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# Constitutional Law—Fourth Amendment and Seizures—Accidental Seizures by Deadly Force: Who is Seized During a Police Shootout? Plumhoff V. Rickard, 134 S. Ct. 2012 (2014).

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CONSTITUTIONAL LAW—FOURTH AMENDMENT AND SEIZURES—ACCIDENTAL SEIZURES BY DEADLY FORCE: WHO IS SEIZED DURING A POLICE SHOOTOUT? *PLUMHOFF V. RICKARD*, 134 S. CT. 2012 (2014).

## I. INTRODUCTION

> [Donald] Rickard, 44, and his live-in girlfriend, Kelly Allen, 44, died July 18[, 2004,] after West Memphis police chased them into Memphis and shot into their car.
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> . . .
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> Police found them dead after their car slammed into a North Memphis house. Either the gunshots or the crash could have killed them, the medcal examiner says.
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> . . .
>
> Even if Rickard did ram one of their cruisers when cornered . . . as West Memphis police contend, were officers justified in shooting, especially with another person in the car?[1]

This decade-old newspaper account describes an unfortunately familiar type of police-citizen encounter and raises a question that continues more than ten years later to challenge courts across the country. Between 2005 and 2012, police officers in the United States were responsible for an average of 400 fatal shootings per year.[2] In light of the need to subject police conduct to constitutional scrutiny,[3] the judiciary plays an important role in probing police shootings, deterring misconduct, and incentivizing reforms necessary to reduce unconstitutional conduct.[4] However, federal courts' excessive force and seizure decisions have not yielded clear, bright-line mandates for law enforcement officers.[5]

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1. Chris Conley, *2 Dead, Police Probe Asks Why*, MEMPHIS COMMERCIAL APPEAL, July 25, 2004, at B1.

2. Kevin Johnson et al., *Local Police Involved in 400 Killings Per Year*, USA TODAY (August 15, 2014, 9:41 AM), http://www.usatoday.com/story/news/nation/2014/08/14/police-killings-data/14060357/.

3. Kathryn R. Urbonya, *"Accidental" Shootings As Fourth Amendment Seizures*, 20 HASTINGS CONST. L.Q. 337, 380 (1992) [hereinafter Urbonya, *"Accidental" Shootings*].

4. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 34 (2012). Justice Robert H. Jackson explained that "the right to be secure against searches and seizures is one of the most difficult to protect. Since [police] officers are themselves the chief invaders, there is no enforcement outside of court." Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

5. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 198 (1993) ("The entity primarily responsible for educating the public and the

Cases that arise when police officers cause injuries to bystanders and passengers during high-speed chases engender a unique breed of claim that lives somewhere on the hazy frontier between the constitutional prohibition of unreasonable seizure and the guarantee of substantive due process.[6] The Supreme Court of the United States has held that police officers' use of deadly force to *apprehend* a criminal suspect triggers the protections of the Fourth Amendment,[7] but accidental applications of police force do not fall neatly into this category of Fourth Amendment decisions.[8] The Civil Rights Act of 1871—codified as 42 U.S.C. § 1983—and its state corollaries provide means of redress for the deprivation of constitutional rights,[9] and most section 1983 lawsuits are excessive-force claims brought against state and local government officials.[10] But whether an innocent person injured or killed by police force can recover on a Fourth Amendment claim brought under section 1983[11] is a closer question that often turns on where the incident took place.[12] Indeed, the Supreme Court recently recognized that "[t]here seems to be some disagreement among lower courts as to whether [a vehicle] passenger . . . can recover under a Fourth Amendment theory" for claims of excessive force.[13] Underlying the circuit split over such claims

police about the Fourth Amendment—the United States Supreme Court—has often tried, without much success, to alleviate society's confusion about the amendment.").

6. Andrew J. Mathern, Note, *Federal Civil Rights Lawsuits and Civil Gideon: A Solution to Disproportionate Police Force?*, 15 J. GENDER RACE & JUST. 353, 361 (2012) ("The Supreme Court most commonly analyzes excessive force under either the Fourth Amendment's prohibition against unreasonable seizures or the substantive due process component of the Fifth and Fourteenth Amendments."). *See also* Mary Helen Wimberly, Note, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 288–89 (2007) (discussing the first Supreme Court decision analyzing the Fourth Amendment, *Boyd v. United States*, 116 U.S. 616 (1886), in which the Court found that the Fourth Amendment and Fifth Amendment "run almost into each other").

7. Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

8. *See* discussion *infra* Parts II.A–C.

9. See Michael Mosley et al., *Sixteen Years of Litigation Under the Arkansas Civil Rights Act: Where We Have Been and Where We Are Going*, 32 U. ARK. LITTLE ROCK L. REV. 173 (2010).

10. ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 8–9, at 600 (6th ed. 2012).

11. 42 U.S.C. § 1983 (1996).

12. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1137–39 (2012) (noting that federal constitutional rights "can and do often vary based on geographic location, and a chief source of this variation stems from . . . the nation's federal circuit courts of appeals"). The principal case of this note illustrates this issue: when a pursuit that began in Arkansas (within the Eighth Circuit Court of Appeals) crossed into Tennessee (within the Sixth Circuit Court of Appeals), the parties left a federal circuit that does not recognize "accidental seizures" for a federal circuit that does. *See* discussion *infra* Parts II.D–E.

13. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 n.4 (2014).

is an even more fundamental divide on which of the Supreme Court's definitions of a Fourth Amendment seizure applies in any given case.[14]

A police chase that originated in West Memphis, Arkansas, and ended with gunfire in Memphis, Tennessee—leaving both the driver, Donald Rickard, and his passenger, Kelly Allen, dead—highlighted the current circuit split over whether the Fourth or the Fourteenth Amendment protects victims of "accidental seizures."[15] Given the importance of "'develop[ing] constitutional precedent' in an area" of law that governs police officers[16] and ensuring constitutional safeguards for citizens who are "accidentally struck and tragically killed,"[17] this inquiry is ripe for consideration.[18] Based on the Supreme Court's existing seizure definitions, excessive-force decisions, and treatment of negligence within the constitutional realm,[19] the Court's precedent establishes that the Fourth Amendment's protection against unreasonable seizures does not extend to accidental victims of deadly force used by police. Such protection may arise, however, from other sources of substantive rights.

This note explores the historical development of the Supreme Court's analysis of seizure and use-of-force cases, examining federal circuit court decisions involving seizure and excessive force claims brought by "accidental seizure" victims to highlight the current disagreement among federal courts.[20] Next, this note argues that the Supreme Court's decisions involving seizure by force, claims of negligence, and substantive due process do not support Fourth Amendment claims arising from "accidental seizures," which must then be analyzed under the Fourteenth Amendment.[21] This note analyzes the facts underlying *Plumhoff v. Rickard*[22] and answers in the negative

14. *See* discussion *infra* Part II.A.

15. *See Plumhoff*, 134 S. Ct. at 2022 n.4.

16. *Id*. at 2020 (quoting Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

17. Tina Sfondeles, *Bettie Jones Was the 'Glue' of Her Family, Mourners Say at Visitation*, CHICAGO SUN-TIMES (Jan. 5, 2016), http://chicago.suntimes.com/news/bettie-jones-was-the-glue-of-her-family-mourners-say-at-visitation (quoting a police statement issued after the shooting death of Bettie Jones, who was accidentally killed at her Chicago home when a police officer shot and killed her teenage neighbor, who became combative when the officer arrived).

18. Claims of excessive force are among the most common civil rights claims and represent a significant portion of federal courts' section 1983 docket. *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 121 (2009). Although analyzing seizures has given rise to a number of disagreements among the federal circuits, *see* Logan, *supra* note 12, at 1137, the Supreme Court is unable to address even half of those circuit splits identified by litigants because the Court hears so few cases. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1449 (2009).

19. *See* discussion *infra* Parts III.A–B.

20. *See* discussion *infra* Parts II.A–C.

21. *See* discussion *infra* Part III.

22. 134 S. Ct. 2012 (2014).

whether someone in Kelly Allen's position[23] can recover on a Fourth Amendment claim under existing Supreme Court precedent.[24]

## II. THE FEDERAL JUDICIARY'S ANALYSIS OF SEIZURES AND CLAIMS OF EXCESSIVE FORCE

Courts have interpreted both the Fourth and Fourteenth Amendments as prohibiting the use of excessive force by police officers.[25] While both amendments protect the fundamental right to personal security,[26] the Supreme Court has expressly rejected the notion that all excessive force claims brought under section 1983 are governed by "a single generic standard."[27] Nonetheless, excessive police force may violate the Fourth Amendment's prohibition of unreasonable seizures and the substantive due process component of the Fourteenth Amendment, which prohibits egregious conduct.[28] Thus, determining the constitutionality of police officers' use of force potentially requires courts to analyze both the Fourth and Fourteenth Amendments, but determining the definition of a seizure is a threshold matter that must be addressed before the Fourth Amendment's reasonableness standard can be applied.[29] Accordingly, examining the Supreme Court's definitions of a seizure is critical to understanding claims that arise in a muddled area of an already confusing constitutional doctrine.

### A. The Fourth Amendment and the Supreme Court's Definition of Seizure

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[30] No denial of constitutional protection "is so effective in cowing a population, crushing the spirit of the individual and putting terror in every

23. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 n.4 (2014).

24. *See* discussion *infra* Part III.D.

25. Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 209–10 (1991) [hereinafter Urbonya, *Constitutionality of High-Speed Pursuits*].

26. Kathryn R. Urbonya, *Public School Officials' Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1, 3 (2000). *See also* Delaware v. Prouse, 440 U.S. 648, 650 (1979) (analyzing "an unreasonable seizure under the Fourth and Fourteenth Amendments").

27. Graham v. Connor, 490 U.S. 386, 387 (1989).

28. Urbonya, *Constitutionality of High-Speed Pursuits*, *supra* note 25, at 207–09.

29. *Id.* at 209. *See also Graham*, 490 U.S. at 386.

30. U.S. CONST. amend. IV. The touchstone of analysis under the Fourth Amendment "is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977) (citation omitted); Atwater v. City of Lago Vista, 532 U.S. 318, 360 (2001).

heart" as the deprivation of rights secured by the Fourth Amendment.[31] The liberty secured by the Fourth Amendment is a freedom "made in America," one rooted in the colonists' revolt against the heavy-handed law enforcement methods of the British.[32] The protections of the Fourth Amendment "apply to all invasions on the part of the government and its employe[e]s of the sanctity of a man's home and the privacies of life."[33]

Historically, a seizure required a police officer to either physically restrain or arrest a person to trigger the Fourth Amendment's prohibition of unreasonable seizures.[34] The American colonists sought safeguards "against the arbitrary exercise of government power . . . [and] intentional misconduct by government officials,"[35] and the Fourth Amendment's coupling of the words "persons and things to be seized" evidenced the Framers' intent to prohibit arbitrary arrests.[36] However, the Fourth Amendment as ratified in 1791 "had both the virtue of brevity and the vice of ambiguity."[37]

More than 200 years after its ratification, the Fourth Amendment continues to precipitate novel constitutional questions and innovative variations on the familiar themes of search and seizure.[38] Determining with consistency when government actors have effected a seizure of an individual within the meaning of the Fourth Amendment has been a difficult task for the Supreme Court of the United States.[39] As Professor La Fave has noted, the Court for many years did not provide a workable definition of what government conduct amounted to a seizure within the meaning of the Fourth Amendment.[40]

Thus, a fundamental problem with analyzing Fourth Amendment law is that it is convoluted and does little to inform the lower courts and the very officials whom the amendment was ratified to govern.[41] In the context of seizure by deadly force, an additional problem arises in distinguishing torts actionable under state law from constitutional violations, which may be

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31. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

32. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 926 (1997).

33. Boyd v. United States, 116 U.S. 616, 630 (1886).

34. Pamela A. Lemoins, Comment, Brendlin v. California*: Riding Shotgun with the Fourth Amendment*, 35 S.U. L. REV. 573, 581 (2008).

35. Ronald J. Bacigal, *In Pursuit of the Elusive Fourth Amendment: The Police Chase Cases*, 58 TENN. L. REV. 73, 93 (1990) [hereinafter Bacigal, *In Pursuit*].

36. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42, 45 (1966).

37. *Id.* at 44–45.

38. Bacigal, *In Pursuit*, *supra* note 35, at 73.

39. Urbonya, *"Accidental" Shootings*, *supra* note 3, at 342; Lemoins, *supra* note 34, at 581 ("Historically, the Supreme Court struggled to perfect a test to determine when a police-citizen encounter rose to the level of a seizure under the Fourth Amendment.").

40. *See* 3 WAYNE R. LAFAVE, SEARCH & SEIZURE § 5.1(a) (5th ed. 2012).

41. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472 (1985).

remedied under section 1983.[42] The confusion is compounded by an underlying circuit split over which of the Supreme Court's many definitions of a seizure applies in any given case.[43]

*1. The "Reasonable Person" Test for Seizures*

*Terry v. Ohio*[44] has been described as "the big bang that starts the modern world of variable levels of seizures of the person."[45] In an opinion written by Chief Justice Warren, the majority in *Terry* rejected the notion that the Fourth Amendment is inapplicable if an officer stops short of something called a "technical arrest."[46] The Court held "that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[47]

*Terry* thus extended the scope of the Fourth Amendment to include temporary detentions that stop short of full custodial arrests.[48] The Supreme Court subsequently recognized a wide range of potential police-citizen encounters that implicate the Fourth Amendment's protections.[49] Determining the scope of the Fourth Amendment after *Terry* has proved difficult, however, as the Supreme Court's seizure analysis "evolved into this puzzling patchwork of three tests that are sometimes complementary and sometimes inconsistent."[50]

Twelve years after *Terry*, a faction of the Court in *United States v. Mendenhall*[51] recognized that a person is seized within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[52] Justice Stewart, writing only for himself and then-Justice Rehnquist, echoed the *Terry* definition of a seizure before announcing the "reasonable person" test to determine when an officer restrains a person's freedom to walk away from the encounter.[53]

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42. Mark Albert Mesler II, Note, *When an Innocent Bystander Who Is Injured by A Police Officer Can Recover Under § 1983*, 25 U. MEM. L. REV. 781, 782 (1995).

43. Urbonya, *"Accidental" Shootings*, *supra* note 3, at 340 (1992).

44. 392 U.S. 1 (1968).

45. Ronald J. Bacigal, *A Unified Theory for Seizures of the Person*, 81 MISS. L.J. 915, 916 (2012) [hereinafter Bacigal, *A Unified Theory*].

46. Terry v. Ohio, 392 U.S. 1, 19 (1968).

47. *Id.* at 16.

48. Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145, 152 (1994) [hereinafter Bacigal, *The Right of the People*].

49. Christian J. Rowley, Note, Florida v. Bostick*: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601, 608 (1992).

50. Bacigal, *A Unified Theory*, *supra* note 45, at 923.

51. 446 U.S. 544 (1980).

52. *Id.* at 554.

53. *Id.*

Although Justice Stewart's pronouncement did not garner the support of five justices in *Mendenhall*, the "reasonable person" test gradually gained acceptance as the standard to determine when a seizure takes place in situations short of a physical restraint.[54] Addressing seizure issues related to a brief automobile chase, a unanimous court in *Michigan v. Chesternut*[55] acknowledged the Court's acceptance of the "necessarily imprecise" test announced in *Mendenhall*, explaining that no mechanical rule applicable to all investigatory pursuits could be fashioned within the meaning of a seizure.[56] In a concurrence joined by Justice Scalia, Justice Kennedy foreshadowed the Supreme Court's departure from the *Mendenhall* "reasonable person" test that would materialize in Justice Scalia's opinions in *Brower v. County of Inyo*[57] and *California v. Hodari D.*,[58] both decided within three years of *Chesternut*.[59]

### *2. The Departure From the 'Reasonable Person' Test*

*Brower* marked the Court's shift away from the "reasonable person" test.[60] The case involved a twenty-mile high-speed chase, which ended when the driver of a stolen car crashed into a police roadblock and died.[61] The Supreme Court granted certiorari[62] to resolve a conflict between the Ninth and Fifth Circuit.[63]

Justice Scalia's majority opinion did not mention *Mendenhall* and its "reasonable person" formulation, but rather held that a physical seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*"[64] In a separate opinion joined by

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54. Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What Is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 626–27 (1990). *See also* Florida v. Royer, 460 U.S. 491, 501–02 (1983); INS v. Delgado, 466 U.S. 210, 215 (1984).

55. 486 U.S. 567 (1988).

56. Lemoins, *supra* note 34, at 583.

57. 489 U.S. 593 (1989).

58. 499 U.S. 621 (1991).

59. Michigan v. Chesternut, 486 U.S. 567, 577 (1988) (Kennedy, J., concurring) ("It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect.").

60. See infra notes 63–76 and accompanying text.

61. *Brower*, 489 U.S. at 594.

62. 487 U.S. 1217 (1988).

63. Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985).

64. *Brower*, 489 U.S. at 597 (emphasis in original). *See also* Allison K. Wyman, Note, *Seized by the Moment-But Which Moment? How a Physical Force Seizure Requires Only Contact with Intent to Restrain, Not Intentional Termination of Movement*, 48 AM. CRIM. L. REV. 1485, 1486 (2011).

three other justices, Justice Stevens recognized the majority's departure from the "well-established rule" from *Mendenhall*.[65] In *Brower*, the Court established the requirements for a seizure: termination of movement and the intent to seize,[66] and the decision established "that the reasonable perceptions of the *Mendenhall* test are not enough to trigger Fourth Amendment protections."[67]

What Justice Scalia began in *Brower* he completed two years later in *Hodari D.*: displacing *Mendenhall* as the exclusive test for analyzing seizures.[68] In *Hodari D.*, two officers patrolling the streets of Oakland chased Hodari, who fled upon seeing the officers and discarded what was later discovered to be crack cocaine before he was tackled and arrested by one of the officers.[69] The Supreme Court granted certiorari[70] to decide "whether, at the time he dropped the drugs, Hodari had been 'seized' within the meaning of the Fourth Amendment."[71]

Justice Scalia, writing for a seven-justice majority, continued the departure "from the *Mendenhall* 'reasonable person' test and held that a police-citizen encounter amounted to a seizure only if the suspect, when faced with a show of authority, yielded to that show of authority."[72] The majority explained that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."[73] The Court distinguished show-of-authority seizures by the absence of physical force and defined physical seizures as common-law arrests, "where intentional physical force, regardless of its success, constitutes a seizure."[74]

*Hodari D.* thus clarified the relationship between the *Mendenhall* test and the seizure standards announced in both *Brower* and *Hodari D.* by dismissing the *Mendenhall* test as "a necessary, but not a sufficient, condition for seizure."[75] The Court now analyzes a Fourth Amendment seizure claim based on whether the officer applied intentional physical force that resulted in contact, or, where no contact occurred, whether the suspect's freedom of

65. *Brower*, 489 U.S. at 600 (Stevens, J., concurring).
66. Wyman, *supra* note 64, at 1488.
67. Bacigal, *A Unified Theory*, *supra* note 45, at 921.
68. Continuing the departure from the *Mendenhall* standard, the Supreme Court in *Florida v. Bostick*, 501 U.S. 429 (1991), developed another "reasonable person" test: whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. Lemoins, *supra* note 34, at 584–85.
69. California v. Hodari D., 499 U.S. 621, 622–23 (1991).
70. 498 U.S. 807 (1990).
71. *Hodari D.*, 499 U.S. at 623.
72. Lemoins, *supra* note 34, at 584 (emphasis added).
73. Wyman, *supra* note 64, at 1486.
74. *Id.* at 1493 (emphasis omitted).
75. *Hodari D.*, 499 U.S. at 628 (emphasis omitted).

movement was terminated by his submission to a show of police authority.[76] Under *Hodari D.*, neither the "reasonable person" test of *Mendenhall* nor the intentional means test of *Brower* is sufficient to constitute a seizure until police completely eliminate the suspect's physical ability to escape.[77]

The Supreme Court reaffirmed these principles in *Brendlin v. California*,[78] in which all nine justices agreed that when an officer pulls over an automobile, "the passenger is automatically seized [under] the Fourth Amendment because a passenger is subject to an officer's authority and cannot ignore the officer's presence and walk away."[79] In *Brendlin*, Justice Souter cobbled a seizure definition from *Florida v. Bostick*,[80] *Brower*, and *Hodari D.*,[81] and cited *Mendenhall* as the test for when police conduct does not "show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence."[82] Justice Souter's opinion for the unanimous court in *Brendlin* explained that the crux of *Brower* was not that the plaintiff alone was the target, but rather that officers detained him "through means intentionally applied."[83] If there was a passenger in the car, Justice Souter continued, it would have made sense to hold that the passenger was seized when the car collided with the roadblock.[84]

From these cases arose a conflict among the circuits that highlights the "contradictory sentiments expressed in *Brower* and *Hodari D.* regarding the definition of a physical seizure."[85] The federal courts are split over whether a physical seizure requires intent and termination of movement under *Brower* or simply intent and physical contact under *Hodari D.*[86] Thus, courts tasked with analyzing police shootings face the challenge of determining which seizure definition applies, choosing a standard used in a factually similar case, or crafting an ad hoc rule based on the facts of the case.[87] This very question—that remains unresolved among the circuits—of whether the

76. Wyman, *supra* note 64, at 1497.
77. Bacigal, *A Unified Theory*, *supra* note 45, at 922.
78. 551 U.S. 249 (2007).
79. Lemoins, *supra* note 34, at 573–74.
80. 501 U.S. 429 (1991).
81. *Brendlin*, 551 U.S. 249, 254 (2007) (internal quotation marks omitted) (citations omitted).
82. *Id.* at 255.
83. *Id.* at 261.
84. *Id.* The Court in *Brendlin* rejected the State of California's position that a seizure requires a purposeful, deliberate act of detaining a passenger, noting that in *Lewis* the Court "did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger." *Id.*
85. Wyman, *supra* note 64, at 1492.
86. *Id.* at 1489.
87. Urbonya, *"Accidental" Shootings*, *supra* note 3, at 340.

intentional application of force by police officers amounts to a seizure when the suspect continues flight was implicated by the facts of *Plumhoff*.[88] Settling the physical seizure conflict would necessarily help resolve the question of whether a passenger in Kelly Allen's position[89] can recover under the Fourth Amendment.[90] But whether a seizure occurs is a threshold matter, and the Supreme Court's excessive force decisions instruct that relief may be available to victims of "accidental seizures" under the Fourteenth Amendment rather than the Fourth Amendment.

### B. The Supreme Court's Excessive Force Decisions Under Both the Fourth and Fourteenth Amendments

In addressing an excessive force claim brought under section 1983, a court's analysis begins by "identifying the specific constitutional right allegedly infringed by the challenged application of force."[91] Although *Garner* established that apprehension—i.e., seizure—by the use of deadly force is subject to scrutiny under the Fourth Amendment,[92] the Court's analysis was simply an application of the Fourth Amendment's reasonableness test.[93] Only subjects of police force who can allege a "seizure" under the Fourth Amendment trigger the reasonableness test;[94] other victims of law enforcement excessive force are protected through the Fourteenth Amendment and its guarantee of substantive due process.[95] Preserving constitutional protection under the Fourteenth Amendment—rather than the Fourth—in the context of the use of deadly force suggests that such force may be egregious.[96]

By recognizing substantive due process as a basis for infringements of the right to life and personal security, the Supreme Court has clarified that both the Fourth and Fourteenth Amendments are possible bases for constitu-

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88. *See* Wyman, *supra* note 64, at 1485.

89. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 n.4 (2014).

90. *See* Urbonya, *"Accidental" Shootings*, *supra* note 3, at 341 (arguing that the Supreme Court's different approaches to defining Fourth Amendment seizures require lower courts to rely upon their own interpretation of the Fourth Amendment).

91. Graham v. Connor, 490 U.S. 386, 394 (1989).

92. Tennessee v. Garner, 471 U.S. 1, 7 (1985). Three justices subsequently rejected the notion that *Garner* implicitly held that all excessive force claims are to be analyzed under the Fourth Amendment rather than a substantive due process standard. *Graham*, 490 U.S. at 399–400 (Blackmun, J., concurring).

93. *See* Scott v. Harris, 550 U.S. 372, 382 (2007).

94. Randolph Alexander Piedrahita, Note, *A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure*-California v. Hodari D., 52 LA. L. REV. 1321, 1322 (1992).

95. Renée Paradis, Note, *Carpe Demonstratores: Towards A Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 316 (2003).

96. *See* Urbonya, *Constitutionality of High-Speed Pursuits*, *supra* note 25, at 267.

tional scrutiny of officials' conduct.[97] The application of the Fourteenth Amendment's Due Process Clause as a constitutional safeguard against excessive police force emerged in the landmark case of *Rochin v. California*.[98] Antonio Richard Rochin's conviction for possession of morphine was reversed after police officers had Rochin's stomach forcibly pumped when he swallowed two capsules of the drug in front of the officers.[99] Evoking Justice Cardozo, the Supreme Court in *Rochin* defined the Due Process Clause of the Fourteenth Amendment as "a summarized constitutional guarantee of respect for those personal immunities [that] . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' or are 'implicit in the concept of ordered liberty.'"[100]

In the Fourth Amendment context, *Garner* was a watershed decision, because the Supreme Court invalidated the common-law view that police officers may use deadly force if they reasonably believe it necessary to prevent the escape of a person fleeing from a felony arrest.[101] In *Garner,* the Court held unconstitutional a Tennessee statute that authorized police officers to use "all the necessary means" to effect an arrest of a fleeing or forcibly resisting suspect after a Memphis policeman shot and killed a fleeing teenage burglar despite being "reasonably sure" the suspect was unarmed.[102] The *Garner* majority emphasized that the original justifications for the common-law rule did not apply in the modern judicial system and that the trend among the states was away from the common-law rule.[103] However, *Garner* was limited to circumstances where a suspect was "actually apprehended;" otherwise, there is no "seizure" for Fourth Amendment purposes.[104]

Following *Garner* and almost forty years after *Rochin*, the Supreme Court in *Graham v. Connor*[105] clarified that all claims that law enforcement officers used excessive force in the course of a seizure should be analyzed

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97. Urbonya, *"Accidental" Shootings*, *supra* note 3, at 376. Although not before the Supreme Court, Justice Harlan recognized that the issues arising in *Terry* implicated "protections afforded by the Fourth and Fourteenth Amendments." Terry v. Ohio, 392 U.S. 1, 31 (Harlan, J., concurring).

98. E. Bryan MacDonald, Note, Graham v. Connor*: A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 159 (1990). In an earlier case, the Court held that confessions extorted by police officers who physically tortured three murder suspects violated the Due Process Clause of the Fourteenth Amendment. Brown v. State of Mississippi, 297 U.S. 278, 280 (1936).

99. Rochin v. California, 342 U.S. 165, 166 (1952).

100. *Id.* at 169 (citation omitted).

101. 3 LAFAVE, *supra* note 40, § 5.1(d).

102. Tennessee v. Garner, 471 U.S. 1, 3–4 (1985).

103. 3 LAFAVE, *supra* note 39, § 5.1(d).

104. *Garner*, 471 U.S. at 31 (O'Connor, J., dissenting).

105. 490 U.S. 386 (1989).

under the Fourth Amendment.[106] Prior to *Graham*, federal courts were uncertain concerning the source of constitutional protection for individuals claiming excessive force during seizure.[107] Several courts looked to the Fourteenth Amendment's guarantee of due process to test the constitutionality of excessive force during seizure,[108] while others applied Fourth Amendment analysis for similar claims.[109]This issue persists as the circuit courts remain split over whether "accidental seizure" victims can recover under the Fourth Amendment against police officers who use deadly force.[110]

C. The Convergence of the Fourth and Fourteenth Amendments

In the realm of excessive force claims that hover between the Fourth and Fourteenth Amendments, the Supreme Court's most recent decision came in *County of Sacramento v. Lewis*.[111] In *Plumhoff*, Justice Alito's majority opinion cited *Lewis* after recognizing the current circuit split over whether someone like Kelly Allen could bring a Fourth Amendment claim.[112] This aside has already been viewed as affirming the relevance of *Lewis* and establishing "that even fatal injury does not constitute seizure [absent] the requisite intent to detain."[113] Thus, for the purposes of this note, the Supreme Court's decision in *Lewis* merits careful examination.

In *Lewis*, a teenager riding as a passenger on a motorcycle died after the motorcycle crashed and a pursuing police vehicle accidentally ran over the passenger.[114] The Supreme Court granted certiorari[115] "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case."[116]

106. Mitchell W. Karsch, Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 823 (1990).

107. *Graham*, 490 U.S. at 393 (citation omitted) ("[M]any courts have seemed to assume, as did the courts below in this case, that there is a generic 'right' to be free from excessive force, grounded not in any particular constitutional provision but rather in 'basic principles of § 1983 jurisprudence.'").

108. *See* Rochin v. California, 342 U.S. 165, 172 (1952).

109. *Garner*, 471 U.S. at 7.

110. *See* discussion *infra* Part II.D.

111. 523 U.S. 833 (1998).

112. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 n.4 (2014).

113. West v. Davis, 767 F.3d 1063, 1074 (11th Cir. 2014) (Benavides, J., dissenting).

114. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 837 (1998).

115. 520 U.S. 1250 (1997).

116. *Lewis*, 523 U.S. at 839.

While *Lewis* is recognized for establishing the level of culpability necessary to sustain a due process claim under the Fourteenth Amendment,[117] the Supreme Court had occasion to analyze whether the motorcycle passenger was seized when he was accidentally struck by the police officer's car, which would, under *Graham,* determine whether the plaintiffs could sustain a due process claim rather than a claim under the Fourth Amendment's reasonableness standard.[118] In *Lewis*, the Supreme Court found that the passenger had not been seized.[119]

Justice Souter explained that under *Hodari D.* "a police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment."[120] Nor did a seizure occur absent "a governmental termination of freedom of movement through means intentionally applied" under *Brower*.[121] Justice Souter found that the facts of *Lewis* were analogous to a hypothetical scenario discussed in *Brower* where no seizure would occur: a police car attempts to stop a suspect only by a show of authority—flashing lights—and in continuing pursuit accidentally stops the suspect by crashing into him.[122]

Thus, the motorcycle passenger in *Lewis* was not seized within the meaning of the Fourth Amendment, and the plaintiffs' claims were analyzed under the Due Process Clause of the Fourteenth Amendment.[123] *Lewis* supports the proposition that not all physical force applied by police to private citizens amounts to a seizure and that substantive due process remains a viable source of constitutional protection for "accidental seizure" victims.[124] Because excessive force claims brought by passengers who are inadvertently injured or killed by police gunfire invoke the Supreme Court's somewhat

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117. *See* Bonnie E. Bull, *In Pursuit of A Remedy: A Need for Reform of Police Officer Liability*, 64 S.C. L. REV. 1015, 1029–30 (2013).

118. *Lewis*, 523 U.S. at 842.

119. *Id.* at 843.

120. *Id.* at 843–44 (citing California v. Hodari D., 499 U.S. 621, 626 (1991)).

121. *Id.* at 844 (quoting Brower v. Cnty. of Inyo, 489 U.S. 593, 596–597 (1989)) (emphasis omitted).

122. *Id.*

123. *Id.* (reviewing federal court decisions and explaining 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") (alteration in original) (citation omitted).

124. *See* Karen M. Blum & John J. Ryan, *Recent Developments in the Use of Excessive Force by Law Enforcement*, 24 TOURO L. REV. 569, 578–79 (2008); Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 265 (2010). Support for this position also appears in the Court's earlier decisions in *Hodari D.* and *Bostick*. *See* Bacigal, *The Right of the People*, *supra* note 48, at 184 (arguing that *Bostick* "implies that the *Hodari* decision is supple enough to recognize that certain forms of touching are insufficient for a seizure"); Wyman, *supra* note 64, at 1499 ("*Bostick* is correct in recognizing that certain forms of touching do not constitute a seizure.").

muddled seizure doctrine, the federal courts analyzing such claims have arrived at conflicting conclusions.[125]

### D. The Circuit Courts Are Divided on the Issue of Whether Passengers, Hostages, and Bystanders Can Bring Excessive Force Claims Under the Fourth Amendment

The existing case law regarding whether unintended targets of police gunfire during pursuits are seized under the Fourth Amendment is far from settled.[126] Some courts interpret *Brower* to require an objective intent to stop a particular individual, and others require an objective intent to use means which results in a stop, whether of a known or unknown person.[127] Courts have also disagreed about whether a seizure requires an intent to harm or an intent to stop.[128] Adding to the discord are the circuit courts' differing approaches to analyzing the Fourth Amendment based on whether the claimant is a suspect, a hostage, or an unsuspecting passerby.[129]

While most bystander cases were decided prior to *Brendlin*, which seemed to steer Fourth Amendment analysis toward "objective intent," *Brendlin* did not abandon statements in *Brower* that led lower courts and commentators to focus to some degree on the subjective intent of the officers in analyzing Fourth Amendment claims.[130] Indeed, the enduring requirement from *Brower*—that some level of purely subjective intent to seize is required to trigger the protection of the Fourth Amendment—has led the lower courts to equate an "acquisition of control over a suspect [with] a 'seizure' only if the officer intended to accomplish this by the means actually used to do so."[131] A sharp circuit split has emerged.

#### *1. Circuits That Permit "Accidental Seizure" Victims to Bring Claims Under the Fourth Amendment*

Courts that permit innocent passengers to bring Fourth Amendment claims against police officers who use deadly force during pursuits endorse the limiting language of *Brower* that courts cannot draw too fine a line when determining whether the means that terminates the freedom of movement is

125. *See* discussion *infra* Part II.D.
126. Cooper v. Rutherford, 503 F. App'x 672, 676 (11th Cir. 2012) (collecting cases).
127. Urbonya, *"Accidental" Shootings*, *supra* note 3, at 369.
128. *Id.* at 371.
129. *See* Vaughan v. Cox, 343 F.3d 1323, 1328 n.4 (11th Cir. 2003).
130. Gardner v. Bd. of Police Comm'rs, for Kansas City, Mo., 641 F.3d 947, 952–53 (8th Cir. 2011).
131. George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 378 (2006).

the very means that the government intended.[132] In *Vaughan v. Cox*,[133] the Court of Appeals for the Eleventh Circuit considered Fourth and Fourteenth Amendment claims[134] against a police officer who shot at the driver of a speeding vehicle in which the passenger—also a suspect—was riding, accidentally hitting and killing the passenger.[135] In finding that the passenger was seized when he was struck by the officer's bullet, the Eleventh Circuit explained that it was not necessary for the means by which a suspect is seized to conform exactly to the means intended by the officer.[136] The court found that the officer fired his weapon to stop the vehicle and its occupants, and because the passenger was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure.[137]

Likewise, in *Fisher v. City of Memphis*,[138] the Sixth Circuit considered the Fourth Amendment claim of a passenger who was struck by a bullet fired by a police officer who, to avoid being hit by the vehicle in which the passenger was riding, jumped on the hood of his own vehicle and simultaneously fired at the vehicle.[139] The Sixth Circuit found that the car was the intended target of the officer's intentionally applied exertion of force and that by shooting at the driver of the moving car, the officer intended to stop the car, effectively seizing everyone inside.[140]

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132. *Vaughan*, 343 F.3d at 1329.

133. 343 F.3d 1323 (11th Cir. 2003).

134. Interestingly, the Eleventh Circuit, after determining the passenger was seized within the meaning of the Fourth Amendment, found the Fourteenth Amendment claim lacked merit under *Lewis* rather than that the claim was covered by the Fourth Amendment under *Graham*. *Vaughan*, 343 F.3d at 1333.

135. *Id.* at 1328. The *Vaughan* court recognized that a different analysis was required for Fourth Amendment claims brought by passengers who were suspects rather than hostages or innocent bystanders. *Id*., at 1328 n.4; Cooper v. Rutherford, 503 F. App'x 672, 675 (11th Cir. 2012) ("However, this court just as clearly acknowledged the difference between the events in *Vaughan* and . . . when an innocent bystander or hostage is accidentally shot by police officers chasing a fleeing suspect.").

136. *Vaughan*, 343 F.3d at 1329.

137. *Id. See also* Jamieson v. Shaw, 772 F.2d 1205, 1209–11 (5th Cir. 1985) (holding a passenger was seized when vehicle collided with police roadblock).

138. 234 F.3d 312 (6th Cir. 2000).

139. *Id.* at 315.

140. *Id.* at 318–19. The Sixth Circuit affirmed *Fisher* in *Rodriguez v. Passinault*, 637 F.3d 675, 686 (6th Cir. 2011) ("Under *Fisher*, an officer's intentionally applied exertion of force directed at a vehicle to stop it effectuates a seizure of all occupants therein."). However, there is conflicting authority within the Sixth Circuit regarding the viability of a bystander's Fourth Amendment claim. *See* Claybrook v. Birchwell, 199 F.3d 350, 359 (6th Cir. 2000) ("[T]he Fourth Amendment 'reasonableness' standard does not apply to section 1983 claims which seek remuneration for physical injuries inadvertently inflicted upon an innocent third party by police officers' use of force while attempting to seize a perpetrator, because the authorities could not 'seize' any person other than one who was a deliberate object of their exertion of force.").

Similarly, the Fourth Circuit found a seizure occurred when a thirteen-year-old boy was accidentally bitten by a police patrol dog used by an officer to find the boy, who was reported missing.[141] In *Melgar ex rel. Melgar v. Greene*,[142] the court interpreted *Brower* to mean that "so long as the instrumentality is intended, a seizure occurs even if the degree of the instrumentality's effectiveness was unanticipated."[143] The Fourth Circuit reasoned that the officer specifically used the dog to locate the boy, and found that the fact that the seizure did not occur in the manner envisioned by the officer was not outcome determinative.[144]

These decisions rely on a more expansive interpretation of intent to seize under *Brower*, allowing Fourth Amendment claims notwithstanding the absence of intent to seize a specific person, such as passengers who are inadvertently struck by gunfire when police fire at vehicles.[145] This approach is rejected by the majority of federal circuits that interpret *Brower* to require intent to seize a particular person.[146]

### *2. Circuits That Do Not Permit "Accidental Seizure" Victims to Bring Claims Under the Fourth Amendment*

The majority of circuits analyzes an accidental shooting victim's excessive force claim using the substantive due process framework.[147] The Court of Appeals for the Fourth Circuit in *Rucker v. Hardford County., Maryland.*[148] held that *Brower* directly foreclosed a Fourth Amendment claim by a plaintiff who was not the intended object of a police shooting by which he was injured.[149] The *Rucker* court rejected the plaintiff's argument that a seizure occurs if the act of restraint itself is intended—e.g., the act of shooting—and restrains one not intended to be restrained.[150] Ten years later in *Milstead v. Kibler*,[151] the Fourth Circuit again discussed two types of "accidental seizures": when an officer shoots at a suspect but misses, accidently

141. Melgar *ex rel.* Melgar v. Greene, 593 F.3d 348, 351 (4th Cir. 2010). Like the Sixth Circuit, there is conflicting authority within the Fourth Circuit regarding "accidental seizures." *See infra* notes 148–152 and accompanying text.

142. 593 F.3d 348 (4th Cir. 2010).

143. *Id.* at 354 (emphasis omitted).

144. *Id.* The *Melgar* decision appears to be an application of the instruction in *Brower* that it is "enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." Brower v. Cnty. of Inyo, 489 U.S. 593, 599 (1989).

145. *See supra* notes 131–139 and accompanying text.

146. *See* discussion *infra* Part II.D.2.

147. *See infra* notes 147–161.

148. 946 F.2d 278 (4th Cir. 1991).

149. *Id.* at 281.

150. *Id.*

151. 243 F.3d 157, 163 (4th Cir. 2001).

hitting a bystander, and when an officer shoots "at a person he believes to be the suspect and hits the intended target, but . . . the target was misidentified and turns out to be an innocent victim."[152] Relying on *Brower*, the Fourth Circuit again found that no seizure occurs in the first situation "because the means of the seizure were not deliberately applied to the victim."[153]

In *Landol–Rivera v. Cruz Cosme*,[154] the Court of Appeals for the First Circuit held that no seizure occurred when a hostage taken during an armed robbery was inadvertently struck by police gunfire when the suspect began fleeing in a car.[155] Also relying on *Brower*, the *Landol–Rivera* court found that a "police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern."[156]

Similarly, the Second Circuit held that a hostage who was accidentally shot when police fired at his captor had no interest protected by the Fourth Amendment,[157] and the Tenth Circuit rejected a hostage's Fourth Amendment claim because there was not intent to seize the hostage.[158] The Court of Appeals for the Eleventh Circuit applied similar reasoning in upholding a district court's jury instruction "that negligent conduct alone absent any intentional government conduct could not form the basis" of a Fourth Amendment claim brought under section 1983.[159]

The Court of Appeals for the Eighth Circuit takes a slightly different approach. By analyzing a defendant officer's subjective intent, the Eighth Circuit requires a plaintiff to show that a defendant officer intended to seize the plaintiff through the means applied to the plaintiff (e.g., gunfire) to establish a Fourth Amendment claim.[160] The Ninth Circuit adopted a similar

152. *Id.* at 163.

153. *Id.* at 163–64.

154. 906 F.2d 791 (1st Cir. 1990).

155. *Id.* at 795.

156. *Id.* (emphasis omitted).

157. Medeiros v. O'Connell, 150 F.3d 164, 168 (2d Cir. 1998). The Court of Appeals for the Third Circuit, citing *Medeiros*, explained that "if a police officer fires his gun at a fleeing robbery suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure." Berg v. Cnty. of Allegheny, 219 F.3d 261, 269 (3d Cir. 2000).

158. Childress v. City of Arapaho, 210 F.3d 1154, 1156–57 (10th Cir. 2000). *See also* Clark v. Edmunds, 513 F.3d 1219, 1222 (10th Cir. 2008) (finding no seizure when sheriff shoved plaintiff to the ground because the "sheriff only intended to remove Plaintiff from his path to the door; he did not intend to acquire physical control over her").

159. Ansley v. Heinrich, 925 F.2d 1339, 1344 (11th Cir. 1991).

160. Moore v. Indehar, 514 F.3d 756, 760 (8th Cir. 2008) ("As other circuits have explained, bystanders are not seized for Fourth Amendment purposes when struck by an errant bullet in a shootout."); Simpson v. City of Fort Smith, 389 F. App'x 568, 571 (8th Cir. 2010) (citing *Moore* and holding no seizure occurred where plaintiff "presented no evidence that [he] was struck by anything other than an errant bullet").

framework in *Lewis v. Sacramento County* although no Fourth Amendment claim was before the court.[161]

Thus, the circuits that do not recognize Fourth Amendment claims for "accidental seizure" victims reject the notion that the intention requirement under *Brower* is met by the deliberateness with which a given action is taken.[162] Pointing to *Brower*, these circuits distinguish between "police action directed toward producing a particular result—in Fourth Amendment parlance, 'an intentional acquisition of physical control'—and police action that simply causes a particular result."[163] In the context of the application of physical force during police chases, the circuits that permit Fourth Amendment claims use a broader notion of intent, and apply it to vehicles rather than people.[164] Amid this backdrop, the Supreme Court decided *Plumhoff*, but, appropriately, did not reach the question of whether Kelly Allen, as a passenger, could recover under the Fourth Amendment.[165]

## E. The Supreme Court's Decision in *Plumhoff*

The events giving rise to *Plumhoff* began around "midnight on July 18, 2004, [when] Lieutenant Joseph Forthman of the West Memphis, Arkansas, Police Department pulled over a white Honda Accord because the car had only one operating headlight."[166] "Donald Rickard was the driver of the Accord, and Kelly Allen was in the passenger seat."[167] "Forthman noticed an indentation, 'roughly the size of a basketball,' in the windshield of the car."[168] Donald Rickard appeared nervous and let Kelly Allen speak with Forthman, who asked Donald Rickard to step out of the car after he failed to produce his driver's license.[169] "Rather than comply with Forthman's request, [Donald] Rickard" fled.[170]

"Forthman gave chase and was soon joined by five other police cruisers[, one] driven by Sergeant Vance Plumhoff," the eponymous petitioner.[171] "The officers pursued [Donald] Rickard east on Interstate 40 toward Mem-

161. Lewis v. Sacramento Cnty., 98 F.3d 434, 438 n. 3 (9th Cir. 1996), *rev'd sub nom.* Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998) (discussing *Brower* and explaining that because it is was undisputed that defendant officer did not intend to hit the plaintiff with his patrol car, "[t]here was thus no Fourth Amendment violation").

162. Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 (1st Cir. 1990).

163. *Id.* (emphasis omitted).

164. *See supra* notes 147–161 and accompanying text.

165. *See* discussion *infra* Part III.D.

166. Plumhoff v. Rickard, 134 S. Ct. 2012, 2017 (2014).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

phis, Tennessee," and "attempted to stop [him] using 'a rolling roadblock,' but they were unsuccessful."[172] The vehicles "swerv[ed] through traffic at high speeds," reaching speeds over 100 miles per hour.[173] "During the chase, [Donald] Rickard and the officers passed more than two dozen vehicles" before Donald Rickard exited the interstate in Memphis, eventually colliding with one of the cruisers and spinning out into another cruiser.[174]

"Now in danger of being cornered, [Donald] Rickard put his car into reverse 'in an attempt to escape.'"[175] As he did so, two officers got out of their cruisers and approached Donald Rickard's car, which made contact with yet another police cruiser.[176] As Donald Rickard's tires started spinning, and his car was rocking back and forth, Plumhoff fired three shots into the car.[177] Donald Rickard then reversed and maneuvered onto another street, forcing one officer to step to his right to avoid the vehicle.[178] "As [Donald] Rickard continued 'fleeing down' that street, [two officers] fired [twelve] shots toward [the] car, bringing the total number of shots fired during this incident to [fifteen.]"[179] Donald "Rickard then lost control of the car and crashed into a building."[180] He and Kelly Allen died from a "combination of gunshot wounds and injuries suffered in the crash that [ultimately] ended the chase."[181]

The estates of both Kelly Allen and Donald Rickard filed suit in the United States District Court for the Western District of Tennessee, alleging numerous state-law and constitutional claims.[182] The defendant officers moved for summary judgment based on qualified immunity, but the district court denied the motion.[183] The officers appealed to the Sixth Circuit Court of Appeals, and a merits panel affirmed the district court's decision, holding that the defendant officers' conduct violated Donald Rickard's Fourth

172. *Plumhoff*, 134 S. Ct. at 2017.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Plumhoff*, 134 S. Ct. at 2017.
179. *Id.* at 2018.
180. *Id.*
181. *Id.*
182. Estate of Allen v. City of W. Memphis, No. 05-2489, 2011 WL 197426, at *1 (W.D. Tenn. Jan. 20, 2011), *aff'd in part,* 509 F. App'x 388 (6th Cir. 2012), *rev'd and remanded sub nom. Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) [hereinafter Summary Judgment Order].
183. *Id.* at *6–12. The trial court, relying on *Lewis* and *Claybrook*, held that Kelly Allen was not seized within the meaning of the Fourth Amendment. *Id.* at *11.

Amendment rights.[184] The Supreme Court granted the officers' petition for writ of certiorari on November 15, 2013.[185]

The Supreme Court in *Plumhoff* analogized its decision in *Scott v. Harris*,[186] where the Court did not analyze whether the plaintiff was seized within the meaning of the Fourth Amendment when the defendant officer used his police vehicle to ram the plaintiff's vehicle to terminate a high-speed chase.[187] Using the seizure definition from *Brower*, the Court in *Harris* acknowledged the government had terminated the plaintiff's freedom by means intentionally applied when the officer applied his push bumper to the rear of plaintiff's vehicle, causing him to lose control of his vehicle and crash.[188]

The *Plumhoff* decision, like *Scott* before it, did not discuss whether a seizure occurred.[189] But in determining that the officers did not use excessive force by firing at the fleeing vehicle fifteen times, the Court explained that "the presence of Kelly Allen in the front seat of the car . . . [does not] change[] the calculus."[190] At this juncture in the decision, Justice Alito highlighted the current circuit split over whether someone in Allen's position could recover under the Fourth Amendment, but expressed no view on the matter.[191]

Thus, the question remaining after *Plumhoff* is whether a passenger in Kelly Allen's position can bring an excessive force claim under the Fourth Amendment rather than the Fourteenth Amendment. The district court initially held that Kelly Allen was not seized within the meaning of the Fourth Amendment and analyzed her estate's excessive force claim under the Fourteenth Amendment.[192] After granting a motion to reconsider the estate's Fourth Amendment claim[193] and following the *Plumhoff* decision, the district court again held that Allen's Fourth Amendment claim "depends on whether Rickard's flight posed a grave public safety risk" and that her Fourth Amendment rights were not violated.[194] Because immunity from the

184. *Id.*
185. 134 S. Ct. 635 (2013).
186. 550 U.S. 372 (2007).
187. *Id.* at 381.
188. *Id.*
189. *See* Plumhoff v. Rickard, 134 S. Ct. 2012, 2020–22 (2014).
190. *Id.* at 2022. The Court noted that "[o]ur cases make it clear that 'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.'" *Id.* (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)).
191. *Id.* at 2022 n.4.
192. Summary Judgment Order, *supra* note 182, at *11–12.
193. Order Granting Motion for Reconsideration at 5–11, Estate of Allen v. City of W. Memphis, No. 05-2489 (W.D. Tenn. July 23, 2013).
194. Order Granting Second Motion for Summary Judgment at 12–13, Estate of Allen v. City of W. Memphis, No. 05-2489 (W.D. Tenn. March 24, 2015).

remaining state-law claims was unavailable to the defendant officers, both cases eventually settled out of court following *Plumhoff*.[195]

## III. ARGUMENT

"Accidental seizures are . . . beyond the scope of a Fourth Amendment that encompasses only those situations in which the government intends to capture a specific individual in a precise manner."[196] The Supreme Court's multiple definitions of what constitutes a seizure and the Court's rejection of negligence as a basis for constitutional claims place "accidental seizures" beyond the scope of the Fourth Amendment.[197] Such claims must, therefore, be analyzed under state law—constitutional, statutory, or tort—or the framework of substantive due process.[198] Yet courts—notably the Sixth Circuit and, to a certain extent, the Eleventh Circuit—permit Fourth Amendment claims by individuals who are not the intended target of police officers' use of force.[199] The majority of the federal circuit courts that requires "accidental seizure" victims to bring their claims under the Fourteenth rather than the Fourth Amendment evince a better reading of the Supreme Court's decisions concerning seizures.[200]

While declaring that the Fourth Amendment addresses the "misuse of power" rather than the unintentional effects of otherwise constitutional government conduct,[201] the *Brower* court held "that constraint of a person does not reach constitutional significance if the police do not intend for the constraint to occur."[202] And although the Court in *Graham* established that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of a[] . . . 'seizure' . . . should be analyzed under the Fourth Amendment,"[203] the Supreme Court later clarified that *Graham* does not require all constitutional claims relating to physically abusive police conduct to be brought under the Fourth Amendment.[204] Rather, unless police

195. E-mail from Michael A. Mosley, Arkansas Municipal League, to author (March 6, 2016, 04:31 CST) (on file with author). A decade after the incident, the plaintiffs collectively settled for $17,500. *Id.*

196. Bacigal, *The Right of the People*, *supra* note 48, at 146.

197. *See* discussion *infra* Parts III.A–B.

198. *See* discussion *infra* Part III.C.

199. *See* discussion *supra* Part II.D.1.

200. *See* discussion *infra* Part III.A.

201. Brower v. Cnty. Of Inyo, 489 U.S. 593, 596 (1989) (quoting Byars v. United States, 273 U.S. 28, 33 (1927)).

202. Bacigal, *The Right of the People*, *supra* note 48, at 155.

203. Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis omitted).

204. United States v. Lanier, 520 U.S. 259, 272 (1997). In light of *Lanier*, the majority opinion in *Graham* could be read to support the proposition that no generic standard under *any* amendment—e.g., the Fourth Amendment—governs all excessive force claims. *Graham*, 490 U.S. at 399–400 (Blackmun, J., concurring).

conduct triggers the protections of the Fourth Amendment, an excessive force claim should be analyzed under state law and substantive due process principles.[205] In other words, the unintentional application of physical force by police does not satisfy the *Brower* definition of a seizure and does not give rise to a Fourth Amendment claim.[206] These limits and the definitions of seizure provided by the Supreme Court reveal that claims like those brought by Kelly Allen's estate should be decided under state law and the doctrine of substantive due process rather than the Fourth Amendment's "reasonableness" standard.

### A. Accidental Seizures Do Not Comport with the Supreme Court's Definition of What Constitutes a Seizure

Excessive force claims brought by victims of accidental seizure fall outside the scope of the Fourth Amendment as defined by the Supreme Court. In *Lewis* and *Brower*, the Court foreclosed recovery under the Fourth Amendment "for damages that innocent bystanders incur as a result of police pursuits."[207] Under *Brower*, negligent or accidental conduct by police officers does not rise to the level of a constitutional violation; specifically, a seizure must be willful to be actionable under the Fourth Amendment.[208] Thus, a vehicle passenger is not seized by police gunfire unless there is a governmental termination of the freedom of the passenger's movement through means intentionally applied to the passenger.[209] Because the Supreme Court defined "seizure" in "situations in which the use of physical force or the 'show of authority' was directed at a criminal suspect, most courts have applied the Fourth Amendment only to the relationship between the police officer and the suspect, not the officer and injured bystanders."[210] This position, adopted by the majority of federal circuit courts, requires adoption of the *Brower* definition of seizure within the police chase context.

One argument against adopting the *Brower* "requirement that a seizure be 'intentional' [is it] allows reckless shootings to evade review if one fo-

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205. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). The Fourth Amendment "is not a general prohibition of all conduct that may be deemed unreasonable, unjustified or outrageous." Medeiros v. O'Connell, 150 F.3d 164, 167 (2d Cir. 1998).

206. *See* discussion *infra* Part III.A.

207. Bull, *supra* note 117, at 1030–31.

208. Baskin v. City of Houston, Mississippi, 378 F. App'x 417, 418 n.1 (5th Cir. 2010) (explaining that "any attempt to allege excessive use of force in the course of a negligent seizure is foreclosed by the Supreme Court's decision in *Brower*").

209. *Brendlin* is not to the contrary. The Court concluded that an unintended person "'[may be] the object of the detention', so long as the detention is 'willful' and not merely the consequence of 'an unknowing act.'" Brendlin v. California, 551 U.S. 249, 254 (2007) (alteration in original) (citations omitted).

210. Urbonya, *"Accidental" Shootings*, *supra* note 3, at 367.

cuses solely on the act of shooting and not the conduct preceding the shooting."[211] Indeed, Justice Stevens lamented in *Hodari D*. "that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as the officer misses his target."[212] But under *Hodari D.*, such a show of authority could amount to a seizure if it unambiguously conveyed the message that the citizen was not free to leave.[213] Furthermore, brazen misconduct of police would implicate the Fourteenth Amendment's prohibition of acts undertaken "to terrorize, cause harm, or kill."[214]

Another problem is that although the language in *Brower* regarding police intent eliminated accidental—i.e., unintended—seizures from the Fourth Amendment's ambit, "it did not establish the point at which an intended seizure becomes an accomplished seizure."[215] However, "*Hodari D*. did for attempted seizures what *Brower* had done for accidental seizures" by placing attempted seizures "beyond the coverage of the Fourth Amendment because a seizure occurs only when the government successfully controls the citizen, either by [physical] restraint or by obtaining his submission to a show of authority."[216]

Finally, "[t]he *Brower* allusion to the accidental effects of otherwise lawful conduct . . . avoids the fundamental question of whether the Fourth Amendment encompasses a situation in which a police officer's volitional act[—]whether ultimately reasonable or unreasonable[—]results in an accidental intrusion upon the suspect's freedom of movement."[217] One commentator questions whether the *Brower* court declined to extend the Fourth Amendment to accidental seizures and expand section 1983 to encompass mere negligence, thus avoiding further punishing the constable for well-intentioned blunders.[218] This is the position taken by the majority of circuit courts, and reflects the *Brower* majority's rejection of accidental seizures.[219]

The minority of circuits that permits Fourth Amendment recovery for unintentional victims of police seizure rely on a more expansive concept of intent to apply physical force.[220] The Supreme Court seems to have left room for such interpretation in *Harris*, noting that the defendant officer's *decision* to terminate a high-speed chase by ramming the fleeing suspect's vehicle

211. *Id.* at 380 (alteration in original).
212. California v. Hodari D., 499 U.S. 621, 630 (1991) (Stevens, J., dissenting).
213. *Id.* at 628.
214. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 855 (1998).
215. Bacigal, *A Unified Theory*, *supra* note 45, at 921.
216. *Id.* at 922.
217. Bacigal, *In Pursuit*, *supra* note 35, at 92.
218. *Id.* at 95.
219. *Id.* at 96.
220. *See* Urbonya, *"Accidental" Shootings*, *supra* note 3, at 369 ("Some courts require an objective intent to stop a particular individual, and others require an objective intent to use means which results in a stop, whether of a known or unknown person.").

amounted to a seizure.[221] A dictum in *Brendlin* also appears to support the proposition that means may be intentionally applied to more than one target.[222] However, permitting accidental shooting victims to bring Fourth Amendment claims ignores the line—drawn in *Brower* and traced in *Brendlin*—between "willful" detentions and the consequences of unknowing acts.[223] Although several circuits have analyzed only whether *Brendlin* gives passengers standing to challenge automobile searches,[224] the Eleventh Circuit expressly declined to extend the holding of *Brendlin* to cases involving the use of deadly force that accidentally injures hostages or innocent bystanders.[225] Doing so would go beyond the Fourth Amendment's limits on seizure powers, which were intended to prevent government actors from arbitrarily and oppressively interfering with the privacy and personal security of individuals.[226] The Court recognized this very point in *Brendlin*, rejecting the idea that all motorists who move to the side of the road as police pull over another vehicle are seized.[227]

Moreover, the minority position that permits "accidental seizures" is at odds with *Brower*, which imposes a minimal but purely subjective requirement to trigger Fourth Amendment coverage: "the acquisition of control over a suspect is a 'seizure' only if the officer intended to accomplish [the seizure] by the means actually used to do so."[228] At least one circuit court of appeals has also viewed *Brendlin* in this light.[229] Accordingly, accidental shooting victims who are unintentionally struck by police gunfire do not fall within the *Brower* definition of when the application of physical force amounts to a Fourth Amendment seizure.

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221. Scott v. Harris, 550 U.S. 372, 381 (2007).

222. Brendlin v. California, 551 U.S. 249, 261 (2007) (explaining that if the car in *Brower* "had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock").

223. *Id.* at 254 (quoting Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989)).

224. *See, e.g.*, United States v. Valdez, 540 F. App'x 363, 364 (5th Cir. 2013) (per curiam); United States v. Guzman, 454 F. App'x 531, 534 (8th Cir. 2012); United States v. Symonevich, 688 F.3d 12, 19 (1st Cir. 2012).

225. Cooper v. Rutherford, 503 F. App'x 672, 675 (11th Cir. 2012). At least one federal district court has followed suit. Rosenbloom v. Morgan, No. 313-CV-160-RS-CJK, 2015 WL 300428, at *6 (N.D. Fla. Jan. 22, 2015) (discussing *Brendlin* and explaining a "plaintiff must be the intended object of the act of restraint").

226. United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); *Brendlin*, 551 U.S. at 263.

227. *Brendlin*, 551 U.S. at 262.

228. Dix, *supra* note 131, at 378.

229. Gardner v. Bd. of Police Comm'rs, for Kansas City, Mo., 641 F.3d 947, 952–53 (8th Cir. 2011).

B. Negligence Does Not Give Rise to a Fourth Amendment Claim

When "accidental seizures" amount to negligence, resulting claims are traditionally governed by state law and insufficient to trigger Fourth Amendment protection.[230] Although the Supreme Court has recognized that the Constitution does not supplant traditional tort law,[231] the Court has left open the possibility that some constitutional provisions may be violated by negligent conduct.[232] But while the Fourth Amendment's reasonableness standard has been compared to a negligence regime,[233] the "exclusion of negligence from the Constitution seems unequivocal and broad."[234] Accordingly, decisions across several circuits support the proposition that police negligence does not give rise to a Fourth Amendment excessive force claim.[235] And, relevant to excessive force claims brought by unintended vic-

230. *See supra* notes 228–229 and accompanying text; *infra* notes 231–234 and accompanying text.

231. Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

232. *Id.* ("[W]e need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care."); Parratt v. Taylor, 451 U.S. 527, 547–48 (1981) (Powell, J., concurring) ("The intent question cannot be given 'a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.'"), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

233. L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1534 (2011) (arguing that negligence is "the effective rule embodied by the Reasonableness Clause of the Fourth Amendment"). *But see* Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards: Elusive Review*, 67 CHI.-KENT L. REV. 127, 132 (1991) ("[E]ven though the [F]ourth [A]mendment speaks of unreasonable searches and seizures, it does not leave the courts to define what is unreasonable with the latitude of a jury in a negligence action.").

234. Conner v. Rodriguez, 891 F. Supp. 2d 1228, 1234 (D.N.M. 2011).

235. *See* McCoy v. City of Monticello, 342 F.3d 842, 846–50 (8th Cir. 2003) (finding plaintiff seized when he submitted to officer's show of authority and applying Fourth Amendment reasonableness standard only to officer's intentional action of drawing weapon before officer slipped on ice, accidentally shooting the plaintiff); Evans v. Hightower, 117 F.3d 1318, 1321 (11th Cir. 1997) (finding no evidence that defendants intended their vehicle to strike plaintiff); Sturges v. Matthews, 53 F.3d 659, 662 (4th Cir. 1995) (approving jury instruction on excessive force that no violation occurred upon a finding that plaintiff's injuries resulted "from an accident or from an unknowing act"); Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991); Campbell v. White, 916 F.2d 421, 423 (7th Cir. 1990) (holding that accident during police chase was not "means intentionally applied"); Pleasant v. Zamieski, 895 F.2d 272, 276–77 (6th Cir. 1990) (applying Fourth Amendment reasonableness standard only to officer's intentional acts of officer unholstering and not reholstering his weapon before accidental shooting); Dodd v. City of Norwich, 827 F.2d 1, 7–8 (2nd Cir. 1987) (rejecting plaintiff's claims based on simple negligence because the Fourth Amendment "only protects individuals against 'unreasonable' seizures, not seizures conducted in a 'negligent' manner"); Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985) ("The constitutional

tims, the Supreme Court in *Brower* "significantly narrowed the scope of the Fourth Amendment" by equating seizures with "intentional" conduct,[236] placing police negligence outside the amendment's purview.[237]

Furthermore, the Supreme Court's applications of the exclusionary rule and qualified immunity[238] reveal a fundamental tolerance for governmental intrusions on liberty that fall short of deliberate misconduct,[239] and a common theme throughout many use-of-force cases is deference to an officer's judgment.[240] Although negligence once came within the Supreme Court's formulation of the exclusionary rule,[241] the Court in *Herring v. United States* concluded that negligence by police was insufficient to trigger the protections of the exclusionary rule, because "any marginal deterrence [of constitutional violations] does not 'pay its way.'"[242] At its very core, the Fourth

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right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest.").

236. *See* Urbonya, *"Accidental" Shootings*, *supra* note 3, at 374.

237. Bacigal, *The Right of the People*, *supra* note 48, at 171–72.

238. *See* Messerschmidt v. Millender, 132 S. Ct. 1235, 1244 n.1 (2012) (citing United States v. Leon, 468 U.S. 897, 922–923 (1984)) (explaining that the Court has held "'the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer' who obtained or relied on an allegedly invalid warrant"); Malley v. Briggs, 475 U.S. 335, 344 (1986); Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 672 (2011) (citing Herring v. United States, 129 S. Ct. 695 (2009)) (arguing the contours of the exclusionary rule announced in *Herring* "were not drawn primarily from exclusionary rule jurisprudence, but rather from the arena of constitutional tort law—specifically, from the good faith defense, or qualified immunity"); H. Richard Uviller, *Seizure by Gunshot: The Riddle of the Fleeing Felon*, 14 N.Y.U. REV. L. & SOC. CHANGE 705, 708–15 (1986) (examining *Garner* and "its impact on the exclusionary rule in criminal prosecutions").

239. *See* Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011) ("But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way.") (citations omitted) (internal quotation marks omitted)); Franks v. Delaware, 438 U.S. 154, 171 (1978) (explaining that "[a]llegations of negligence or innocent mistake are insufficient" to mandate an evidentiary hearing to challenge the veracity of affidavits supporting warrants); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 207 (2010) ("'Mere negligence' would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression.").

240. Aaron Kimber, Note, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 658 (2004).

241. United States v. Leon, 468 U.S. 897, 919 (1984) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.").

242. Herring v. United States, 555 U.S. 135, 143–48 (2009) (citation omitted) (noting that "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional."). At least one state supreme court has rejected *Herring* on state law grounds. *See* Commonwealth v. Johnson, 86 A.3d 182, 192–199 (Pa. 2014).

Amendment and its reasonableness standard "embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[243] High-speed interstate chases and encounters with apparently dangerous suspects on city streets are not exceptions. In light of the wide latitude afforded to police and the express pronouncement in *Brower* that the Fourth Amendment addresses the misuse of governmental power and not the inadvertent effects of otherwise lawful government conduct,[244] the Fourteenth Amendment becomes the final resort for accidental shootings victims to adjudicate their federal constitutional rights.

Finally, states have considerable autonomy in fashioning their own remedies for the use of deadly force by police officers.[245] Although federal plaintiffs have had some success litigating use-of-force claims on negligence grounds, judicial resistance to constitutional claims premised on negligence "runs high."[246] The Supreme Court has recognized that states, through their courts and legislatures, may expand the duties of care and protection owed by the state's agents, "[b]ut not 'all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.'"[247] In the same vein, the Court has repeatedly explained that the protections of the Constitution are not coterminous with those provided by state law.[248] As

243. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

244. Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989) (quoting Byars v. United States, 273 U.S. 28, 33 (1927)).

245. Roger K. Picker, *Police Liability in High-Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard Leaves the Burden on the State and What This Might Mean for Maryland*, 29 U. BALT. L. REV. 139, 141 (1999). Moreover, misconduct may subject police officers to criminal liability. *See generally* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 802–15 (2000) (discussing prosecutions for police misconduct at the state and federal levels and proposing a more stringent federal criminal civil rights statute). Following the events giving rise to *Plumhoff*, no criminal charges were filed in connection with Donald Rickard's death; however, the State of Tennessee prosecuted three officers for the death of Kelly Allen. Jay Shapiro, *High Speed Police Pursuit and The Fourth Amendment*, LEXISNEXIS EMERGING ISSUES 7265, November 4, 2014, at 1–2. The charges were ultimately resolved through pretrial diversion. *Id.* at 2.

246. Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, TRIAL, December 1997, at 53.

247. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989); *see also* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 6.3.4.1 (2d ed. 2014) (discussing the relationship between state law and the Supreme Court's Fourth Amendment analysis).

248. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998) (explaining the "need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law"); Daniels v. Williams, 474 U.S. 327, 332 (1986); Baker v. McCollan, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for vio-

Judge Friendly famously explained in *Johnson v. Glick*,[249] "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Constitution.[250] Since *Glick*, some courts adhere to the view that it is "not the function of a federal court to force state tort law into unfamiliar contours under the guise of constitutional interpretation."[251]

Increasingly, state supreme courts have recognized more expansive protections of individual rights under state constitutions than the protections arising from federal courts' interpretation of the Fourth Amendment.[252] Almost fifty years ago, an early commentator on state constitutional law recognized that "there are large gaps in . . . federally protected rights which will have to be filled by the states."[253] Justice Brennan echoed this sentiment eight years later, writing that "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[254] The benefits are many when constitutional protections arise at the state level: avoiding the restraints of federalism; the ability of the states to experiment in the area of individual rights; and the more efficient implementation of rights originating locally, as opposed to enforcing "those which emanate from Washington."[255] Several states have rejected on independent state constitutional grounds the Supreme Court's definition of a seizure.[256] Thus, accidental shootings may give rise to claims under state constitutional law or another federal constitutional provision, specifically the Due Process Clause of the Fourteenth Amendment.

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lations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.").

249. 481 F.2d 1028 (2d Cir. 1973).

250. *Id.* at 1033. *Glick* has arguably "been the most influential decision perpetuating the 'shocks-the-conscience' test for excessive force claims under [section] 1983." Lewis M. Wasserman, *Students' Freedom from Excessive Force by Public School Officials: A Fourth or Fourteenth Amendment Right?*, 21 KAN. J.L. & PUB. POL'Y 35, 55 (2011).

251. Evans v. Avery, 100 F.3d 1033, 1041, n. 9 (1st Cir. 1996).

252. *See, e.g.*, Griffin v. State, 347 Ark. 788, 792, 67 S.W.3d 582, 584 (2002) (citing Arkansas v. Sullivan, 532 U.S. 769 (2001)) ("[W]e do have the authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards."); *see also* CLANCY, *supra* note 246, § 1.4 ("State courts have increasingly turned to analysis of their own search and seizure provisions to afford broader protections to individuals than the Fourth Amendment offers.").

253. Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 164 (1969).

254. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

255. Force, *supra* note 253, at 163–64.

256. CLANCY, *supra* note 247, § 5.1.4.2.5 (compiling cases and noting that "*Hodari D.* may be the single most important event persuading state courts to depart from Supreme Court opinions in construing their own constitutions").

### C. The Due Process Clause of the Fourteenth Amendment Prohibits Egregious Police Misconduct

When police activity does not implicate the Fourth Amendment, the Fourteenth Amendment becomes the most textually obvious source of constitutional protection from abusive government conduct.[257] The Supreme Court so held in *Lewis*.[258] Furthermore, the Court has historically reserved the Fourteenth Amendment's guarantee of due process for claims that involve police misconduct.[259] The Court has also consistently held that the constitutional guarantee of substantive due process prohibits governmental officials from violating citizens' civil liberties,[260] and the Fourteenth Amendment reemerged as a basis for excessive force claims following *Brower*.[261] Thus, when a specific constitutional provision, such as the Fourth Amendment, does not cover a particular claim, courts should analyze alleged constitutional violations that arise from the use of force under the rubric of substantive due process provided by the Fourteenth Amendment.[262]

The shocks-the-conscience test announced in *Lewis* exists mainly to preserve the Fourteenth Amendment for grievous and blatant abuses of governmental authority.[263] The Court in *Plumhoff* noted that the Fourteenth Amendment protects "accidental seizure" victims when a police officer has "a purpose to cause harm unrelated to the legitimate object of arrest."[264] The Court has delineated the use of "unreasonable force" under the Fourth Amendment and a deprivation of life and liberty "without due process of law;"[265] the Court has also expressly rejected attempts to shoehorn claims into express constitutional provisions rather than the general protections of the Due Process Clause.[266] A close reading of *Graham* reveals that, although no generic standard applies to all claims of excessive force, the Fourteenth Amendment is available as a constitutional basis for accidental police shoot-

257. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

258. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843–44 (1998).

259. *See supra* notes 94–97 and accompanying text.

260. *See* Urbonya, *"Accidental" Shootings*, *supra* note 3, at 375 (compiling cases).

261. *Id.* at 374.

262. United States v. Lanier, 520 U.S. 259, 272 n.7 (1997). *See also* Hudson v. Palmer, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring); *cf.* Graham v. Connor, 490 U.S. 386, 395 (1989) (stating that the reasonableness standard under the Fourth Amendment should be used for excessive force cases rather than the substantive due process standard).

263. Roger K. Picker, *Police Liability in High-Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard Leaves the Burden on the State and What This Might Mean for Maryland*, 29 U. BALT. L. REV. 139, 165–66 (1999).

264. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 n.4 (2014).

265. City of Oklahoma City v. Tuttle, 471 U.S. 808, 817 n.4 (1985).

266. Soldal v. Cook Cnty., Ill., 506 U.S. 56, 70–71 (1992).

ing victims who are not seized within the meaning of the Fourth Amendment.[267]

Therefore, when the use of force does not trigger the protections of the Fourth Amendment, excessive force claims are properly analyzed under the Fourteenth Amendment.[268] The latter amendment provides an avenue for plaintiffs like the estate of Kelly Allen to bring a constitutional claim against the West Memphis police officers.[269] A separate question arising in such a case would be whether a passenger's Fourteenth Amendment claim would rise or fall with the driver's Fourth Amendment claim.[270]

D. Kelly Allen's Claim Under the Fourth Amendment

If presented with whether Kelly Allen's estate could sustain an excessive force claim under the Fourth Amendment, the controlling Supreme Court precedent establishes that the estate cannot sustain such a claim. The estate's claim would have been unique in the sense that it is not clear whether Kelly was a suspect, hostage, or simply an innocent bystander.[271] Further complicating the analysis is the fact that Kelly Allen was struck by a bullet fragment.[272]

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267. *Graham*, 490 U.S. at 393–95.

268. United States v. Lanier, 520 U.S. 259, 272 n.7 (1997).

269. The district court, initially finding that Kelly Allen was not seized within the meaning of the Fourth Amendment, analyzed her excessive force claim under the Fourteenth Amendment and found no constitutional violation. *See* Summary Judgment Order, *supra* note 182, at 28–33.

270. It is unclear if a violation of the Fourth Amendment rights of a criminal suspect—e.g., the driver of a car leading police on a high-speed chase—would amount to a violation of a bystander's Fourteenth Amendment rights when the same application of force affects both parties, although it is arguable that an unconstitutional use of deadly force is a purpose to cause harm unrelated to the legitimate object of arrest, especially if the bystander is not subject to arrest. Although Fourth Amendment rights "may not be vicariously asserted," *Alderman v. United States*, 394 U.S. 165, 174 (1969), a case involving a Fourth Amendment claim asserted by one party and a Fourteenth Amendment claim asserted another party may fall outside the holding of *Alderman* and within the *Rochin-Lewis* line of cases. Additionally, the Supreme Court rejected a blanket authorization of using deadly force to apprehend all fleeing suspects, explaining that deadly force "is a self-defeating way of apprehending a suspect" that is not "so vital as to outweigh the suspect's interest in his own life." Tennessee v. Garner, 471 U.S. 1, 10–11 (1985).

271. The Supreme Court rejected Donald Rickard's estates argument that the presence of Kelly Allen in the front seat of the car rendered the number of shots fired by the officers unreasonable. Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014).

272. Brief for Petitioners at 3, Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (No. 12-1117), 2013 WL 6907719, at *3.

Although she interacted with the officer during the initial traffic stop in West Memphis, Kelly Allen was not necessarily a criminal suspect.[273] Nor is it clear that Donald Rickard took his companion as a hostage, although he exposed her to the dangers of a police chase and arguably left her no chance to seek safety as he sped along Interstate 40.[274] Kelly Allen may be best characterized as an unsuspecting bystander who found herself an unwilling participant in a rapidly evolving and eventually fatal high-speed pursuit. This determination may or may not come to bear on the analysis of an "accidental seizure" following *Plumhoff*.[275]

However, the bullet fragment that accidentally struck Kelly Allen is far different from the roadblock in *Brower*, which the Court explained was not only a significant show of authority to induce a voluntary stop, but also a mechanism designed to produce a stop by physical impact if voluntary compliance did not occur.[276] A bullet fired from a police officer's gun becomes a seizure when it hits its intended target or induces the target to submit to the officer's show of authority.[277] Here, neither occurred, but a closer call arises under *Brendlin*.

An aside in *Brendlin* reflects the Supreme Court's sentiment that the definition of a seizure announced in *Brower* would have applied to a passenger in the vehicle that collided with the police roadblock.[278] This reasoning supports the *Brendlin* holding that all occupants of a vehicle are seized when the vehicle submits to a police officer's show of authority (e.g., flashing blue lights), thereby bringing the vehicle and its occupants within the officer's physical control.[279] But police encounters that end in gunfire fall

273. The officer suspected Donald Rickard, the driver of the vehicle, had been drinking beer and involved in an accident. *Plumhoff*, 134 S. Ct. at 2017 n.1.

274. *Id.* at 2022 ("After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit."). During oral arguments, Justice Kennedy noted that the presence of "a passenger who apparently was not involved in any illegal activity . . . makes the police reaction more dangerous." Transcript of Oral Argument at 13–14, Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) (No. 12-1117), 2014 U.S. Trans. LEXIS 36, at *11.

275. The Supreme Court noted that the "risk to Allen would be of central concern" in the case brought by Kelly Allen's estate; however, it is unclear if Rickard's acts would "change the calculus" of the court's analysis of her estate's claim, *Plumhoff*, 134 S. Ct. at 2022, especially if it was brought under the Fourteenth Amendment.

276. Brower v. Cnty. of Inyo, 489 U.S. 593, 598 (1989).

277. Bella v. Chamberlain, 24 F.3d 1251, 1255 (10th Cir. 1994) ("*Hodari* suggests that when law enforcement officers shoot at a fleeing suspect, a 'seizure' occurs only if the shot strikes the fleeing person or if the shot causes the fleeing person to submit to this show of authority."); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding shots fired at fleeing truck "constituted assertions of authority by the officers, but they were not seizures under the Fourth Amendment because Cole did not submit to any of them, nor did any succeed in stopping him").

278. Brendlin v. California, 551 U.S. 249, 261 (2007).

279. *Id.* at 255–56.

outside *Brendlin* and its adoption of the *Mendenhall* test—which is, ultimately, an extension of the analysis announced in *Hodari D.*—for when an individual can only passively submit to a show of governmental authority.[280] Gunfire aimed at a particular suspect that strikes a third party is governed by *Brower* and does not amount to a seizure for lack of intent to terminate the third party's freedom.[281] Even if *Brendlin* were to apply, no seizure of Kelly Allen occurred because the officers did not show unambiguous intent to seize Kelly Allen and Donald Rickard continued to flee after the officers began firing; thus, there was no submission to the officers' show of authority as required by *Hodari D.* and *Brendlin*.[282] Furthermore, *Brendlin* must be read alongside *Hodari D.*, which established that the *Mendenhall* test alone is an insufficient condition for a seizure.[283]

Therefore, the Supreme Court's existing precedent provides that Kelly Allen was not seized within the meaning of the Fourth Amendment, and its reasonableness analysis is not available for victims who bring Fourth Amendment claims for unintentional applications of deadly force.

## IV. CONCLUSION

The Supreme Court's decisions on the Fourth Amendment's prohibition of unreasonable seizures—and police officers' use of excessive force—form a complicated doctrinal web.[284] It is anything but surprising that the federal circuit courts of appeals differ on who may address their grievances under the Fourth Amendment.[285] As it stands today, the Supreme Court's rulings in this muddy area of constitutional law reveal that citizens who are the unintended victims of lethal police force are entitled to a substantive due process claim under the Fourteenth Amendment and not a cause of action under the Fourth Amendment.[286] Claims brought by accidental shooting victims do not fall within the Supreme Court's prevailing seizure definition, nor does the Fourth Amendment govern negligent police conduct.[287] It is axiomatic that not all "intercourse between policemen and citizens involves 'seizures' of persons,"[288] and substantive due process as defined in *Lewis* provides the federal constitutional framework available for claims brought

280. United States v. Allison, 398 F. App'x 862, 864 (4th Cir. 2010) ("The holding in *Brendlin*—that a traffic stop seizes a passenger as well as the driver—rests on the physical confinement of the automobile.").

281. *See* Wyman, *supra* note 64, at 1488.

282. Bacigal, *A Unified Theory*, *supra* note 45, at 921–22.

283. California v. Hodari D., 499 U.S. 621, 628 (1991).

284. *See* discussion *supra* Parts II.A–C.

285. *See* discussion *supra* Part II.D.

286. *See supra* notes 198–259 and accompanying text.

287. *See supra* notes 204–246 and accompanying text.

288. Terry v. Ohio, 392 U.S. 1, 19, n.16 (1968).

by individuals who are accidentally shot by police. Protection also may arise at the state level. When a vehicle passenger like Kelly Allen is struck by police gunfire and files suit against the officers, such claims must be governed by substantive due process and state law.

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