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 U.S. Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

LEIGHTON SCHUR
Counsel of Record
Joel Barlow High School
100 Black Rock Turnpike
Redding, 06896
2038565177
l8onschur@gmail.com

CATHERINE GUTOWSKI
Joel Barlow High School
100 Black Rock Turnpike
Redding, 06896
2034511447
catherine.gutowski@er9.org

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QUESTION PRESENTED

Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment or must physical force be successful in detaining a suspect to constitute a "seizure"?

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FACTS OF THE CASE

On the morning of July 15, 2014, New Mexico State Police Officers Janice Madrid and Richard Williamson went to an apartment complex in Albuquerque to serve an arrest warrant to a woman by the name of Kayenta Jackson. The officers, wearing tactical vests with police markings, approached two individuals standing near a parked Cruiser outside the apartment, looking for the subject of their arrest warrant. One of the individuals ran into the apartment, while the other, Torres, got inside the Cruiser and started the engine. Torres testified to have been "trip[ping] . . . out" from using meth "[f]or a couple of days" at the time. The officers attempted to talk to Ms. Torres to get her to step outside the car, and jiggled the handle of her car door when she did not comply. At that point, Torres put the Cruiser into drive, and drove her vehicle towards the two state police officers because, she asserts, she believed them to be carjackers. In fear for their lives, the officers fired several shots at Torres, two of which struck her in the back. Ms. Torres did not stop, slow down, or otherwise submit to the officers' attempt to gain control over her. She instead fled from the scene, collided with a motorist, stole someone else's vehicle—not wanting to wait around because of her own outstanding arrest warrant—and drove over seventy-five miles west to Grants, New Mexico, evading arrest until the next day. She subsequently plead no contest to three crimes: (1) aggravated fleeing from a law-enforcement officer; (2) assault upon a police officer; and (3) unlawfully taking a motor vehicle. Torres filed complaints of excessive force against the two officers, and the district court and the United States Court of Appeals for the Tenth Circuit concluded that the officers did not "seize" Torres under the meaning of the Fourth Amendment, therefore ruling that the officers were entitled to qualified immunity.

SUMMARY OF ARGUMENT

The Tenth Circuit Court correctly found that Roxanne Torres was not 'seized' by Officers Madrid and Williamson. The Fourth Amendment was written to protect citizens from unreasonable seizures and searches, not to ensure liability when police mishandle a situation. Police misconduct without seizure falls under the Fourteenth Amendment's Due Process Clause, but the Fourth Amendment only protects an individual from 'excessive force' when they have been 'seized' by the officers. In the instance of this case, the gunshots failed to allow the officers to gain physical control over her movements. Therefore, the question at hand is: must physical force be successful in detaining a suspect to constitute a "seizure"[1]? The entirety of this Court's Fourth Amendment jurisprudence, particularly *Brower v. County of Inyo* has answered this question. There must be the "intentional acquisition of physical control,"[2] through a show of authority or the use of physical force, such that the suspect does not feel free to leave. The ruling on 'seizure' in *California v. Hodari D.* is not relevant to the outcome of *Torres v. Madrid*, or in *Hodari* itself, rendering it dicta. Even if this court rules that she was seized under the Fourth Amendment, the officers are still protected by qualified immunity, unless Petitioner proves the officers acted unreasonably. Because Torres was not seized, and 'excessive force' without seizure does not fall under the Fourth Amendment, this Court should affirm the Tenth Circuit's decision.

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[1] U.S. Const. amend. IV

[2] *Brower v. County of Inyo,* 489 U.S. 593 (1989)

ARGUMENT

I. Petitioner Was Not Seized Under the Meaning of the Fourth Amendment

A. Without a Seizure, There is No Fourth Amendment Violation

In the instance of this case, Torres sued Officers Madrid and Williamson, claiming the use of 'excessive force' on the grounds that her Fourth Amendment right to be free from "unreasonable seizures"[3] was violated when she was struck in the back by two of thirteen bullets the officers collectively fired at Torres' moving vehicle. However, lower courts dismissed her claims, holding that—regardless of whether police acted reasonably or unreasonably—Torres was not seized at the time the officers fired upon her, because she fled the scene and was therefore not under the officers' physical control during that time.

In question is the constitutional right for individuals to be free from "unreasonable searches and seizures,"[4] as outlined in the Fourth Amendment to the United States Constitution. Torres claims that the Fourth Amendment was violated when the officers' "intentional discharge of a fire arm … exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied."[5] Here, it is critical to make the distinction between "unreasonable" and "seizure." The word "unreasonable" under the meaning of the Fourth Amendment only applies when an individual has been "seized." In *Elkins v. United States*, the Court determined, "what the constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[6] Therefore, Torres can not claim that she was seized unreasonably without first proving that she was seized.

II. Common Law Dictates Petitioner Was Not Seized

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[3] U.S. Const. amend. IV

[4] Id.

[5] *Torres v. Madrid* - Citation pending

[6] *Elkins v. United States,* 364 U.S. 206 (1960)

Relevant case law consists of cases that help determine the true meaning of seizure, but this first requires we go back to the meaning of the word as was intended by authors of the Constitution. In the case of *California v. Hodari D*, Justice Scalia wrote, "[f]rom the time of the founding to the present, the Fourth Amendment's term "seizure" has "meant a 'taking possession.'"[7] To determine what is meant by "taking position," we can look to early understanding of the meaning of the word 'seizure.' Black's Law Dictionary from the edition of 1631[8], and American Heritage Dictionary of the English Language from 1588[9] defined "seizure" as "[t]he act or an instance of taking possession of a person or property by legal right or process" especially, "in constitutional law, a confiscation or arrest that may interfere with a person's reasonable expectation of privacy."[10] Johnson, A Dictionary of the English Language from 1785, also defined 'seizure' as "the act of taking forcible possession."[11] In order for Torres to have been seized under the traditional definition of the word seizure, there must have been a "taking [of] forcible possession." No doubt Officers Madrid and Williamson used physical force against Torres' oncoming vehicle, but "taking possession" implies not just the application of force but the taking possession of her person. Though Torres was struck by the officers' bullets, the officers arguably still didn't have possession of her person, because they were unable to exercise any amount of control over her actions. Through implying the 'taking possession' in every seizure, common law at the time of the founding fathers equated 'seizure' to an arrest.

Contrarily, the English common law which set the precedent for Justice Scalia's opinion in *Hodari* is based on the 1704 ruling of *Genner v. Sparks*, which amounted to an arrest to an officer so much as "laying hands"[12] on a suspect. In the instance of this case, had the officer "touched [Sparks] . . . even with the end of his finger," it would have "been an arrest."[13]

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[7] *California v. Hodari D.,* 499 U.S. 621 (1991)
[8] Black's Law Dictionary from the edition of 1631
[9] American Heritage Dictionary of the English Language (1588)
[10] Id.
[11] Samuel Johnson, A Dictionary of the English Language (1755)
[12] *Genner v. Sparks,* 87 Eng. Rep. 928 (QB)
[13] Id.

However, American case law has since departed from this interpretation of both the meaning of seizure and the word 'arrest.' The case *Brendlin v. California* distinguishes, "mere physical contact by an officer, although a significant factor, does not automatically qualify an encounter as a Fourth Amendment seizure."[14] *Terry v. Ohio* qualifies this further, stating, "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[15] Therefore, it is not sufficient enough for Petitioner to demonstrate that physical contact was applied when Officers Madrid and Williamson fired their weapons; she must prove that in doing so they restrained her liberty too.

Cases like *United States v. Watson* have shown, "an arrest, the taking hold on one's person, is quintessentially a seizure."[16] In the case of *Terry v. Ohio*, which dealt with a stop and frisk, the Supreme Court wrote, "it is urged that distinctions should be made between a 'stop' and an 'arrest' (or a 'seizure' of a person)."[17] Here, again, an arrest is equated to a seizure; however Justice Warren specifies an important first step, which is a stoppage. In the case of *Torres v. Madrid*, since this first step never was reached because Torres was never compelled to stop, the rest of the process of an 'arrest' or 'seizure' could never have occurred under the meaning of a common law arrest.

A. Based on the *Mendenhall* Test, Petitioner Was Not Seized

The meaning of seizure inherited from common law came to be codified by the modern court through a series of cases. The decision provided by Justice Stewart in *United States v. Mendenhall,* 1980, provides the test for determining if a seizure had occurred under the meaning of the Fourth Amendment. This test states that a person is seized "only if, in view of all of

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[14] *Brendlin v. California,* 551 U.S. 249 (2007)

[15] *Terry v. Ohio,* 392 U.S. 1 (1968)

[16] *United States v. Watson*, 423 U.S. 411 (1976)

[17] *Terry v. Ohio,* 392 U.S. 1 (1968)

the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[18] In *Mendenhall,* Justice Stewart points out that the subjective intent of an officer to detain a suspect is not determinative of if a seizure under the Fourth Amendment's meaning occurred, only whether a reasonable person would believe that suspect free to leave. This is elucidated in *Tennessee v. Garner,* 1995, when Justice White wrote, "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person."[19] These cases provide a basis for recognizing if a seizure has occurred. For an officer to stop a suspect from walking away, the suspect must either submit to that officer's show of authority, and if not, be subdued by physical force. Moreover, as quoted above in the case of *United States v. Mendenhall*, a seizure occurs when "the officer, by means of physical force or show of authority, has … restrained the liberty of a citizen."[20] This case clearly distinguishes that "physical force" and "show of authority" are only means through which a seizure can occur, but they in themselves do not constitute a seizure because they fail to restrain the liberty of a citizen.

In the case at hand, Torres fled, without stopping or slowing, from the scene, indicating her freedom of movement was not restrained. In the 2006 case of *Brooks v. Gaenzle*, the Tenth Circuit district court ruled in favor of the Officers, because they found that the officers' use of force against Petitioner failed to "control [her] ability to evade capture or control."[21] In this case it was determined that an officer's intentional shooting of a suspect does not constitute a seizure unless the "gunshot… terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him,"[22] however, that "mere use of physical force or show of authority alone, without termination of movement or submission"[23] does not constitute a seizure. Regardless of the intent of Officers Madrid and Williamson to stop Ms. Torres from striking them with her moving vehicle, the shots they fired did not stop Torres, and therefore could not have seized her. Even after being

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[18] *United States v. Mendenhall,* 446 U.S. 544 (1980)
[19] *Tennessee v. Garner,* 471 U.S. 1 (1985)
[20] *United States v. Mendenhall,* 446 U.S. 544 (1980)
[21] *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010)
[22] Id.
[23] Id.

hit twice in the back by the officers' gunshots in Albuquerque, Torres—who had an outstanding arrest warrant—fled the scene of the shooting, proceeded to steal a running vehicle off the side of the road, and drove another seventy-five miles west before stopping. These facts are undisputed by Ms. Torres, and clearly indicate that for all intents and purposes, Ms. Torres felt free to leave and her freedom of movement was not restrained.

Moreover, at no time during her exchange with Officers Madrid and Williamson did Torres act as though she had been seized. After being shot, Ms. Torres drove miles to a completely separate city before she even realized she had been shot. This fact demonstrates that Torres felt free to leave, and suggests that Torres herself did not perceive herself to be 'seized' by the officers' shots at the time of the confrontation.

B. Attempted Seizure is Not Seizure

Thus, working backwards from this framework serves to further demonstrate how the precedent supports our position in the case at hand. Starting with the 2007 case of *Brendlin v. California*, which dealt with police using 'show of authority' in a traffic stop resulting in Brendlin's arrest. This case determined that when an officer uses 'show of authority' to get an individual to stop and the person stops, that is considered a seizure. In the majority opinion of this case, Justice Souter wrote that, "[a] police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned."[24] The citizen's "freedom of movement"[25] must be physically controlled or restrained in order for a seizure to occur. It stands to reason, then, that the "submission" in this case constituted the seizure itself, far from the "show of authority," and in fact without submission, there is only an attempted seizure. To apply this to Torres' case, two officers approached Mrs. Torres while she was inside a vehicle, identified themself, and demanded she show her hands. She soon put the car into drive, causing both officers to draw their guns and shoot at her through the window the moment she started to move forward. The

[24] *Brendlin v. California*, 551 U.S. 249 (2007)
[25] Id.

officers fired thirteen shots, two of which struck her in the arm as she drove away. She then drove over seventy-five miles, crashed the vehicle she was driving, stole another, and was not taken into custody until the next day. When applying *Brendlin v. California*, it is apparent that this was an attempted seizure, but not a seizure itself.

C. There Can Be No Seizure Without the Acquisition of Control

A finding for Madrid is consistent with the 1989 case of *Brower v. Inyo County*, which dealt with the use of 'physical force' when a suspect crashed into a police roadblock, demonstrating that when an officer uses 'physical force' to get an individual to stop and the person stops, that it also considered a seizure. In this case, Petitioner's descendant, William Caldwell, was killed when the stolen car he had been driving at high speeds to elude pursuing police crashed into a police roadblock. This roadblock was created by an unilluminated 18-wheel tractor-trailer placed across a roadway on a curve, with headlights allegedly directed to blind the driver so that a crash was alleged to be unavoidable. As quoted earlier, Justice Scalia wrote that, "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control."[26] Using the precedents of *Brendlin* and *Brower*, if a 'show of authority' without stoppage is not a seizure, and a 'show of authority' with stoppage is a seizure, the determining factor of seizure is stoppage. If the use of 'physical force' with stoppage is a seizure, then it would stand to reason that the use of 'physical force' without stoppage is not a seizure. Therefore, cessation of movement is the essential factor of determining whether a seizure occurred, because it determines the officers' abilities to exercise control over a suspect, whereas physical force alone can do no such thing. Using the standard created by *Brower*, it is impossible to deny that Torres was seized. Not only are the facts of *Brower* much more relevant than *Hodari*, because *Hodari* did not directly pertain to seizure through physical force, though the physical force in *Brower* resulted in a fatality and *Torres* did not, the road block set up by the officers was an unreasonable seizure in the same way Ms. Torres claims; however, *Brower* had a termination of movement where *Torres* did not.

[26] *Brower v. County of Inyo,* 489 U.S. 593 (1989)

III. *California v. Hodari D.* Has No Application to the Outcome of *Torres v. Madrid*

While there is a great amount of common law supporting Madrid, Petitioner's claims hinge on one case, *California v. Hodari D.* The simplest way to harmonize *Hodari* with earlier case law is to recognize that the facts in *Hodari* depart from *Torres* in ways that bar their application to this case.

A. Justice Scalia's Definition of Seizure Is Dictum

The core of Petitioner's claim comes from one particular reading of *California v. Hodari,* which Torres has levied as her one standing use of precedent against the many that contradict her reasoning. The first thing to note when looking about the applicability of a precedent to a case is the facts. The decision in *Hodari* pertained to the admissibility of evidence, not directly a seizure. However, in the majority opinion of this 1991 case, Justice Scalia wrote that, "an arrest is effected by the slightest application of physical force, despite the arrestee's escape."[27] This would therefore indicate that Torres could have been seized under the meaning of the Fourth Amendment; however, there are several reasons as to why Scalia's opinion cannot be applied. Firstly, *Hodari* dealt with a 'show of authority' in a police foot chase, not the use of 'physical force' in the shooting of a suspect. The reference to physical force seizures repeated throughout the case is used only as a contrast to the essential question of *Hodari*: Does a foot chase constitute a seizure? Because this was an isolated comment, non binding to the result, it is therefore dicta and renders any speculation on the application of physical force in police confrontation such.

B. Precedents Involving the Use of Physical Force to Constitute a Seizure Cannot Be Applied Blindly

A police officer reasonably using a gun against another person does so to terminate that person's movement or action. In *Torres v. Madrid*, the officers fired their weapons to stop a life endangering threat, and to obtain

[27] *California v. Hodari D.,* 499 U.S. 621 (1991)

physical control over Ms. Torres. In *Brower v. County of Inyo*, Scalia stated that "acquisition of physical control"[28] is a necessity to constitute a seizure. The roadblock stopped Mr. Brower, so he was seized. In *Hodari*, the action of tackling stopped Mr. Hodari, resulting in a seizure. In *Torres v. Madrid*, the officers shot the petitioner to stop her, to limit her mobility, to arrest her, to seize her, to terminate her movement and action of driving a vehicle. Following the precedent Justice Scalia set in *Hodari*, if the officer chasing Mr. Hodari never caught up with him, resulting in physical control, Mr. Hodari would not have been seized. Likewise, following the precedent also set by Justice Scalia in *Brower*, if the roadblock did not stop Mr. Brower, he would not have been seized. Within both of these cases, heavily cited by both sides of this case, remains one factor that must be agreed upon. The use of physical force by law enforcement is a means to an end. The use of physical force is what allows officers to stop or gain control of a suspect in necessary circumstances. This logic can easily be carried over to *Torres v. Madrid*. Ms. Torres was running away from authority, the officers discharged their weapons to terminate her movement, yet she escaped the scene. Therefore, the application of physical force did not achieve the goal of apprehending Torres, and thus could not achieve the intended goal of seizure.

The question presented in *Hodari* was: has a person who is not under the physical control of a police officer been seized under the Fourth Amendment when the officer is chasing that person? The answer was a resounding no. An officer chases a suspect to stop him, limit his mobility, arrest him, or seize him. Officers Madrid and Williamson shot at Torres for the same reasons. The foot chase in this instance can be equated to the firing of Officers Madrid and Williamson's guns at Torres, as both measures were taken with the intent of acquiring physical control. As explained above, in *Hodari*, a seizure did not occur until the need for physical control was met, so it should not be changed due to the use of a firearm.

It is clear that precedents involving the use of physical force cannot be applied blindly. This was proved by Scalia when he diverged from the precedent set in *Brower* to accommodate the needs and circumstances surrounding a specific case. The respondents do not argue that physical force

[28] *Brower v. County of Inyo,* 489 U.S. 593 (1989)

is not a means through which a seizure can occur. An expansive reading of Fourth Amendment jurisprudence originating from this court makes it clear that that physical force in it of itself is not enough to effectuate a seizure; not all physical force creates the same outcome. Additionally, we acknowledge that both cases providing a common law basis in regard to what constitutes a seizure ended in the apprehension of the suspect. Determining whether a seizure occurred is essential in determining the constitutionality of officers' action due to the liabilities that come with violating the Fourth Amendment. The precedent set by any case involving physical force and the Fourth Amendment must be applied on a case to case basis, just like any other test regarding the constitutionality of an action or law.

Most importantly, we urge the court to recognize that the precedent taken from *Brower* allows for a bright line to be drawn, one that shows when a seizure has occurred, one that is built on logic and is consistent with the previous ruling of this Court. This line is easily distinguishable for both law enforcement and civilians. This decision states that a seizure occurs one of two ways. A show of authority that results in the submission of the suspect, or the application of physical force that results in the control of the suspect. This precedent provides a clear distinction between what is and isn't a seizure, especially when applied to *Torres v. Madrid*. These officers fired their weapons to protect themselves, and simultaneously to obtain control over a dangerous and fleeing suspect (Ms. Torres). But do to the fact that they were unsuccessful because she fled in a vehicle, no seizure could have occurred.

IV. Even if Torres Was Seized, Officers Madrid and Williamson Are Protected From Suit by Qualified Immunity

A. Precedent Dictates That the Officers Are Protected Under Qualified Immunity

Relevant to the case of *Torres v. Madrid* is the doctrine of qualified immunity from the U.S. Code of Laws[29], which, as Justice Alito wrote in the majority opinion of the 2009 case *Pearson v. Callahan*, "balances two

[29] 42 U.S.C. § 1983

important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[30] The main purpose of qualified immunity, as written by Justice Stevens in his dissent of the decision of *Anderson v. Creighton,* 1987, is "that 'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible."[31] This occurred in lower courts' rulings of *Torres v. Madrid*, with the goal being to resolve the issue for the officers at the earliest possible stage of litigation. An "insubstantial claim" in this case would be if the officers' conduct "does not violated clearly established … constitutional rights,"[32] as written by Justice Powell in the majority opinion of the 1982 case *Harlow v. Fitzgerald*. Given that Ms. Torres sued Officers Madrid and Williamson on the basis that her Fourth Amendment rights were violated, it is this Court's duty to determine whether the police seized the petitioner. If the answer is yes, it is possible that the Fourth Amendment was violated, and the officers could be held personally liable for their actions (should it be later ruled that the seizure was 'unreasonable'). If the answer is no, this case is dismissed on the simple basis that the officers are entitled to qualified immunity since the Fourth Amendment, which requires a seizure to apply to the case, was not violated. This same principle was applied in *Mullenix v. Luna,* 2015[33]. An officer shot a suspect during a car chase, yet he was found innocent under qualified immunity. *Mullenix v. Luna* is a perfect representation of how qualified immunity protects officers such as Madrid and Williamson, and offers a secure precedent in favor of the officers.

V. The Fundamentality of the Fourth Amendment and Strict Scrutiny

A. The Fourth Amendment Right to Be Protected From "Unreasonable Searches and Seizures" Is Fundamental Under the Constitution

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[30] *Pearson v. Callahan,* 555 U.S. 223 (2009)

[31] *Anderson v. Creighton,* 483 U.S. 635 (1987)

[32] *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)

[33] *Mullenix v. Luna* 577 US _ (2015)

Justice Cardozo, in the 1938 case of *Palko v. Connecticut*, wrote in the majority opinion that a fundamental right is one "of the very essence of a scheme of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."[34] Using this standard, we can first recognize that the right of every American to be free in their person and possessions is unquestionably an essential liberty, and the Fourth Amendment serves to protect this liberty by prohibiting "unreasonable searches and seizures."[35] In doing so, as written in Justice Frankfurter's dissenting opinion of the case *Davis v. United States,* 1946, the Fourth Amendment "reflects experience with police excesses,"[36] and clearly shows the Constitution will not tolerate unnecessary government intrusion on an individual's freedom. As previously outlined, the Fourth Amendment's distinction of 'reasonability' is central to its protection of ordered liberty by balancing governmental and individual interests. The ability for a government to 'seize' is essential to effective law enforcement, while the protection from 'unreasonable' seizure defends the individual's privacy and personal security where seizure does not serve a compelling state interest. Thus, the right to be free from "unreasonable seizures"[37] is unequivocally a fundamental right.

B. Strict Scrutiny Protects Fundamental Rights

As such, a more strict form of judicial scrutiny must be applied to the case of *Torres v. Madrid* when a fundamental right is in question. Justice Stone outlined in Footnote Four of the 1938 decision of *United States v. Carolene Products Company* that we must have a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."[38] This narrower scope is known today as strict scrutiny, which a court must undergo if a law or policy appears to violate a right protected in the U.S. Constitution, particularly in the Bill of Rights.

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[34] *Palko v. Connecticut,* 302 U.S. 319 (1937)

[35] U.S. Const. amend. IV

[36] *Davis v. United States,* 564 U.S. 229 (2011)

[37] U.S. Const. amend. IV

[38] *United States v. Carolene Products Co.,* 304 U.S. 144 (1938)

Justice Rehnquist summarized this process in the majority opinion of the 1997 decision of *Washington v. Glucksberg*[39], in quoting the 1993 case of *Reno v. Flores*[40], writing, "the Fourteenth Amendment 'forbids the government to infringe … "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"[41] Therefore, for this court to determine that the shooting of Ms. Torres does not constitute a seizure under the meaning of the Fourth Amendment, the definition of seizure must serve a 'compelling state interest,' must be 'narrowly tailored' to achieving that interest, and must be the 'least restrictive means' of doing so.

Due to the use of Strict Scrutiny, it must be proven that the shooting of Ms. Torres not constituting a seizure serves a compelling state interest. In the 1980 case of *United States v. Mendenhall*, Justice Stewart wrote in the majority opinion that, "[o]nly when the officer, by means of physical force or show of authority, has … restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[42] Notably, while 'physical force' and 'show of authority' can be means through which a seizure may occur, the application of physical force alone does not constitute a seizure, as evidenced in the 1989 case of *Brower v. County of Inyo* when Justice Scalia clearly wrote in the majority opinion, "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control."[43] The use of physical force is required in many police confrontations, but again, physical force is only a means through which an individual can be seized. The use of physical force does not necessarily mean the stoppage of the suspect in every instance. In fact, without the acquisition of physical control, the use of physical force serves no compelling state interest whatsoever, and it would be imprudent for this court to define 'seizure' as such. It should not be lost that the simple goal of the meaning of 'seizure' is to apprehend an individual under the law, which can be quantified by a 'stoppage' or the 'taking possession' or any other

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[39] *Washington v. Glucksberg,* 521 U.S. 702

[40] *Reno v. Flores,* 507 U.S. 292

[41] Id.

[42] *United States v. Mendenhall,* 446 U.S. 544 (1980)

[43] *Brower v. County of Inyo,* 489 U.S. 593 (1989)

acquisition of physical control, with the aim of promoting the health and safety of the public through the arrest of a suspect. This is not achieved if the suspect gets away, or moreover, if the suspect has increased incentive to get away. Therefore, deciding in favor of Madrid in this case unquestionably serves a compelling state interest.

Next, it must be determined whether such a decision is narrowly tailored to promoting the health and safety of the public. Certainly, as previously stated, without the acquisition of physical control over a suspect's movements, the goal of any police officer to promote the welfare of the public cannot be achieved. When an officer has "restrained the liberty of a citizen"[44] for even a moment, referring to the above case of *United States v. Mendenhall*, that person has been seized. This implies that the officer gains control over the suspect's movements. In the case of *Torres v. Madrid*, it cannot be argued that Ms. Torres' liberty was restrained by the injuries she sustained from the gunshots or later by the temporary paralysis of her left arm, because that force did not prevent her from fleeing the scene. As Justice White wrote in the majority opinion of the 1985 case of *Tennessee v. Garner*, "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person."[45] However, unquestionably Ms. Torres was 'free to leave,' given that she successfully continued driving despite the gunshots, without stopping or even slowing down, not to mention that Ms. Torres was not aware of her wounds until later. If this court were to rule in favor of Torres, the definition of seizure would be construed to mean any application of physical force, which fails to be narrowly tailored to the aim of apprehending a suspect for the reason that the application of physical force will not necessarily result in the desired arrest, as witnessed in this case. However, holding with the decision in *Brower v. County of Inyo*, the "intentional acquisition of physical control"[46] by law enforcement is narrowly tailored to the aim of apprehending a suspect.

Lastly, it must be asked whether the protection of qualified immunity to officers in this particular case is the least restrictive means for achieving

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[44] *United States v. Mendenhall,* 446 U.S. 544 (1980)

[45] *Tennessee v. Garner,* 471 U.S. 1 (1985)

[46] *Brower v. County of Inyo,* 489 U.S. 593 (1989)

the health and safety of the public. Simply, the answer is yes. Without the "intentional acquisition of physical control,"[47] as indicated above in the case of *Brower v. County of Inyo*, the goal of restraining a potentially dangerous suspect cannot be obtained. If we restrict this definition to the mere application of physical force as Ms. Torres wishes, it would not necessarily achieve in every instance the interest of public safety, and would needlessly confound the meaning of 'seizure' under the Constitution. The question of whether Officers Madrid and Williamson used 'excessive force' and potentially endangered the safety of others in the apartment complex is circumstantial. Present in our case is no argument that Officers Madrid and Williamson's efforts to restrain the movements of Ms. Torres were the least restrictive means of doing so, only that the common law definition of seizure presented before *California v. Hodari D* is the least restrictive means of achieving the interest of public health and safety. The force the officers applied failed to restrain Ms. Torres' movements, which sufficiently demonstrates that Ms. Torres was not seized under the meaning of the Fourth Amendment.

VI. Even if Officers Madrid and Williamson Are Not Protected by Qualified Immunity, Their Actions Were Reasonable

A. The Officers' Actions Fulfill the Test of Reasonability

The Fourth Amendment prohibits the use of excessive force during an arrest, investigatory stop, or other 'seizure,' meaning force that is objectively unreasonable under the circumstances. The test of reasonability is determined by weighing the amount and type of force used against the governmental need for that force, as established in the case of *Graham v. Connor,* 1989, when Chief Justice William Rehnquist wrote, "[t]he 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."[48] If we examine the facts of the case, we see that a car

[47] Id.

[48] *Graham v. Connor,* 490 U.S. 386 (1989)

was moving towards an officer, driven by a seemingly hostile suspect. Precedent from *Tennessee v. Garner, 1985,* states that deadly force is reasonable when an officer has probable cause to believe a suspect poses a threat of serious harm to the officer or others may use deadly force to prevent escape.[49] Therefore, the use of deadly force was in fact reasonable, if not necessary.

As shown above, law enforcement is instructed to use deadly force only when the life of themself or others are in danger, or a serious injury may be sustained. It cannot be argued that a moving vehicle does not qualify as deadly force, or at the very least, force enough to cause serious injury. Notably, as stated in the facts of the case, Madrid and Williamson were wearing tactical gear with police markings. We understand that Mrs. Torres claims she was not aware that the officers were in fact officers, but that has no relation to the officers actions. For all of the forgoing reasons, permitting a suit to continue is unlikely to yield a remedy in Torres favor.

The petitioner relies heavily on multiple Fourth Amendment search cases. Among these are most notably *United States v. Jones*[50], and *Carpenter v. United States*[51]. These cases are far from applicable to the petitioners claim, seeing as *Jones* was focused on property interest and what encompasses a 'search', and *Carpenter* was concerned with historical cell site location data. *Jones* and *Kyllo v. United States*[52], were used to establish that the Fourth Amendment "must provide at a minimum the degree of protection it afforded when it was adopted,"[53] and that "we must assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[54] While these two claims are valid, the framework of these two cases are not relevant. Due to their irrelevance, using the precedent set in *United States v. Caira*[55], "Justice Scalia's lead opinion [in

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[49] *Tennessee v. Garner,* 471 U.S. 1 (1985)

[50] *United States v. Jones,* 565 U.S. 400 (2012)

[51] *Carpenter v. United States,* 138 S.Ct. 2206 (2018)

[52] *Kyllo v. United States,* 533 U.S. 27, 34 (2001)

[53] *United States v. Jones,* 565 U.S. 400 (2012)

[54] *Carpenter v. United States,* 138 S.Ct. 2206 (2018)

[55] *United States v. Caira*, 833 F.3d 803, 808 (7th Cir. 2016)

Jones] applied a framework that is not relevant here."[56] Even if these claims are applicable it cannot be said that our reading of the Fourth Amendment provides less protection than at the time its founding. Additionally, the petitioner used *Maryland v. King* to prove that the bullet is "an invasion of 'cherished personal security' that is subject to constitutional scrutiny."[57] While this claim is valid, the action can be scrutinized under the Fourteenth Amendment's Due Process Clause, not the Fourth Amendment.

B. Other Legal Avenues Were Available to Petitioner

The Fourth Amendment was created to protect the privacy of citizens. It is a barrier that stops law enforcement from using illegally obtained evidence, information, as well as disqualifies adjudication of an illegally obtained suspect. That the Fourth Amendment was made to protect civilians from police misconduct is simply false; that is the realm of the Due Process Clause.

In 1998, in the case of *County of Sacramento v. Lewis*[58], Justice Souter wrote in the majority opinion, quoting the 1996 decision of *Evans v. Avery*[59], that, "'outside the context of a seizure … a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983.'"[60] Thus, should it be ruled that Ms. Torres was not seized, her only legal remedy would be that any 'excessive force' used by Officers Madrid and Williamson remains in violation of the Due Process Clause of the Fourteenth Amendment, which protects an individual's "life, liberty, or property" from being taken "without due process of law."[61] When a law enforcement officer acts in a way which is arbitrary or 'shocks the conscience,' in other words, if they deliver justice through physical assault, assault far out of proportion with the crime that may or may not have been committed, they deprive the victim of due process. That being said, the function of this Court is to

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[56] *Id .*

[57] *Maryland v. King, 569 U.S. 435, 446 (2013),*

[58] *Sacramento v. Lewis, 523 U.S. 833*

[59] Evans v. Avery, 130 So. 2d 373 - 1961

[60] *Id.*

[61] *U.S. Const. amend. XIV, § 2*

determine whether the shooting of Ms. Torres in and of itself constituted a seizure under the meaning of the Fourth Amendment, not to rule on the integrity of the actions of the officers or Ms. Torres, reasonable or otherwise.

CONCLUSION

Under the Fourth Amendment, Ms. Torres wasn't seized, and without seizure, no Fourth Amendment violation can be made. The one line claim from *Hodari* cannot be used to support the majority of the petitioner's argument because it is dicta. Moreover, it is clear that the vast majority of Fourth Amendment jurisprudence has equated a seizure to the stoppage, or acquisition of control over a suspect. By applying Justice Scalia's dicta to the Fourth Amendment, it is apparent that the ruling in *Hodari* cannot be applied blindly, further illustrating why we must use multiple methods of analysis when considering the definition of seizure in the context of this case. Once this concept is understood, it is very apparent that *Brower* is more applicable to the outcome of *Torres*, and is the standing use of precedent for cases that deal with 'physical force.' Even if this Court rules that Ms. Torres was seized under the Fourth Amendment, Officers Madrid and Williamson remain protected under qualified immunity. If qualified immunity falls, using the test of reasonability and case law, it still can be determined that Officers Madrid and Williamson were reasonable in their actions. Lastly, because, in this case, the definition of seizure directly influences the protection of a fundamental right, we argue that strict scrutiny should be used to consider the implications of the meaning of 'seizure' on its own in the Constitution. Applying the dictum in *Hodari* hurts the public and state interest, and erodes the meaning of seizure under the Fourth Amendment, not supporting the founders' intentions. As case law dictates, Torres must win all of these arguments to ensure the right to sue officers Madrid and Williamson under the Fourth Amendment. She must prove she was seized, therefore proving *Hodari* is applicable. Then she must show that the officers were not protected by qualified immunity, and explain how her position is supported by Strict Scrutiny. Furthermore, she must explain how her broad reading of the Fourth Amendment supports what the Founder intended, or why it must be changed to better protect state and public interest. If it is determined that the officers are not protected under qualified immunity, Ms. Torres must then go on to prove the officers actions were unreasonable given the circumstances. Without a single one of these requirements, the petitioner cannot legally claim 'excessive force,' and the decision of the Tenth Circuit should unquestionably stand.

Respectfully submitted,

LEIGHTON SCHUR
Counsel of Record
Joel Barlow High School
School Address
Redding, 06896
2038565177
l8onschur@gmail.com

CATHERINE GUTOWSKI
Joel Barlow High School
100 Black Rock Turnpike
Redding, 06896
2034511447
catherine.gutowski@er9.org

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