RECORD NO. 22-2001

In The
United States Court of Appeals
For The Tenth Circuit

ROXANNE TORRES,

Plaintiff – Appellant,

v.

JANICE MADRID, *et al.*,

Defendants – Appellees.

**On Appeal from the United States District Court
for the District of New Mexico
Civil Action No. 1:16-CV-01163-LF-KK
Hon. Laura Fashing**

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to securing greater protection for individual liberty. IJ is a leading voice on restoring constitutional limits on the power of government, including holding individual public officials accountable for their constitutional wrongdoings and ensuring courts, like the district court in this case, do not act outside the powers granted to them by the U.S. Constitution to further immunize government officials from wrongdoing.

IJ's work on official accountability includes litigating cases (*e.g.*, *Brownback v. King*, 141 S. Ct. 740 (2021)), filing amicus briefs in the Supreme Court and federal circuit courts (*e.g.*, Brief of *Amicus Curiae* Institute for Justice in Support of Respondent, *Egbert v. Boule*, No. 21-147 (S. Ct. Jan. 26, 2022)), publishing scholarship (*e.g.*, Patrick Jaicomo & Anya Bidwell, *ecalibrating Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105 (2022)),

[1] Pursuant to Fed. R. App. P. 29, all parties have consented to the filing of this brief. No party or party's counsel for either side authored this brief in whole or in part. No person or entity other than Amicus and its members made a monetary contribution to its preparation or submission.

and conducting nationwide research (*e.g.*, Institute for Justice, *50 Shades of Government Immunity* (Jan. 25, 2022), https://ij.org/report/50-shades-of-government-immunity/).

SUMMARY OF ARGUMENT

In addition to the reasons set forth in Appellant's Opening Brief, this Court should reverse the district court's dismissal of Roxanne Torres's Fourth Amendment claim because the district court relied on irrelevant and improper facts to grant qualified immunity to Officers Madrid and Williamson. Under a proper application of the qualified immunity analysis set forth by the United States Supreme Court, qualified immunity should be denied and Ms. Torres's claims should go forward.

The district court awarded Officers Madrid and Williamson qualified immunity for shooting Ms. Torres because, in the court's view, the officers did not have fair notice that they were committing a constitutional violation when they used lethal force against the non-threatening Ms. Torres. To support this conclusion, the court observed (likely incorrectly, *see infra* p. 14, n.3) that it was not clearly established until *Torres v. Madrid*, 141 S. Ct. 989

(2021), that an officer seizes a person against whom he used force even if that person temporarily avoids capture.

This analysis misses the mark. It does not matter if officers know that they will eventually seize their suspect *after* they use force. For qualified immunity purposes, it only matters whether, at the time they acted, the officers had fair notice that the force they used exceeded the need for force, thus violating the Fourth Amendment. But the district court never asked this question. Instead, it pointed to the fact that, after she was shot, Ms. Torres evaded custody for a few more hours—a fact knowable only after the officers pulled their triggers—as a reason why the officers could not have known that pulling the trigger in the first place was unconstitutionally excessive. This was incorrect. An axiomatic limitation of qualified immunity is that courts may not look beyond "'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam)).

By introducing an additional escape valve from liability into the qualified immunity analysis, the district court flouted our nation's long history of imposing strict liability against government officials for their unconstitutional conduct and ignored separation of powers principles.

The proper question for the qualified immunity analysis set forth by the Supreme Court is simply: Did Officers Madrid and Williamson violate clearly established law when they shot a fleeing woman after any threat to the officers or others expired? At least since the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), and this Court's decision in *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), the answer, plainly, is "yes": Officers may not use deadly force against a non-threatening person merely trying to escape. Therefore, this Court should reverse the district court's summary judgment in favor of the Defendants–Appellees.

ARGUMENT

I. Congress enacted 42 U.S.C. § 1983 to afford victims a meaningful remedy for constitutional violations.

At our nation's founding, and for many decades that followed, victims of government misconduct were empowered to hold wrongdoers accountable through damages suits. *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1874 (2010). Rules in favor of liability were strict, and they did not spare even those who acted in good faith or under official order. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804). While some justices acknowledged that this strict system caused them pause and that they may have favored an exception for those who were following orders or acting in good faith, they recognized that it was not the power of the courts to provide such an exception, which would eliminate recompense for harms and contravene the separation of powers. *See id.* As Justice Story explained in *The Apollon*, "[the Supreme] Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable

redress." 22 U.S. (9 Wheat.) 362, 366–67 (1824). It was not the role of the judiciary to provide protections from liability; it was for the legislature to, if appropriate, "apply a proper indemnity." *Id.* at 367.

Reinforcing the historical rule of strict liability, Congress enacted the 1871 Ku Klux Klan Act. In the wake of the Civil War and ratification of the Fourteenth Amendment, Congress created a civil cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983). This provision is now commonly known as "Section 1983" and is the basis of the suit before this Court today.

Section 1983 does not include any exceptions, and it is well established that none existed outside the statute. *See* Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 119 (2022); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50–61 (2018). For nearly 100 years, courts faithfully applied Section 1983,

rejecting defendants' pleas to be excused from liability. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 377–78 (1915); *Poindexter v. Greenhow*, 114 U.S. 270, 298 (1885); *United States v. Lee*, 106 U.S. 196, 220 (1882); *Bates v. Clark*, 95 U.S. 204, 209 (1877); *see also Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (noting the long history of damages relief for government officials' violations).

That is until 1967, when the Supreme Court denounced strict liability and created its own exception to Section 1983 actions. In *Pierson v. Ray*, the Court, for the first time, shielded officers from suit under its contemporaneously declared "defense of good faith and probable cause," which the Court adopted from the common-law tort of false arrest. 386 U.S. 547, 556 (1967).[2] This defense would shield officials who were acting on the orders of another—even if those orders were unconstitutional—or executing

[2] *Pierson*'s analysis is dubious. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 52–56 (2018). In addition to contravening the many decisions that came before it, *Pierson*'s statutory justification contradicted the original text of Section 1983 and its historical application. *See* Baude, *supra*, at 54–56; Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 122 n.118 (2022) (discussing similar issues with *Pierson*'s analysis).

a law—even if the law was invalid, *id.* at 555–56, unless the officer did so in bad faith. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

While *Pierson* was a relatively modest exception to the strict liability that previously controlled, it was not long before exemption from liability became the norm. Merely 15 years after *Pierson* was decided, the Supreme Court issued *Harlow v. Fitzgerald*, entirely discarding historical standards of liability and creating the doctrine of qualified immunity we know today. 457 U.S. 800, 813–14 (1982). Weighing the "competing values" of constitutional guarantees against litigation costs, *Harlow* concluded that it was too expensive to require government officials to establish good faith for their unlawful acts. *Id.* at 817. So, instead, the Court declared that: "[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. As the Court explained, qualified immunity imposes an objective test that asks whether the law violated by the government official "was clearly established

at the time an action occurred," such that the official could "fairly be said to 'know' that the law forbade [his] conduct." *Id.*

With one decision, not only was the history of strict liability completely undone, but protection from liability became the new default. The Court's decision in *Harlow* and the decades of decisions that have followed are a far cry from the separation of powers insisted upon by Chief Justice Marshall and Justice Story—among others—for most of our nation's jurisprudential history.

Of course, only the Supreme Court can reverse the clock, but circuit courts, like this Court, can (and should) ensure that the principles of redressability and separation of powers are not further undermined by rejecting lower courts' attempts to introduce additional protections that have no basis in the law, history, or even the purposes of qualified immunity articulated in *Harlow*. *See Malley v. Briggs*, 475 U.S. 335, 342 (1986) (recognizing that courts' "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that [they] are guided in interpreting Congress' intent by the common-law tradition").

This is one such case. The district court here attempts to provide even greater protections than those set forth by the Supreme Court and this Court, extending immunity based on irrelevant and improper facts. This Court, therefore, should reverse.

II. The district court erred in relying on an irrelevant factor to award Officers Madrid and Williamson qualified immunity.

As noted, modern qualified immunity protects government officials from accountability unless their conduct violated (1) a constitutional or statutory right (2) that was clearly established at the time of their actions. *Harlow*, 457 U.S. at 818. In this case, Ms. Torres sued Officers Madrid and Williamson for violating her Fourth Amendment right to be free from excessive force when they twice shot her in the back, even though she did not pose a threat to anyone's safety. As is almost always the case, the officers invoked qualified immunity. Therefore, under Supreme Court and this Court's precedent, the district court was tasked with answering two questions: (1) Did the officers violate the Fourth Amendment when they shot Ms. Torres; and (2) Did the law clearly establish that an officer may not shoot

a non-threatening woman, even if she is fleeing, at the time Officers Madrid and Williamson pulled their triggers?

However, the court answered neither question. Instead, the district court held that the officers were entitled to qualified immunity because, in the court's view, it was not clearly established until *Torres v. Madrid*, 141 S. Ct. 989 (2021), that the officers seized Ms. Torres because she continued driving away after being shot.[3] In so doing, the district court contravened Supreme Court precedent and further eroded the historical tradition of holding government officials accountable for constitutional violations.

The district court's analysis stems from this Court's caselaw providing that "[w]ithout a seizure, there can be no claim for excessive use of force."

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[3] Although Amicus principally writes to explain the district court's error in its application of qualified immunity, it also notes that the district court misstated the holding of *Torres*. App. Vol. II at 315–316 (quoting *Torres*, 141 S. Ct. at 995). *Torres* did not hold that *California v. Hodari D.*, 499 U.S. 621 (1991), failed to clearly establish that a "seizure" occurs when an officer uses force against someone who temporarily evades custody. To the contrary, the *Torres* Court expressly noted that it was not necessary to decide whether this principle was already clearly established in *Hodari D.* because it was independently obvious, based on common law and precedent, that shooting someone, regardless of their subsequent evasion from custody, is a seizure. *Torres*, 141 S. Ct. at 995.

App. Vol. II at 313 (quoting *Jones v. Norton*, 809 F.3d 564, 575 (10th Cir. 2015)). In other words, the district court seems to believe that the officers are entitled to qualified immunity unless clearly established law informed them that their behavior would ultimately result in a seizure. This is simply incorrect.

Whether a seizure occurred is certainly a "threshold" inquiry for determining whether a Fourth Amendment claim exists in the first place. *See Lindsey v. Hyler*, 918 F.3d 1109, 1115 (10th Cir. 2019). Because, of course, without a "search" or a "seizure," a case isn't even in the Fourth Amendment universe. But whether a seizure occurred sheds no light on the *constitutionality* of the seizure. After all, the Fourth Amendment does not protect against seizures generally; it protects against "*unreasonable* searches or seizures." U.S. Const. amend. IV.

Mapped onto the two-prong qualified immunity analysis, whether there was a seizure is simply a predicate necessary for determining whether a constitutional violation occurred (prong 1), but it is irrelevant to whether the law clearly established the specific constitutional right at issue (prong 2). Assessing whether an officer's behavior violated clearly established law

turns entirely on the *reasonableness* of the seizure. *See, e.g.*, *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1187–88, 1195–97 (10th Cir. 2001).

For instance, in *Holland*, this Court addressed whether officers were entitled to qualified immunity for their actions during a SWAT team raid. *Id*. at 1186–87. In its analysis, this Court considered both prongs of the qualified immunity test.[4] In addressing the first prong—i.e., whether the officers violated the Constitution—this Court answered the three questions for an excessive force claim: (1) Was there a seizure?; (2) Was the seizure unreasonable?; and (3) Was there an injury? First, despite the officers' arguments to the contrary, this Court concluded that the officers seized the plaintiffs by holding them at gunpoint. *Id.* at 1187–88. Next, this Court applied the factors set forth in *Graham v. Connor*, 490 U.S. 386 (1989), to determine that the seizure was objectively unreasonable. *Id.* at 1188–95.

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[4] At the time *Holland* was decided, courts were required to address both prongs of the qualified immunity test in sequential order. *Holland*, 268 F.3d at 1186 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). In *Pearson v. Callahan*, however, the Supreme Court removed this requirement, enabling courts to address the factors in either order and to skip over the first prong entirely. 555 U.S. 223, 236 (2009).

Finally, this Court found that the plaintiffs had alleged a sufficient injury, even though their injuries were emotional rather than physical. *Id.* at 1195.

Concluding that the SWAT Team violated plaintiffs' Fourth Amendment rights, this Court then moved to prong two of the qualified immunity analysis: whether the SWAT Team's conduct violated a clearly established right. *Id.* Importantly, this Court did not ask whether it was clearly established that a seizure occurred or whether it was clearly established that a non-physical injury was sufficient.[5] Those were questions relevant only to whether the plaintiffs had stated a Fourth Amendment claim. The clearly established inquiry, in contrast, focused on only one question: whether the officers' use of force was reasonable, "based upon the information the officers had when the conduct occurred." *Id.* at 1195–97

[5] If this Court had imposed a "clearly established" requirement for either factor, the plaintiffs almost certainly would have lost. *See Holland*, 268 F.3d at 1188 (providing no caselaw for the proposition that holding a person at gunpoint is a "seizure"); *id.* at 1195 (acknowledging that this Court had previously "never upheld an excessive force claim without some evidence of physical injury" (quoting *Bella v. Chamberlain*, 24 F.3d 1251, 1257 (10th Cir. 1994)).

(emphasis added) (quoting *Saucier v. Katz*, 533 U.S. 194, 207 (2001)). This Court determined it was not. So it denied qualified immunity. *Id.* at 1197.

While showing that a seizure ultimately occurred (and that the plaintiff suffered an injury) is a necessary predicate for there to be an Fourth Amendment violation, it makes no difference to whether the officers' application of force was reasonable, which is the only relevant question for determining whether an officer violated clearly established law.[6] As the Supreme Court explained in *Tennessee v. Garner*, the crux of any excessive force claim is not whether a seizure occurred or whether it was supported by probable cause; it is "*how* that seizure is made." 471 U.S. 1, 7–8 (1985); *see also County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) ("The operative question in excessive force cases is whether the totality of the circumstances justifies a particular sort of search or seizure." (cleaned up)).

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[6] *See, e.g.*, *Maresa v. Bernalillo County*, 804 F.3d 1301, 1308–10, 1313–15 (10th Cir. 2015) (treating question of whether force was excessive separate from questions of whether conduct amounted to a seizure and whether injury was sufficient to state a Fourth Amendment claim); *Cortez v. McCauley*, 478 F.3d 1108, 1130–32 (10th Cir. 2007) (en banc) (similar).

Here, there is no question that a seizure occurred: The Court confirmed that in *Torres v. Madrid*, 141 S. Ct. 989 (2021). As in *Holland*, whether the law clearly established that the officers' actions would ultimately result in a seizure at the time of their actions does not matter. All that needs to be clearly established for Ms. Torres's claims to continue is the unreasonableness of the officers' use of force. As discussed below, she hurdled this burden.

III. The district court erred in relying on facts Officers Madrid and Williamson did not know when they pulled their triggers to award the officers qualified immunity.

Logically, it makes sense that whether a use of force ultimately resulted in a seizure (or, for instance, a sufficient injury) is relevant only to assessing whether a Fourth Amendment violation occurred, not whether clearly established law put officers on notice that their behavior was unconstitutional. After all, it is impossible to answer those questions until *after* the officer acted. *Cf. Rhodes v. Robinson*, 408 F.3d 559, 570 (9th Cir. 2005) ("Taken to its logical extreme, the officers' claim would insulate any retaliatory conduct from later sanction, for no officer can observe whether

his or her retaliation has successfully chilled a prisoner's rights until long after deciding to act."). And "[e]xcessive force claims . . . are evaluated . . . based upon the information the officers had when the conduct occurred," *Saucier v. Katz*, 533 U.S. 194, 207 (2001), "rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Therefore, by conditioning its grant of qualified immunity on information that Officers Madrid and Williamson could have only learned after they shot Ms. Torres, the district court erred.

a. Whether an officer is entitled to qualified immunity can never be assessed through 20/20 hindsight.

An officer is not entitled to qualified immunity if he violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *Pauly*, 137 S. Ct. at 551). When boiled down, this inquiry asks what a reasonable officer would have done with the facts and law knowable "*at the time of the conduct*" in question. *Id.* (emphasis added) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

Because the qualified immunity analysis hinges on how an officer acted in the circumstances he faced at the time of his conduct, courts may

not judge an officer's actions "with the 20/20 vision of hindsight," regardless of what later-developed facts or law reveal about the officer's conduct. *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).

We see this rule play out all the time. For example, an officer who aims a gun at the driver of a vehicle reported as stolen is not deemed to have acted unreasonably just because the facts later reveal that the driver didn't steal the vehicle. *Henry v. Storey*, 658 F.3d 1235, 1237, 1240 (10th Cir. 2011).

The rule works both ways: Officers cannot justify their conduct by pointing to facts they did not know at the time they acted. The Supreme Court made this point clear in *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), when it reversed the Fifth Circuit for granting qualified immunity on the basis of facts not known to the defendant at the time of his conduct.

In *Hernandez*, a U.S. Border Patrol agent stood on U.S. soil and fatally shot 15-year-old Hernandez, who stood on Mexican soil. The Fifth Circuit granted qualified immunity because, it determined, the law did not clearly establish that an officer cannot shoot "an alien who had no significant voluntary connection to, and was not in, the United States when the incident

occurred." *Hernandez v. United States*, 785 F.3d 117, 120 (5th Cir. 2015) (en banc) (per curiam), *vacated and remanded sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).

The Supreme Court disagreed with the Fifth Circuit's conclusion—not because the circuit court was incorrect about what law was clearly established, but because it was relying on extraneous facts and, in turn, answering the wrong question. When the border patrol agent pulled his trigger, he had no idea whether the boy standing on Mexican soil was "an alien" or a U.S. citizen, or what connections, if any, he had to the United States. *Hernandez*, 137 S. Ct. at 2006. That Hernandez was a Mexican national became apparent only after the shooting. *Id.* at 2007. And as the Supreme Court explained, "[t]he qualified immunity analysis . . . is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question." *Id.* (quoting *Pauly*, 137 S. Ct. at 550). Therefore, the Court concluded, the Fifth Circuit incorrectly awarded qualified immunity based on facts "not relevant." *Id.*

Even before *Hernandez*, circuit courts, including this Court, had already recognized that an assessment of an officer's conduct is limited to the facts known by the government official at the time of his conduct. For instance, in *Al-Turki v. Robinson*, Colorado state prisoner Homaidan Al-Turki sued his prison nurse for refusing to provide any care when Al-Turki—a high-risk patient with Type II diabetes—suffered debilitating pain one night. 762 F.3d 1188, 1194 (10th Cir. 2014). In response, the nurse invoked qualified immunity. *Id.* She explained that, the next morning, Al-Turki's pain subsided after he passed two kidney stones. *Id.* at 1191–1192. The condition was not life-threatening and, due to intermittent unconsciousness, Al-Turki had "only" suffered five or six total hours of pain. *Id.* at 1194. So, the nurse argued, she had not violated the Eighth Amendment. *Id.*

This Court roundly rejected the nurse's arguments. Specifically, this Court emphasized, she could not rely on later-known facts—such as the eventually revealed source of Al-Turki's pain—to justify her actions from the night before. This Court expressly recognized that the qualified immunity analysis turns not on "the facts we now know . . . [but] the facts

that *were known at the time*." *Id.* (emphasis added). That night, when Al-Turki's nurse refused to provide medical treatment, all she knew was that her patient was "a diabetic inmate who had collapsed onto the floor, repeatedly vomited, and complained . . . of severe abdominal pain." *Id.* Under those facts, it was clearly established that she should have provided medical care; as such, this Court denied qualified immunity. *Id.* at 1195.

More than a decade earlier, the Eleventh Circuit articulated the same rule of law. *See Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002). In *Lee*, the Eleventh Circuit denied qualified immunity to an officer who applied excessive force against a nonresistant woman he pulled over for improper use of a car horn. *Id.* at 1190. Before the woman could even grab her license, the officer yanked her out of the car, handcuffed her, and slammed her head against the car. *Id.* at 1191. In his defense, the officer claimed that his force was not excessive because the arrestee ultimately did not suffer substantial injury to her head as a result of being slammed against the trunk of a car. *Id.* at 1199–1200.

The Eleventh Circuit didn't buy the officer's arguments. To explain, the court analogized to its prior decision in *Rodriguez v. Farrell*, where the court *granted* qualified immunity to an officer who painfully handcuffed a man recovering from a recent elbow surgery. 280 F.3d 1341 (11th Cir. 2002). Just as reasonable force (like handcuffing) does not become unreasonable when it aggravates a preexisting condition unknown at the time (like an arrestee's recent elbow surgery), the court emphasized, "objectively unreasonable force does not become reasonable simply because the fortuity of the circumstances protected the plaintiff from suffering more severe physical harm." *Lee*, 284 F.3d at 1200. In other words, that the arrestee was ultimately spared a more severe injury did not transform the officer's excessive force into reasonable conduct. When the officer slammed the already handcuffed woman's head against the car, he had no way of

knowing the severity of injury his unnecessary force would cause—but he should have known that slamming her head was excessive.[7]

Limiting the qualified immunity analysis to facts that were knowable to the officer is critical to ensuring that the doctrine does not become even more unmoored from history than it already is. Courts have justified qualified immunity as a way to protect an officer from liability when he cannot reasonably know whether his conduct is unlawful "*before* he does it." *Al-Turki v. Robinson*, 762 F.3d 1188, 1195 (10th Cir. 2014) (internal quotation omitted)). Therefore, awarding qualified immunity based on information received *after* the questionable conduct serves neither history nor even the

[7] Across the board, the circuit courts properly limit the qualified immunity analysis to facts known at the time of the officer's conduct. *See, e.g.*, *Est. of Bennett v. Wainwright*, 548 F.3d 155, 172 (1st Cir. 2008); *O'Bert ex rel. Est. of O'Bert v. Vargo*, 331 F.3d 29, 36–37 (2d Cir. 2003); *Jefferson v. Lias*, 21 F.4th 74, 85 (3d Cir. 2021); *Jackson v. Long*, 102 F.3d 722, 727 (4th Cir. 1996); *Solis v. Serrett*, No. 21-20256, 2022 WL 1183762, at *1, __ F.4th __ (5th Cir. Apr. 21, 2022); *Onwenu v. Bacigal*, 841 F. App'x 800, 807–08 (6th Cir. 2021); *Abbott v. Sangamon County*, 705 F.3d 706, 724 (7th Cir. 2013); *Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006); *Cox v. Dep't of Soc. & Health Servs.*, 913 F.3d 831, 838 (9th Cir. 2019); *Jones v. Cannon*, 174 F.3d 1271, 1283 n.4 (11th Cir. 1999).

purpose of qualified immunity, nor does it comport with the Supreme Court's commands. *See Hernandez*, 137 S. Ct. at 2007.

b. Contrary to Supreme Court precedent, the district court granted qualified immunity to Officers Madrid and Williamson based on facts the officers did not know—and could not have known—at the time they shot Ms. Torres in the back.

Despite *Hernandez*'s clear command, the district court relied on facts unknown to Officers Madrid and Williamson to grant them qualified immunity.

Here's what the record before this Court shows: One early Albuquerque morning in 2014, Ms. Torres was sitting in her car when she noticed two armed, dark-clothed figures trying to open her car door. App. Vol. I at 28; App. Vol. II at 308. Believing the two figures to be carjackers—though they were in fact Officers Madrid and Williamson—Ms. Torres hit the gas to escape. App. Vol. I at 165–167; App. Vol. II at 308. As she tried to get away, Officers Madrid and Williamson began firing their guns. App. Vol. I at 19; App. Vol. II at 309. And even after Ms. Torres's vehicle passed both officers—thus eliminating any perceivable threat to either the officers or the public—the officers continued to fire their service weapons, striking Ms.

Torres twice in the back. App. Vol. 1 at 152; App. Vol. II at 309. Despite the gunshot wounds, Ms. Torres continued driving until she reached a hospital in Grants, New Mexico. App. Vol. I at 63; App. Vol. II at 309. Once there, doctors flew her back to Albuquerque for life-saving care, where she was placed under arrest. App. Vol. I 63, 94; App. Vol. II at 309.

Even though there is no dispute that Officers Madrid and Williamson shot a non-threatening woman in flight—a clear contravention of established law—the district court nonetheless awarded the officers qualified immunity. It did so based on irrelevant and improper facts. Specifically, the district court held that qualified immunity was appropriate because, in the court's view, the officers did not have fair notice that shooting Ms. Torres was a seizure because Ms. Torres temporarily evaded capture when she continued her drive to Grants, New Mexico. App. Vol. II at 313–315.

Just like in *Hernandez*, *Al-Turki*, and *Ferraro*, that was the wrong inquiry. Whether the officers knew that, in light of Ms. Torres's temporary evasion, their shots would amount to a seizure is simply irrelevant to whether the officers were justified in pulling their triggers in the first

instance and is dependent upon "the 20/20 vision of hindsight." *Kingsley*, 576 U.S. at 397.

The moment Officers Madrid and Williamson shot at Ms. Torres, they had no idea whether Ms. Torres would immediately come to a stop, stop a few feet down the road, or escape entirely. The only thing they knew is that a non-threatening suspect was attempting to flee, and, based on that information alone, they continued firing their service weapons after Ms. Torres's car passed them. By conditioning the clearly established prong of its analysis on later-learned information, the district court made the same error the Fifth Circuit made in *Hernandez*. Just as the Fifth Circuit justified a border patrol agent's shooting of Hernandez by pointing to Hernandez's (then-unknown) Mexican nationality, the district court here justified the officers' shooting of Ms. Torres on the basis of her then-unknown, *post-shooting* evasion. This holding contravenes Supreme Court and this Court's precedent, demanding reversal.

IV. Officers Madrid and Williamson had fair notice that shooting a non-threatening driver in flight was unlawful.

Under the correct analysis, the result is clear: Officers Madrid and Williamson violated clearly established law when they shot a fleeing suspect after she drove past the officers thus posing no threat to them or to others.

Simply, officers cannot gun down nonthreatening suspects in an effort to apprehend them. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Rather, the use of deadly force requires probable cause that a person "poses a threat of serious physical harm, either to the officers or to others." *Garner*, 471 U.S. at 11.

Officers Madrid and Williamson shot at Ms. Torres even though she did not present any threat. This fact is beyond dispute. And when Officers Madrid and Williamson fired their guns, they had fair notice that shooting a non-threatening person driving away was unlawful.

An officer who, at the time of her conduct, had fair notice that her conduct was unlawful cannot receive qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The fair notice inquiry is about asking whether "a reasonable officer in [the defendant's] shoes" would have understood that

what she was doing was wrong. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007). As this Court stated, because whether force is excessive is "a fact-specific inquiry . . . 'there will almost never be a previously published opinion involving exactly the same circumstances.'" *Morris v. Noe*, 672 F.3d 1185, 1196 (10th Cir. 2012) (quoting *Casey*, 509 F.3d at 1284). Yet, here, even that nearly unattainable standard is satisfied. Since at least 2009, it has been clearly established that officers may not shoot a non-threatening person as she attempts to drive away. *See Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009).

As in this case, *Cordova* came before this Court after the district court awarded summary judgment to an officer who fired multiple gunshots at a person who was driving away from the officer. *Id.* at 1185–86. The officer, who was on foot, claimed he fired his gun because he was in immediate danger of Cordova bearing down on him in a truck. *Id.* at 1186–87. The district court held the officer acted reasonably throughout the entire incident in light of the officer's claim that he was in immediate danger. *Id.* at 1187. This Court disagreed. The evidence showed that Cordova had turned his

truck away from the officer before the officer fired his fatal shot, casting doubt on the officer's claims of immediate danger. *Id.* This Court then analyzed the reasonableness of the officer's conduct under the three *Graham* factors, concluding that the officer used excessive force by shooting a driver who did not pose an imminent threat. *Id.* at 1190.[8]

Cordova alone is sufficient to demonstrate that clearly established law existed in 2014. But if there were any question about whether *Cordova* sufficiently put Officers Madrid and Williamson on notice that their actions were unconstitutional, this Court removed all doubt in *Reavis ex rel. Est. of Coale v. Frost*, 967 F.3d 978 (10th Cir. 2020). There, under facts similar to those here, this Court explained that, "[g]iven [this Court's 2009] decision in *Cordova*, it would be clear to every officer that the use of deadly force to stop a fleeing vehicle is unreasonable unless there is an immediate threat of harm to himself or others." *Frost*, 967 F.3d at 995; *see also Orn v. City of Tacoma*, 949

[8] After establishing that the officer's actions violated the Fourth Amendment, the Court ultimately affirmed summary judgment because, at that time, the unlawfulness of those actions had not yet been clearly established. *Id.* at 1193.

F.3d 1167, 1178 (9th Cir. 2020) (noting that before 2011, at least seven circuits, including this one, had clearly established the same rule). Though *Frost* was decided in 2020, it unequivocally confirms that the rule set forth in *Cordova* was clearly established in 2009, and, thus, in 2014. Again, if there were a question about "whether *Cordova* provided 'fair warning' to a reasonable officer . . . that officers may not use lethal force against a driver who does not pose an immediate threat to officers or third parties," *Simpson v. Little*, 16 F.4th 1353, 1366 (10th Cir. 2021), the answer is clear. "It did." *Id.*

CONCLUSION

The district court erred when it granted summary judgment for Officers Madrid and Williamson on the basis of qualified immunity. This Court, therefore, should reverse.

Dated: May 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to all registered participants.

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