No. 22-2001

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROXANNE TORRES,

Plaintiff-Appellant,

v.

JANICE MADRID, et al.,

Defendants-Appellees.

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

REPLY BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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I. The District Court Erred In Granting Qualified Immunity To Defendants.

A. The District Court Improperly Based Its Qualified Immunity Analysis On Facts Not Known To Defendants When They Shot Ms. Torres.

As laid out in Ms. Torres's opening brief, the district court's qualified immunity ruling requires reversal because the court improperly relied on facts that were not known to Defendants at the time they fired their weapons—namely, that Ms. Torres would survive and be able to drive away despite being shot. Abundant Supreme Court and Tenth Circuit case law establishes that Defendants are entitled to qualified immunity only if they could reasonably have believed in the moment they employed deadly force that such force was lawful. Subsequent factual developments are irrelevant to the qualified immunity inquiry. *See* Appellant's Br. 14-20; *see also* Amicus Curiae Constitutional Accountability Center Br. 12-16; Amicus Curiae Institute for Justice Br. 10-26. Defendants' response brief offers no meaningful defense of the district court's ruling.

Defendants' reliance on *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021), *see* Appellees' Br. 14, only confirms the district court's error. The Supreme Court held in *Bond* that the defendant officers were entitled to qualified immunity because no precedent clearly established that their use of deadly force was excessive under the circumstances the officers faced at the moment they used force—i.e., where the

suspect raised a hammer and appeared ready to charge at the officers after they cornered him in a garage. *Bond*, 142 S. Ct. at 10-11. The Court focused its qualified immunity analysis entirely on how "the relevant legal doctrine [of] excessive force" applied to "the factual situation the officer[s] confront[ed]" when they shot the suspect, *id.* at 11-12 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). This is precisely the approach that the district court rejected here, and that Ms. Torres urges this Court to follow. *See* Appellant's Br. 15 ("[Q]ualified immunity in the excessive force context looks solely at whether a reasonable officer would have understood in the moment he decided to employ force that such force was unwarranted and therefore unlawful.").

Defendants emphasize *Bond*'s observation that courts should not "define clearly established law at too high a level of generality," Appellees' Br. 14, but offer no explanation for how this proposition relates to the district court's decision to grant Defendants qualified immunity based on facts unknowable by Defendants when they shot Ms. Torres. In any event, the specificity standard articulated in *Bond* is easily satisfied here: Ms. Torres's opening brief cites Tenth Circuit precedent, predating the shooting and consistent with decisions by the other courts of appeals, specifically establishing that, where a fleeing suspect initially endangers police by driving toward them but then drives away, continuing to shoot at the suspect after the danger has passed constitutes unlawful excessive force. *See* Appellant's Br. 20-26; *infra* pp. 8-13.

Childress v. City of Arapaho, 210 F.3d 1154 (10th Cir. 2000), *see* Appellees' Br. 14, is inapposite twice over: It did not involve qualified immunity, and it addressed the

Fourth Amendment's application to an entirely different situation involving hostages inadvertently injured by police attempting to capture their kidnappers. To the extent Defendants cite *Childress* to show that pre-2021 Tenth Circuit precedent held that no Fourth Amendment seizure occurs where officers fail to gain control of a fleeing suspect, that proposition is uncontested: Ms. Torres's opening brief identifies the correct case, *Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010), which was abrogated by the Supreme Court in this case, 141 S. Ct. 989 (2021).[1] *See* Appellant's Br. 8-9.

Defendants do not argue that *Brooks* made it reasonable for them to believe it was *lawful* to shoot people without justification if the victim survives and manages to get away. Their position, rather, is that the pre-2021 division of authority over the definition of seizure entitles them to qualified immunity regardless of whether they reasonably believed their use of deadly force was justified. Appellees' Br. 12-16. Notably, Defendants do not contest Ms. Torres's observation that their position would extend qualified immunity to officers who shot an innocent bystander point

[1] Although not integral to this appeal, Defendants' assertion that Ms. Torres's opening brief mischaracterized the Supreme Court's reliance in *Torres* on *California v. Hodari D.*, 499 U.S. 621 (1991), *see* Appellees' Br. 7-8, compels a response. Ms. Torres stated that the *Torres* Court "relied heavily" on *Hodari D.* Appellant's Br. 9. That is true: The majority opinion discusses *Hodari D.* at great length in explaining the Court's reasoning, citing it over 15 times. *See* 141 S. Ct. at 995 (observing that "[t]he question before us" was "largely covered" in *Hodari D.*); *id.* at 995-96, 999, 1001-02. Defendants assert that the Court "plainly stated that *Hodari D.* would *not* control the outcome of this case." Appellees' Br. 8 (emphasis in original). That is false: The Court stated that it "need not decide" whether *Hodari D.* controlled the outcome as a matter of *stare decisis* because it "independently reach[ed] the same conclusions" as the *Hodari D.* Court. 141 S. Ct. at 995.

blank for no reason at all so long as the victim limped away afterward, Appellant's Br. 19—which is surely reason alone to reject it as untenable.

But even putting aside this dystopian consequence of Defendants' qualified immunity theory, it is foreclosed by the myriad Supreme Court decisions cited in Ms. Torres's opening brief. *See* Appellant's Br. 14-20. *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), in particular, makes clear why Defendants' argument fails: the circuit split that led to the Supreme Court's review in the case had to do with the legal significance of a suspect escaping *after* the police employ force, while "[t]he qualified immunity analysis is … limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." *Id.* at 2007 (internal quotation marks omitted). Because Defendants did not and could not know when they shot Ms. Torres that she would nonetheless be able to continue driving away despite the bullets in her back, they cannot rely on that fact to claim qualified immunity. Appellant's Br. 16-17.

Although Defendants suggest that *Hernandez* is distinguishable because it "was concerned with the state of the facts, not the law, at the time of the incident," Appellees' Br. 15, the posture of the two cases is identical: In *Hernandez*, the fact of the teenager's nationality raised uncertainty about the Fifth Amendment's application to the border patrol agent's use of deadly force against him, but because the agent did not know that fact when he fired at the teenager, he could not rely on that legal uncertainty to claim qualified immunity. 137 S. Ct. at 2007-08. Here, the fact of Ms. Torres's temporary evasion raised uncertainty about the Fourth Amendment's

application to Defendants' use of deadly force against her, but because Defendants did not know that fact when they fired at her, they cannot rely on that legal uncertainty to claim qualified immunity. The only arguable difference is that the unknown fact in this case was unknowable by anyone when Defendants fired, because it had not happened yet, whereas the unknown fact in *Hernandez* was simply unknown by the border patrol agent. Defendants offer no explanation for why this distinction would make a difference to the qualified immunity analysis, and there is none.

Defendants also assert that *Hernandez* is inapplicable because it was decided in 2017, after the shooting in this case. Appellees' Br. 15. As an initial matter, the Court's per curiam decision in *Hernandez* did not announce a new rule, but rather made clear that it was reiterating earlier precedent regarding the scope of qualified immunity. *See* 137 S. Ct. at 2007 (citing four prior Supreme Court decisions establishing that "qualified immunity analysis … is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question") (internal quotation marks omitted). Notably, although three Justices dissented with respect to a different aspect of the opinion, no Justice expressed disagreement with the Court's holding that the Fifth Circuit erred in granting the agent qualified immunity based on legal uncertainty arising from a fact unknown to the agent when he shot the teenager. *See id.* at 2008 (Thomas, J., dissenting); *id.* at 2008-11 (Breyer, J., dissenting).

More fundamentally, Defendants' argument fails because it confuses the question of whether there is clearly established law that overcomes qualified immunity with the law of qualified immunity itself. Uncertainty over the latter is not a basis for qualified immunity; when the Court announces a rule about how to conduct the qualified immunity analysis, that rule applies in all pending and future cases, regardless of when the alleged unlawful conduct occurred. Indeed, if Defendants were correct, there would have been no need for remand in *Hernandez*, because the Court's decision necessarily post-dated the shooting incident. The Court did remand, however, instructing the Fifth Circuit to re-examine its qualified immunity assessment consistent with the Court's ruling that the legal uncertainty arising from the teenager's nationality was irrelevant to the inquiry. 137 S. Ct. at 2008; *see also, e.g., Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (remanding for the court of appeals to reassess qualified immunity in light of the holding announced in that same decision). So, too, here, *Hernandez* requires re-assessing Defendants' qualified immunity defense without regard to Ms. Torres's escape.

Finally, Defendants assert that Ms. Torres's temporary evasion entitles them to qualified immunity because it was "immediately obvious that [she] fled the scene." Appellees' Br. 16. Again, Defendants fight the well-established rule that qualified immunity in police shooting cases turns on the facts known to the officers "*when [they] fired*" their guns. *Mullenix*, 577 U.S. at 18 (emphasis added); *see also* Appellant's Br. 6-20. That Ms. Torres would be able to drive away despite Defendants' bullets could

not have been known by Defendants "when [they] fired" at her *because it had not happened yet*.

To the extent Defendants mean to argue that the *possibility* that Ms. Torres would nonetheless survive and escape entitled them to qualified immunity, that would mean that before 2021, *every* police shooting of a fleeing suspect—no matter how unreasonable and no matter if the suspect immediately fell down dead—triggered qualified immunity because the suspect *might* get away, thus implicating the then-existing circuit split. Unsurprisingly, abundant precedent forecloses that result too. *See, e.g., Simpson v. Little*, 16 F.4th 1353 (10th Cir. 2021) (denying qualified immunity to an officer who shot a fleeing suspect); *Reavis ex rel. Estate of Coale v. Frost*, 967 F.3d 978 (10th Cir. 2020) (same); *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013) (same).[2]

[2] As the Institute for Justice notes in its amicus brief, the Ninth Circuit's decision in *Rhodes v. Robinson*, 408 F.3d 559, 570 (9th Cir. 2005), rejected a similar argument in the First Amendment retaliation context. *See* Amicus Curiae Institute for Justice Br. 16-17. The defendant officers in *Rhodes* claimed they were entitled to qualified immunity because their allegedly retaliatory conduct against the plaintiff prisoner did not ultimately deter him from exercising his First Amendment rights, and it was "not clearly established that a prisoner has any constitutional right to be free from retaliatory conduct that does not chill and/or deter the exercise of his constitutional rights." *Rhodes*, 408 F.3d at 570. The Ninth Circuit observed that, "[t]aken to its logical extreme, the officers' claim would insulate any retaliatory conduct from later sanction, for no officer can observe whether his or her retaliation has successfully chilled a prisoner's rights until long after deciding to act." *Id.* (internal quotation marks and emphasis omitted). The court of appeals rejected the officers' position as "flatly inconsistent with the concept of qualified immunity," explaining that it would shift "the focus of the qualified immunity inquiry from the time of the conduct to its aftermath and effect, and therefore would make immunity hinge upon *precisely* the kind of post hoc judgment that the doctrine is designed to avoid." *Id.*

When Defendants made the decision to continue shooting at Ms. Torres as she drove away, they did so with the intent and expectation that their use of deadly force would terminate her flight and effectuate a Fourth Amendment seizure. The only sensible qualified immunity inquiry under these circumstances—and the inquiry dictated by Supreme Court and Tenth Circuit precedent—is whether Defendants could have reasonably believed in that moment that it was lawful to use deadly force to seize Ms. Torres. *See* Appellant's Br. 14-20.

B. The Summary Judgment Record Forecloses Granting Defendants Qualified Immunity Based On The Reasonableness Of Their Use Of Deadly Force.

The proper qualified immunity inquiry in this case is whether, at the time of the incident, it was clearly unlawful for Defendants to continue shooting at Ms. Torres after she had passed them and neither they nor anyone else was in danger of being struck by her car. *See* Appellant's Br. 20-21. Ms. Torres's opening brief demonstrates that the answer is yes: *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), decided five years before the incident here, is exactly on point: The defendant officer shot a fleeing suspect who initially drove "straight at" the defendant and another officer, but the fatal shot "entered the [suspect's] truck from the side and went through the back of [his] head," "strongly suggest[ing] that [the suspect] had turned the truck and was no longer bearing down upon [the defendant] at the moment [he] fired the fatal shot." *Id.* at 1186-87. Because "whatever danger [the defendant] might have perceived had passed by the time [the defendant] fired the fatal shot," *id.,* this Court held that a

reasonable jury could find that the defendant's use of deadly forced violated the Fourth Amendment, *id.* at 1191-92. *See generally* Appellant's Br. 23-24; *see also* Amicus Curiae Constitutional Accountability Center Br. 16-21; Amicus Curiae Institute for Justice Br. 27-30.

Likewise, the two shots that hit Ms. Torres entered through the rear window of Ms. Torres's car and lodged in her back, "strongly suggesting" she was driving away from Defendants when they shot those bullets, after "whatever danger [they] might have perceived had passed." *See* Appellant's Br. 22-24. Indeed, this Court has subsequently relied on *Cordova* to deny qualified immunity in cases virtually identical to this one. *See* Appellant's Br. 24-26 (discussing *Simpson*, 16 F.4th at 1358-66, and *Reavis*, 967 F.3d at 982-95).

Defendants attempt to distinguish these cases only by asserting that, in fact, they *were* still in danger when they shot the two bullets that entered Ms. Torres' back. *See* Appellees' Br. 20 ("both officers were endangered" when they "fired their weapons simultaneously and immediately upon Appellant's driving away"); *id.* at 21 (*Cordova* "has little factual similarity" to this case because "the officer *was not in immediate danger*" when he shot the suspect); *id.* at 22 (*Simpson* "is not instructive" because "the key issue … was a factual dispute as to whether or not there was a threat

of harm"); *id.* (*Reavis* "is also dissimilar" because "there was no threat at the time the force was used").[3]

This is a fatal error for Defendants: At the summary judgment stage, Defendants' qualified immunity defense fails if it requires resolving "genuine disputes of fact" in their favor. *Tolan*, 572 U.S. at 656; *see also id.* at 657 ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."). Defendants do not and cannot contest that there is abundant record evidence establishing that they continued to shoot Ms. Torres as she drove away from them: Officer Madrid admitted in her deposition that Officer Williamson "fired into the back of the vehicle" after it had "already passed" her, at which point she was "out of danger." App. Vol. I at 139. Officer Williamson likewise admitted that he fired into the back of the vehicle as Ms. Torres drove away. App. Vol. I at 187-88. A fellow officer at the scene confirmed that "'some' of the shots were fired after Ms. Torres's vehicle passed by Officers Madrid and Williamson," at which point "the

[3] Defendants note that *Simpson* and *Reavis* were decided after the incident in this case, Appellees' Br. 21-22, but fail to address Ms. Torres's point that *Simpson* and *Reavis* are relevant and controlling precedent on the question of whether *Cordova* clearly established in 2009 that it is unlawful for police to continue to shoot at a suspect fleeing by car after the suspect has passed the officers and no one is in immediate danger of being hit, *see* Appellant's Br. 24-25. Indeed, the Court held exactly that in *Simpson*: "'[A] case decided after the incident underlying a section 1983 action can state clearly established law when the case ruled that the relevant law was clearly established as of an earlier date preceding the events in the later section 1983 action.'" 16 F.4th at 1365 (quoting *Soza v. Demsich*, 13 F.4th 1094, 1100 n.3 (10th Cir. 2021)).

officers were not in any danger of being hit." App. Vol. II at 309; *see also* App. Vol. I at 151-53. Bullet trajectory analysis established that all thirteen rounds were fired from the side and back of Ms. Torres' vehicle. App. Vol. I at 187, 211, 259-79. And the two bullets that hit Ms. Torres—and that are thus the basis of her excessive force claims—entered through the rear window and lodged in Ms. Torres's *back*, meaning they were not discharged until Defendants were *behind* her. App. Vol. I at 172, 228-32, 260.

Defendants do not dispute this evidence; instead, their claim that they remained in danger throughout the shooting appears to be based solely on the length of time they shot at Ms. Torres: thirteen bullets over seven seconds. Appellees' Br. 20; *see* App. Vol. I at 259-79 (number of shots). But one need only pause and count out seven seconds to appreciate that a car accelerating out of a parking space would be well past anyone standing next to the parking space by the time the final shots were fired. At minimum, this is a quintessential jury determination that cannot be resolved in Defendants' favor at the summary judgment stage.

To the extent Defendants suggest that seven seconds is simply too short a period of time to parse the lawfulness of their final shots from the lawfulness of their initial shots, Appellees' Br. 20, that argument too fails as both a matter of law and fact. This Court has long recognized that "'[f]orce justified at the beginning of an encounter is not justified *even seconds later* if the justification for the initial force has

been eliminated.'" *Fancher v. Barrientos*, 723 F.3d 1191, 1200 (10th Cir. 2013) (quoting *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) (emphasis added)).

In *Fancher*, the defendant officer fired seven shots at a fleeing suspect who endangered the officer by reversing toward him; a witness "heard a series of gunshots, followed by five to seven seconds in which he did not hear any gunshots, followed by the sound of two more gunshots." 723 F.3d at 1197. In rejecting the officer's qualified immunity defense, this Court segmented not only the last two shots, but also shots two through five, finding "a question of fact as to whether, under the totality of circumstances, [the defendant] reasonably perceived that he or others were in danger at the precise moments that he fired shots two through seven, and thus, whether those additional shots were excessive." *Id.* at 1999. Likewise, the evidence here—including Defendants' own admissions, eyewitness testimony, and bullet trajectory analysis, *see supra* pp. 10-11—suffices to create a triable issue of fact as to whether Defendants "reasonably perceived [they] were in danger at the precise moments that [they fired the two shots that entered Ms. Torres's back], and thus whether those additional shots were excessive."

Defendants make the same mistake when they invoke *Brosseau v. Haugen*, 543 U.S. 194 (2004) and *Clark ex rel. Estate of Burkinshaw v. Bowcutt*, 675 Fed. App'x 799 (10th Cir. 2017) (unpublished). Appellees' Br. 27-29. As Defendants acknowledge, the suspect in *Clark* was driving directly at the officer and "inches away" from hitting him when the officer fired the fatal shot. Appellees' Br. 27-28; *see Clark*, 675 Fed.

App'x at 807-08. And in *Brosseau*, the officer shot the suspect because she reasonably believed his flight would pose a "threat of serious physical harm" to other officers nearby. Appellees' Br. 28; *see Brousseau*, 543 U.S. at 200 (describing the relevant qualified immunity inquiry as whether the officer reasonably believed it was lawful "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight"). Defendants have never put forth any evidence suggesting that they or anyone else was endangered by Ms. Torres's flight after she pulled passed them out of the parking space.

In short, neither *Clark* nor *Brosseau* casts any doubt on *Cordova*'s holding that it is unlawful for police to continue to shoot at a fleeing suspect after any immediate danger to the officers or other people has passed. Because the record contains sufficient evidence for a jury to conclude that is precisely what happened here, Defendants cannot obtain summary judgment based on qualified immunity.

II. The District Court Erred In Finding Ms. Torres's Excessive Force Claims Barred Under *Heck*.

A. Ms. Torres's Claims Do Not Necessarily Imply The Invalidity Of Her Plea Agreement.

The district court's *Heck* ruling is wrong for the reasons laid out in Ms. Torres's opening brief: It can be true both that, consistent with Ms. Torres's plea agreement, she endangered Defendants when she initially pulled her car forward, *and* that Defendants employed unlawful excessive force when they shot Ms. Torres in the back *after* she had pulled out of the parking space because Defendants were no longer in

danger. Accordingly, a judgment in Ms. Torres's favor does not "necessarily imply the invalidity of her conviction," *Heck v. Humphry*, 512 U.S. 477, 487 (1994), making *Heck* inapplicable. *See* Appellant's Br. 27-33; *see also* Amicus Curiae Constitutional Accountability Center Br. 21-25.

Defendants dedicate the bulk of their *Heck* argument to the proposition that Ms. Torres's plea agreement "undeniably show[s] that Officer Madrid and Officer Williamson were in danger." Appellees' Br. 20. To the extent Defendants mean that they were in danger when they shot the two bullets that entered Ms. Torres's back, that argument fails for the reasons just discussed, *supra* pp. 10-11: At the summary judgment stage, all factual inferences must be drawn in Ms. Torres's favor as the nonmovant, and there is abundant, uncontroverted evidence that Ms. Torres was driving away from Defendants and did not pose an immediate danger to anyone when they shot her in the back.

To the extent Defendants mean that Ms. Torres's plea agreement establishes that they were initially in danger when she pulled out of the parking space, this is a non-sequitur. The *Heck* inquiry is whether a judgment in Ms. Torres's favor would "*necessarily* imply" the invalidity of Ms. Torres's plea agreement, 512 U.S. at 487 (emphasis added), and here a reasonable jury could find that although Ms. Torres initially endangered Defendants when she pulled forward, they engaged in excessive force when they continued to shoot at her as she drove away and the danger had passed. Accordingly, Ms. Torres can prevail on her excessive force claim without

necessarily implying the invalidity of her plea agreement. *See Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("necessarily" is key to conducting a proper *Heck* analysis).

Defendants assert that *Hooks v. Atoki*, 983 F.3d 1193 (10th Cir. 2020), is "unhelpful to the present analysis" because "[t]he only claims allowed to move forward were those in which force was applied *after* [the plaintiff] was subdued." Appellees' Br. 17-18. But the legal significance of the plaintiff being subdued in *Hooks* was simply that, once the plaintiff was subdued, the conduct underlying the plaintiff's conviction for assaulting the officers ended, meaning that *Heck* did not foreclose a jury determination that any force the officers used *after* that moment was not justified as self-defense. *Hooks*, 983 F.3d at 1201; *see also McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018) (same). Here, the conduct underlying Ms. Torres's plea agreement ended when she had pulled past Defendants and they were no longer in danger of being hit by her car. Because a jury could reasonably find that Defendants use of deadly force *after* that moment was not justified as self-defense, *see* Appellant's Br. 20-23 and *supra* pp. 1-11, a judgment in Ms. Torres's favor does not pose a *Heck* problem. Defendants' claim that it is improper to "parse out each individual shot" in this way, Appellees' Br. 20, fails at the summary judgment stage for the reasons already discussed, *supra* pp. 11-12.

Defendants attempt to distinguish *Harrigan v. Metro Dade Police Department Station #4*, 977 F.3d 1185 (11th Cir. 2020), by noting that it involved a situation where the plaintiff alleged the officer engaged in excessive force *before* the plaintiff engaged in the

conduct underlying his criminal conviction. Appellees' Br. 19-20. Defendants offer no explanation for why that sequencing would change the *Heck* analysis. It does not, as evident in *Jefferson v. Lias*, 21 F.4th 74 (3d Cir. 2021), a case involving facts largely identical to this one. *See* Appellant's Br. 26, 30 (explaining that the Third Circuit rejected the officer's *Heck* challenge in *Jefferson* because a reasonable jury could conclude that although the plaintiff initially engaged in risky flight such that he was properly convicted of second-degree eluding, he was no longer a danger when the officer shot him).

Defendants do not address *Jefferson*'s *Heck* analysis. They simply observe that it is an out-of-circuit decision that "cite[s] the U.S. Supreme Court's opinion in this very litigation to set the established law on a claimant's required showings in a Fourth Amendment excessive force fleeing case, presumably because before the *Torres* decision the issue was unsettled." Appellees' Br. 22-23 (citing *Jefferson*, 21 F.4th at 78). That is exactly right. And yet the Third Circuit: (1) denied qualified immunity to the defendant officer without regard to the pre-*Torres* split over the Fourth Amendment's application where the suspect evades capture, instead focusing on the abundant case law establishing that police may not continue to shoot at a fleeing suspect once the suspect is driving away and no longer poses an immediate danger to anyone, *see* Appellant's Br. 26 (citing *Jefferson*, 21 F.4th at 81, 85), and (2) rejected the officer's *Heck* defense on the ground that a reasonable jury could conclude that although the plaintiff initially engaged in risky flight such that he was properly convicted of second-

degree eluding, he was no longer a danger at the moment the officer shot him, *see* Appellant's Br. 30 (citing *Jefferson*, 21 F.4th at 86-87). Defendants do not and cannot identify any basis for reaching a different result in this case.[4]

B. To The Extent Any Of Ms. Torres's Factual Allegations Contradict Her Plea Agreement, The Proper Course Is To Strike Them And Allow The Rest Of Her Suit To Proceed.

Relying on *Havens v. Johnson*, 783 F.3d 776 (10th Cir. 2015), Defendants assert that *Heck* bars Ms. Torres's claims because Ms. Torres "asserts innocence: she claims she did not know that defendants were police officers and she maintains that Officer Madrid and Officer Williamson were never endangered." Appellees' Br. 26. Ms. Torres's opening brief explained why this argument fails. *See* Appellant's Br. 29-30 n.4. As this Court observed in *Havens*, the plaintiff in that case had no explanation for "how [the officer] used excessive force in a way that would still be consistent with the basis of his attempted-assault conviction." 783 F.3d at 777. Here, in contrast, a

[4] Ms. Torres's opening brief lays out the factual similarities between this case and *Jefferson*. *See* Appellant's Br. 26, 30. Defendants' assertion that the facts here "are more in line" with *Bland v. City of Newark*, 900 F.3d 77 (3d Cir. 2018), Appellees' Br. 23, is easily dismissed. In *Bland*, the officers shot the plaintiff after he carjacked someone, reportedly at gunpoint, and then engaged in an extended car chase during which he ran red lights, weaved in and out of traffic, reached speeds exceeding 100 miles per hour, twice struck a police car, and threatened to kill the officers. 900 F.3d at 80-82. Nothing remotely similar happened here. Defendants argue otherwise only by mischaracterizing the record: Although the person Defendants were looking for "was the subject of a felony arrest warrant," Appellees' Br. 23, Defendants knew by the time they attempted to open Ms. Torres's car door that she was not that person, and they had no reason to believe when they shot at Ms. Torres that she had such a warrant, *see* App. Vol. I at 132, 181, 184, 187, 206-09. Defendants also omit that Ms. Torres "drove erratically" and "stole a civilian's vehicle to continue her flight," Appellees' Br. 23, only *after* they shot her in the back, App. Vol. I. at 90-91, 172-75, which means those facts are irrelevant to Defendants' qualified immunity defense.

reasonable jury could conclude that although Ms. Torres's plea agreement establishes that she endangered Defendants when she initially pulled her car forward, Defendants engaged in excessive force when they shot in her in the back after she had passed them. *Havens* identifies this exact scenario as one where *Heck* does not apply: "An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer. For example, the claim may be that the officer used too much force to respond to the assault *or that the officer used force after the need for force had disappeared*." *Id.* at 782 (emphasis added).

Defendants do not provide any citations for the factual allegations they believe render this suit incompatible with Ms. Torres's plea agreement, *see* Appellees' Br. 26, but to the extent this Court nonetheless finds that such allegations exist, it is well-established that the proper course under *Heck* is to strike the problematic allegations and instruct the jury accordingly, while still allowing the jury to consider the plaintiff's claims. *See* Appellant's Br. 32-33 (citing caselaw). Defendants do not argue otherwise.

CONCLUSION

For the reasons set forth above and in Appellant's opening brief, the judgment of the district court should be reversed, and the case remanded for further proceedings.

Dated: August 10, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a) and 10th Circuit Rule 32. This brief contains 5085 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), as calculated in Version 16.50 of Microsoft Word for Mac. It was prepared in 14-point (above-the-line) or 13-point (footnotes) font using Garamond, a proportionally spaced typeface.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2022, I electronically transmitted the foregoing brief to the Clerk of the Court using the appellate CM/ECF System, causing it to be served on counsel of record, who are all registered CM/ECF users.

/s/ Kelsi Brown Corkran
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