane was near where he was standing at the passenger side of the patrol car. ER 328-29. McLeod was still standing in the "V" of the passenger door and unsure whether the Honda would strike the car door on its way to the street. ER 504-06. Troche did not give any instructions to McLeod. ER 474-75.

The Honda started moving forward. ER 475. Troche testified that he did not hear tires screech or squeal but that he believed the driver "floored the gas." *Id.*

Troche was carrying his department issued Sig-Sauer .40 caliber, semi-automatic gun that has a light attached to it. ER 428. Troche raised his gun and pointed it at the driver as soon as the car started moving. ER 476. The weapon was fully loaded with 12 hollow point bullets in the magazine and 1 bullet in the chamber. ER 429, 490. The trigger must be pulled each time for a bullet to be fired. ER 490. When the gun is fired, its shell casings eject to the right. ER 491.

The Honda drove straight toward Fletcher Lane to leave the lot. ER 476-77. Contrary to the claims of Petitioner, *the Honda did not swerve toward the passenger side of the patrol car*. Int. 20:43, 24:35. Troche opened fire when the car was coming straight. ER 483.

He was standing by the passenger side of the patrol car when he began shooting. ER 483.

Portions of the incident were caught on videotape by two security cameras located across the street from the parking lot where the shooting occurred. ER 522-23. The video does not show the Honda veering toward the patrol car. City of Hayward Police Officer Sgt. Krimm, who was tasked with investigating the officer-involved shooting, reviewed the videotape. ER 524-26, 528-29. Sgt. Krimm testified that he could see the light from Officer Troche's gun being fired but did not see the Honda swerve. ER 524-28, Incident Video. Moreover, a Hayward Police Crime Scene tech, Sgt. Jason Corsolini, did not find physical evidence that Honda swerved or veered. He testified "with a high degree of certainty" that the Honda was on a path to get out of the parking lot that "was on a direct course of the passenger side of Officer Troche's vehicle." ER 562. McLeod's head was down inside the patrol car and he did not see the Honda swerve toward him or the car. ER 305-07, 479-8.

In addition to the foregoing, as noted by the Court of Appeals, Pakman, the driver of the Honda, stated in his video interview, "I didn't drive at [Officer Troche]. I didn't drive at anybody. I wasn't trying to run anybody over." 817 Fed.Appx. at 377, Int. 20:43.

Petitioner argues that Pakman's statements should be disregarded under Fed. R. Evid. 602 because he lacked personal knowledge. The argument is preposterous. Pakman was a participant in the incident.

He may have had gaps in his memory of the events, perhaps due to the terror of being fired at, but at most that might raise a question of credibility.[3] Credibility determinations are for the jury at trial, not for a judge on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nor does *Heck v. Humphrey*, 512 U.S. 477 (1984) bar consideration of Pakman's statements. *Heck* announced a rule barring claims by a party who had been convicted of a criminal defense, where the claim would call into question the validity of the conviction. The concern is a conflict between the remedy of habeas corpus and a civil action for damages. The rule has no application to the admissibility of evidence on a claim by a third party who was never prosecuted.[4]

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[3] Pakman stated in response to some questions, "I can't recall step-by-step like that. I'm not sure of exactly the sequence of events." Int. 15:15. He had a memory of other events, for example, lighting a cigarette while stopped, Int. 32:48, and stated repeatedly and unequivocally that he had not driven at nor attempted to run anyone over.

[4] Nor do Pakman's statements call into question the validity of his plea and conviction on the charges of involuntary manslaughter, Cal. Penal Code § 192(b) and felony driving under the influence, Cal. Veh. Code § 23152(b). The charges of murder and assault with a deadly weapon were dismissed. ER 815. Petitioner cites *Beets v. County of Los Angeles*, 669 F.3d 1039 (9th Cir. 2012) in support of his *Heck* argument. *Beets* is questionable authority at best, involves barring a claim rather than the admissibility of evidence, and is distinguishable in any event because the claimants' decedent there was the driver of the vehicle in question, aiding and abetting the passenger, whereas decedent in the instant case was an innocent passenger.

As noted above, Troche was standing by the passenger side of the patrol car when he began shooting. ER 483. He back peddled as he fired and ended up in the street at the rear of the patrol car. ER 483-84, 488. The physical evidence proved that Troche continue to fire at the Honda after it was no longer headed toward him. City of Hayward Police Department Crime Scene Technicians processed the Honda for evidence. ER 565-66. According to Hayward Crime Scene Technician Jennifer Padavana, the Honda was riddled with several bullet holes. ER 541-45; 583-90. Specifically, bullet holes and/or fragments were found in the Honda's front windshield, front passenger door and rear passenger door. *Id.* The Crime Scene Investigators extracted bullets and/or bullet fragments from the front driver floorboard, the front passenger floorboard, the rear passenger door and four (4) bullets from the front passenger door. ER 565-69.

As noted by the Court of Appeals, photographic evidence also depicted the "bullet holes in the side and rear of the car," and thus, "A reasonable trier of fact could examine the photographs and conclude that Officer Troche fired his gun from the side and rear of Pakman's car." 817 Fed.Appx. at 378. Photos at ER 583-87.

Respondent retained a forensic evidence analysis, reconstruction and animation expert, Scott G. Roder. He reviewed the discovery, including but not limited to, interviews, deposition transcripts, and photographs of the incident scene. He personally visited the shooting scene and examined the Honda and the patrol car's

passenger side door. ER 572-75. Mr. Roder is an internationally recognized expert and has provided expert testimony in 25 states and 3 countries, including both U.S. state and federal courts in civil and criminal cases. *Id.* He owns and operates the Evidence Room, which is the business that conducts the forensic animation and demonstrative evidence referenced herein. *Id.*

After analyzing the aforementioned data and bullet trajectories, Roder concluded that the last four (4) gun shots by Troche were fired after the Honda had already passed the ride-along, the patrol car and Troche himself; when neither Troche nor the ride-along were in danger. *Id.* Mr. Roder opined that Stoddard-Nunez received the fatal gunshot injury from one of those four shots that were fired from the rear as the Honda was driving away. (*Id.*)

The physical evidence contradicts Troche's claim made in his Petition for Certiorari that he "fired nine shots at Pakman, ceasing his fire as soon as the threat had passed." Pet. 10. Moreover, Troche has made inconsistent statements in this regard. He testified that he stopped firing when he perceived that the Honda had passed him. ER 484. He claimed that at no point did he shoot when the Honda was beside him; in fact, he testified that he pulled the trigger as fast as he could aiming at the driver and as the Honda "got to the side of me, I had stopped firing at that point." ER 484-85. However, Troche had previously testified that he was standing at the rear quarter panel of the passenger side when he began firing and that he *continued firing* as the Honda came past the patrol car. ER 419-21. He

admitted that based upon the photographs of the bullet holes in the Honda *he must have fired into the side of the Honda*. *Id.*

Troche was aware there were two people in the Honda. ER 475-76. He fired nine (9) shots, pulling the trigger as fast he could without pause. ER 492, 497, 530, 540. Troche admits that at the time he opened fire he did not consider the possibility that he would shoot the innocent passenger. ER 485-86. He was unsure as to what would have happened had a bullet killed the driver, but acknowledged that had a bullet hit the driver, the driver would have lost control of the car. ER 493-94. Troche further admits that his bullets could have hit anyone, including his ride-along. ER 495-96. The City's Shooting Policy 304.4 states that, "shots fired at or from a moving vehicle are rarely effective and generally discouraged." ER 549-50. The Policy implores officers "to move out of the path of any approaching vehicle." *Id.*

According to the Coroner, Decedent Stoddard-Nunez, the innocent Honda passenger, sustained a fatal gunshot wound that entered his right shoulder and traveled right to left through his body. The bullet was recovered on the left side of his neck. He also suffered a through-and-through shot through his right arm. ER 571. The coroner determined that Stoddard-Nunez ultimately died from a massive hemorrhage due to transection of the carotid artery by the bullet. *Id.*

A jury could reasonably reject Petitioner's claim that the Honda struck the patrol car's door. Pet. 9.

Pakman denied that he crashed into the patrol car. Pakman Interview; see manual filing. Troche did not hear any noise that he attributed to the cars colliding during the incident. ER 479. Troche was informed of "the collision claim" after the shooting took place. ER 481-82. Sgt. Corsolini prepared a report and developed opinions pertaining to the purported collision between the patrol car and the Honda. Corsolini claims the patrol car had damage consistent with it having been hit by the Honda. ER 552-61. However, Corsolini never made any effort to see if the scuff marks he attributed to the Honda match the Honda's paint. *Id.* In addition, Corsolini did not find any parts from the Honda at the shooting scene or any paint chips from the Honda on the patrol car or at the shooting scene. ER 555-56.

McLeod believes the Honda hit the patrol car door and slapped it into him. He stated it felt like a "really hard, hard push." ER 513. However, the "really hard, hard push" is also consistent with Troche's testimony that he tried to shove McLeod into the patrol car. ER 478-81. Moreover, despite being reportedly pinned in the "V" of the patrol car passenger door that was allegedly struck by the Honda, McLeod did not seek any medical attention for any injuries he suffered from the incident. ER 324-25. During the interview he gave within hours after the incident he told investigators that he was injured. ER 512. However, when the investigators looked at his supposed injury sight (his rib cage) to take photos they did not see any injuries. ER 512.

A jury could also reasonably reject Petitioner's claim that the Honda left the scene at sufficient speed to bottom out and scrape the pavement. Pet. 10. The claim was that the Honda left "gouge marks" on the ground. ER 552-61. However, Sgt. Corsolini admitted that he did not perform any type of analysis to determine if the asphalt he claimed he found on the ground near gouge marks did in fact come from the gouge marks. ER 552-61. He also admitted he could not offer an opinion as to which specific part of the Honda caused the alleged gouge marks and that he did not find any part of the Honda laying on the ground which could have caused the marks. ER 559-61.

After the shooting, the Honda turned onto Fletcher Lane and drove toward Mission Boulevard. Incident Video. Pakman ultimately crashed the car and fled on foot. ER 541, 850-51. Stoddard-Nunez remained in the Honda. ER 601-13.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. The Court of Appeals' Opinion is Faithful to This Court's Precedent Concerning Qualified Immunity

Contrary to the assertion of Petitioner, the Court of Appeals followed the mandates of this Court with respect to qualified immunity. The Court of Appeals considered whether Petitioner's conduct violated clearly established law, as particularized to the facts of this

case. Its decision was not rooted in law at a high level of generality, but as described below in detail, addressed a specific question: whether a police officer may fire his weapon at a moving vehicle when the vehicle does not pose a danger to the officer or others. The court properly decided that under that standard, summary judgment could not be granted to Petitioner at this stage of the case because genuine disputes of material fact required resolution.

It is Petitioner who has disregarded this Court's precedents, namely by presenting the facts of the case in the light most favorable to himself, rather than in favor of the party against whom he was seeking summary judgment. *White v. Pauly*, ___ U.S. ___, 137 S.Ct. 548, 550 (2017); *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam). The petition for certiorari "reflects a clear misapprehension of summary judgment standards," in light of Supreme Court precedents. *Tolan*, 572 U.S. at 659. It improperly engages in weighing the evidence and reaching factual inferences contrary to Respondent's competent evidence, both of which fail to "adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U.S. at 660.

When viewed in the light most favorable to Respondent, the facts of the case, as set out in detail in the Statement of Facts, are that Petitioner, Officer Troche, without identifying himself as a police officer, shot and killed Decedent Stoddard-Nunez, a passenger in a motor vehicle which had been driving past, not at,

the officer, by firing into the side of the vehicle after it had passed his position, when he and his companion were no longer in danger. The suspect driver had never driven his car at the officer, never swerved in his direction, and never hit the cruiser.

Petitioner claims that the Court of Appeals judged those facts only under the general standard set by *Tennessee v. Garner*, 471 U.S. 1 (1985). That claim ignores the explicit language of the opinion below that "it was clearly established that officers are not entitled to qualified immunity for shooting at an individual in a fleeing vehicle that does not pose a danger to them or to the public." 817 Fed.Appx. at 379, citing two Ninth Circuit decisions that predated this incident: *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996) and *Adams v. Speers*, 473 F.3d 989 (9th Cir. 2007). The dispositive question as framed by the court below in substance incorporates the inquiry framed by this Court in cases where officers have fired at moving vehicles to protect persons in the vicinity: *Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) ("whether . . . it was 'clearly established' " in the "particularized sense" relevant to the situation in the case: "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"); *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (where the officer shot "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and

who was moments away from encountering an officer" under an overpass he was speeding toward).

In *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996), the court identified the dispositive question in a case where the officer shot at a moving vehicle as follows: "whether the evidence, viewed most favorably to the [plaintiffs], permitted a conclusion that a reasonable officer in [defendant's] position would not have believed himself to be in danger" when he fired. 83 F.3d at 1146. Obviously, there are a variety of factors which might influence whether a reasonable officer would perceive himself or others to be in danger from a moving vehicle. Sensibly, for twenty-five years the Ninth Circuit has applied the dispositive question from *Acosta* consistently to a variety of fact patterns to judge whether firing at a moving motor vehicle constitutes excessive force. Decisions published and unpublished, before and after the incident in the present case (March 3, 2013), have held that firing at a motor vehicle constitutes excessive force when the officer and others are not in danger.

In *Adams v. Speers*, 473 F.3d 989 (9th Cir. 2007) the court found that firing six shots and killing the driver of a car that was backing away from the officer, where there was no danger to others, constituted excessive force. The court denied the officer qualified immunity, finding the constitutional violation "obvious." 473 F.3d at 994. The court specifically found that the defendant officer was not entitled to qualified immunity under the governing law of *Brosseau* and the cases cited therein.

In *Orn v. City of Tacoma*, 949 F.3d 1167 (9th Cir. 2020) the court found that, viewing the facts in the light most favorable to the plaintiff, an officer used excessive force when he fired into the side and rear of a vehicle that was moving away from him. The officer made no claim that use of deadly force was justified on the theory that permitting the vehicle to escape could have posed a threat to the general public. The court began with the commonsense observation that, "A moving vehicle can of course pose a threat of serious physical harm, but only if someone is at risk of being struck by it." 949 F.3d at 1174. The court denied qualified immunity, noting that at the time of the incident, October 2011, "at least seven circuits had held that an officer lacks an objectively reasonable basis for believing that his own safety is at risk when firing into the side or rear of a vehicle moving away from him." 949 F.3d at 1178.

The cases in *Orn* from other circuits all predated the shooting in the instant case. *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009) (rejecting officer's claim that shooting was justified to protect himself where jury could conclude he was never in immediate danger and danger had passed by the time he fired fatal shot into back of driver's head); *Lytle v. Bexar County, Tex.*, 560 F.3d 494 (5th Cir. 2009) (shooting at rear of vehicle driving away from officer was not objectively reasonable); *Kirby v. Duva*, 530 F.3d 475 (6th Cir. 2008) (officers who fired from side and rear of vehicle that had never put them in harm's way and had stopped moving violated clearly established constitutional rights);

Waterman v. Batton, 393 F.3d 471, 481-82 (4th Cir. 2005) (reviewing shooting that occurred in approximately six-second period, court concluded "once [decedent's] vehicle passed the officers, the threat to their safety was eliminated and thus could not justify the subsequent shots"; "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated"); *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2d Cir. 2003) (where vehicle was driving slowly, officer was not in front of vehicle but off to the side, vehicle made no sudden turns, and officer fired second shot simply because he was trained to always fire twice, facts suggested he was not in danger of death or physical harm and thus no reasonable officer would have believed that deadly force was necessary); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (where suspects had not menaced or were not likely to menace others on the highway, if vehicle did not present a threat of serious harm to the officer, shooting from cruiser into side of pickup truck, paralyzing passenger, would constitute excessive force); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999) (physical evidence and autopsy would support conclusion that officer was on the side of vehicle and never in front of it, in which event it was not objectively reasonable for her to believe she was in peril).

Other cases from these Courts of Appeals reiterated, prior to March of 2013, the proposition that firing at a moving vehicle when the officer is not in the path of the vehicle violates the Fourth Amendment. See *Godawa v. Byrd*, 798 F.3d 457 (6th Cir. 2015) (objectively

unreasonable in 2012 to fire at fleeing motorist suspected of underage drinking if officer was behind the car and had no reason to believe driver posed an imminent danger); *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005) (clearly established in 2002 that it violated Fourth Amendment for officer to shoot driver who had commandeered police cruiser after cruiser had passed the officer and there was no immediate danger to anyone in vicinity); *Williams v. Strickland*, 917 F.3d 763 (4th Cir. 2019) (arrestee's right to be free from deadly force once officers were no longer in his car's trajectory was clearly established in 2012).

Most recently, in *Villanueva v. California*, 986 F.3d 1158, 1170 (9th Cir. 2021), the Ninth Circuit followed its previous cases in holding that if an officer fires into a vehicle moving slowly, not accelerating, and the officer is not standing in front of the vehicle, the shooting violates the Fourth Amendment, and the officer is not entitled to qualified immunity. The court distinguished the situation from the use of deadly force to stop a recklessly speeding vehicle during a car chase, as in *Mullenix v. Luna*, 577 U.S. 7 (2015).

In unpublished decisions both before and after the incident in this case, the Ninth Circuit has consistently ruled that firing at a moving vehicle when the officer and others are not in danger constitutes excessive force. *Randall v. Williamson*, 211 Fed.Appx. 565 (9th Cir. 2006) (excessive force to fire at slow moving van that had stopped before officer fired); *Tubar v. Clift*, 286 Fed.Appx. 348 (9th Cir. 2008), affirming *Tubar v. Clift*, 453 F.Supp.2d 1252 (W.D. Wa. 2006) (officer fired at car

as it was moving past him); *Estate of Kosakoff ex rel. Kosakoff v. City of San Diego*, 460 Fed.Appx. 652 (9th Cir. 2011), affirming *Kosakoff v. City of San Diego*, 2010 WL 1759455 (S.D. Cal. 2010) (plaintiff's evidence would prove officers shot at vehicle when it was backing out of garage and officers were not in danger); *Losee v. City of Chico*, 738 Fed.Appx. 398 (9th Cir. 2018) (affording qualified immunity to officers who fired at moving car when it was driving at them or other officers; but denying summary judgment to officer who fired before others when car was slowly backing away and he could have avoided it and also fired after others when car was driving away from him and other officers).

At the same time, the Ninth Circuit has also held that where a moving vehicle does pose a risk of death or serious harm to an officer or others, an officer may use deadly force to try to stop it. *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010) (on muddy ground, officer fired at vehicle, having seen his partner fall and believing he had either been run over or would be run over, while car was moving in the midst of officers who were trying to stop it); *Monzon v. City of Murrieta*, 978 F.3d 1150 (9th Cir. 2020) (vehicle posed immediate threat to officers when it drove near, toward, and amongst officers on foot); *Adame v. Gruver*, 819 Fed.Appx. 526 (9th Cir. 2020) (officer shot driver of car as it accelerated with officer at serious risk, partially inside and partially outside the vehicle, with his foot bouncing on the ground).

Where the facts were in dispute, as in many of the previously cited cases, the Ninth Circuit has remanded

for further proceedings to determine whether an officer who fired at a moving car reasonably believed that he or others was at risk, e.g., *Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (*en banc*). That was the situation in the present case and the Court of Appeals properly remanded the matter to determine the facts.

B. Decisions of the Supreme Court Have Established that a Passenger in a Motor Vehicle Who Has Been Shot by an Officer Intending to Stop the Vehicle Has Been Seized for Purposes of The Fourth Amendment.

The second question that Petitioner presents for review is: Whether an unintended victim-passenger of a fleeing vehicle is "seized" for purposes of the Fourth Amendment? Contrary to what Petitioner claims, there has never been a true conflict among the Courts of Appeals on this issue. Moreover, any conflict that there was in the case law has been resolved by subsequent decisions by the Supreme Court.

The decision by this Court in *Brendlin v. California*, 551 U.S. 249 (2007), established that when police stop a vehicle, whether by physical force or a show of authority, "a passenger is seized." 551 U.S. at 251. If the seizure is by show of authority without force, actual submission to the seizure is required. If the seizure is by means of physical force, submission is not required.

The Court resolved the question of whether a passenger is seized by asking whether he would reasonably believe himself free to terminate the encounter between the police and himself. The stop in *Brendlin* was an ordinary traffic stop and the Court concluded that "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." 551 U.S. at 257. Shooting at a car with a hail of bullets would certainly make it even clearer that the passenger would not be free to leave. As this Court said, "a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing," or "move around in ways that could jeopardize his safety." 551 U.S. at 257-58.

Whether the officer subjectively intended to shoot at the car or only at the driver is not relevant to the issue of whether the passenger was seized.[5] This Court said in *Brendlin*, "we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis." 551 U.S. at 260. The question of the officer's intent to seize the passenger is

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[5] Petitioner seems to acknowledge this in the Introduction to his Petition: "This question [victim-passenger's standing] should not turn on whether an officer subsequently says he or she 'shot at the car,' instead of saying, he or she 'shot at the driver inside the car,' two statements that are not mutually exclusive, and both of which were made in this case." Petition, 5. Later in the Petition, however, Petitioner appears to claim that his intent to shoot only at the driver was significant. Petition, 25-27.

an objective matter and depends upon "what a reasonable passenger would understand." 551 U.S. at 260. Even before bullets struck his body, once firing commenced the decedent in the instant case could hardly have believed he was free to terminate the encounter with the officer.[6]

All four of the cases relied upon by Petitioner to constitute a split in the Courts of Appeals were decided prior to *Brendlin*. *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001); *Fisher v. Memphis*, 234 F.3d 312 (6th Cir. 2000); *Vaughn v. Cox*, 343 F.3d 1323 (11th Cir. 2003). Moreover, the two cases that Petitioner suggests stood for the proposition that a passenger-victim of a police shooting at a vehicle had no standing were easily distinguishable from those that found that standing existed. *Milstead* did not involve shooting at an automobile at all but was a case of mistaken identity in which an officer shot the wrong man running from a house. The case relied upon by the *Milstead* court with respect to bystander standing was *Rucker v. Harford County, Md.*, 946 F.3d 278 (4th Cir. 1991), in which an officer fired at a car, but hit a bystander lying on an embankment some distance away.

In *Landol-Rivera* an officer shot at a suspect who commandeered a car and took over the driver's position

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[6] The Ninth Circuit has recently discussed this issue at length. *Villanueva v. California*, 986 F.3d 1158 (9th Cir. 2021) (*Brendlin* establishes the standing of a passenger-victim when police shoot at a car, applying an objective test to determine the officer's intent with respect to the seizure).

with a hostage on his lap. One of the bullets struck the hostage. The court's conclusion that the victim had not been seized depended on the fact that he was a *hostage*. The police had no objective intent to detain the hostage, indeed, the police were attempting to free him.[7]

Given this Court's decision in *Brendlin*, the state of the law is clear that a passenger shot by the police in a vehicle has been seized for purposes of an analysis under the Fourth Amendment.[8]

Finally, it is of no moment that after decedent was shot, the driver of the vehicle drove away from the scene. Petitioner suggested that the Court hold this petition given the then-pending case of *Torres v. Madrid*, ___ U.S. ___, 141 S.Ct. 989 (2021). *Torres* has now been decided. It makes clear that the seizure of the decedent in the instant case occurred and was complete at the moment when he was shot. This Court held in *Torres*: "The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." 141 S.Ct. at 994. In *Torres*, the victim of the shooting left the scene and drove for 75 miles before stopping.

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[7] Other cases that found no standing were, like *Landol-Rivera*, cases where the passenger was a hostage and the officers were trying to rescue him, not seize him. See *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000); *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998).

[8] In addition to the earlier cases of *Fisher* and *Vaughn*, see *Villanueva*; *Davenport v. Borough of Homestead*, 870 F.3d 273 (3d Cir. 2017); *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 410 (5th Cir. 2009).

Moreover, *Torres* reaffirmed that the existence of an intent to restrain must be determined by an objective test. The Court stated, "the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context." 141 S.Ct. at 998 (emphasis in original). As we have said, whether the Petitioner intended to shoot only at the driver of the car is of no moment in determining whether the passenger was seized.

The decisions of this Court in *Brendlin* and *Torres* establish that decedent in the instant case was seized within the meaning of the Fourth Amendment when he was shot by Petitioner, and therefore Respondent had standing to challenge whether the use of deadly force was excessive.

C. When Petitioner Troche Stopped Firing and When He Was Able to Stop Firing Are Adjudicatory Facts for a Jury to Determine.

The petition for certiorari is supported by an amicus brief filed by the Peace Officers' Research Association of California, et al. Amici take the position that there is a significant lag time between when an officer makes a decision to stop firing his weapon and when he is able to do so. Based on that assertion, amici in essence argue that this Court should ignore the numerous cases that have clearly established that an officer may not fire at a moving vehicle after it has passed his position and he is no longer in danger.

Amici acknowledge, however, that their analysis is "merely illustrative, and not meant to govern the analysis of the facts of this particular case." Peace Officers' Brief, 16. The questions of when precisely Troche should have stop firing, was able to stop firing, and did stop firing, are adjudicatory facts that must be determined by a jury. They are "facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent," that is, adjudicatory facts. Fed. R. Evid. 201, Adv. Com. Note to Subdivision (a), citing Prof. Kenneth Davis, 2 Administrative Law Treatise 353.

The sources cited by amici consist of articles written from an advocacy perspective designed to affect litigation concerning police practices. They are hardly the sort of material whose accuracy cannot reasonably be questioned, as Rule 201 would require for judicial notice to be taken of an adjudicatory fact. When this case goes to trial, defendants may wish to call one or more of the authors of the cited articles as expert witnesses. If so, they would have to establish the reliability of their principles, research methods, and expert opinions under the guidelines of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This will require more than the *ipse dixit* of the purported experts themselves. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Respondent would have an opportunity to cross-examine the purported experts and to call his own experts to rebut their testimony.

In the meantime, however, the facts must be taken in the light most favorable to Respondent, the party

against whom summary judgment was sought. This means that Officer Troche would have anticipated that a vehicle driving out of the parking lot would pass his position at some point and that he would have to stop firing if he had not succeeded in stopping the vehicle by that point. As discussed in detail in the Statement of Facts, he failed to do that and fired into both the front and rear passenger doors of the vehicle after it had passed him. That constituted firing when he was no longer in danger (if he ever had been), and thus was an excessive use of deadly force under clearly established law.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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