NO. 16-1697

In The
Supreme Court of the United States

DORIAN JOHNSON,

Petitioner,

v.

THE CITY OF FERGUSON, MISSOURI; FERGUSON POLICE CHIEF THOMAS JACKSON, AND FERGUSON POLICE OFFICER DARREN WILSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

A "seizure" without the application of physical force occurs under the Fourth Amendment when, under the totality of the circumstances, there is a show of authority and means intentionally applied producing actual submission. Here, Petitioner has alleged Officer Darren Wilson ordered Petitioner and Michael Brown, Jr., to "Get the f*ck on the sidewalk"; that Wilson grabbed Brown; that Brown struggled to break free; that Wilson discharged his weapon twice, striking Brown in the arm; that Petitioner "ran away"; and that at no time ordered either of the two to "stop" or "freeze." The question presented is whether a momentary hesitation before fleeing, without compliance to an officer's order or the ability of the officer to enforce the order, constitutes actual submission for purposes of a "seizure."

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INTRODUCTION

Petitioner's characterization of the question presented does not capture the issue posed, argued, and decided in the proceedings below, but requests this Court to issue an impracticable, *per se* rule within the context of the Fourth Amendment. The counterstatement of question presented which captures the issue of this case has been decided by the Eighth Circuit consistently with this Court's precedent and the holdings of other courts of appeals.

Specifically, the issue in the proceedings below cannot be framed in high generality and without consideration of the totality of the circumstances as alleged by Petitioner in his Complaint, which include the allegation Petitioner was walking down Canfield Drive; that Officer Darren Wilson ("Wilson") ordered Petitioner and Michael Brown, Jr., to "Get the f*ck on the sidewalk"; that Wilson grabbed Brown; that Brown struggled to break free; that Wilson discharged his weapon twice, striking Brown in the arm; that Petitioner "ran away"; and that at no time ordered either of the two to "stop" or "freeze."[1] Under these circumstances, qualified immunity applies to Petitioner's federal claims as he was not "seized" under the Fourth Amendment under clearly established law as of August 9, 2014. This is also consistent with this Court's pronouncement of public policy regarding compliance with orders and the

[1] Respondents discuss Petitioner's allegations in this Brief in a light most favorable to Petitioner for purposes of the standard of review regarding a motion to dismiss, but do not concede the truth of any allegation by so doing.

dangers posed to society by flight from law enforcement.

STATEMENT OF THE CASE

Respondents disagree with how Petitioner has chosen to describe the factual background of the matter. Taking all reasonable inferences of fact (and not the legal conclusions) in a light most favorable to Petitioner (*see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), the following allegations in Plaintiff's removed Petition present the issue regarding whether a seizure occurred:

> 20. On August 9, 2014, at approximately 12:00 p.m., Plaintiff Dorian Johnson was peacefully and lawfully walking down Canfield Drive in Ferguson, Missouri with his companion Michael Brown, Jr. Plaintiff and Brown's actions did not impair or impede traffic.
>
> 21. At the same time, Officer Darren Wilson was operating a marked police vehicle on Canfield Drive. As he approached the pair, he slowed his vehicle to a stop and ordered them to "Get the f*ck on the sidewalk."
>
> 22. Officer Wilson continued to drive his vehicle several yards, then abruptly put his vehicle into reverse and parked his vehicle at an angle so as to block the paths of Plaintiff Johnson and Brown.

23. When the pair was stopped by Officer Wilson without reasonable suspicion of criminal activity, Plaintiff was then without justification and unreasonably detained.

24. Officer Wilson stopped his vehicle just inches from Brown and forcefully opened his door, striking Brown.

25. Officer Wilson then reached through his window and grabbed Brown, who was closer to Officer Wilson than Plaintiff Johnson. Officer Wilson thereafter threatened to shoot his weapon. As Brown struggled to break free, Officer Wilson discharged his weapon twice, striking Brown in the arm.

26. Surprised by Officer Wilson's use of excessive force and fearing for his life, Plaintiff Johnson ran away from Officer Wilson simultaneously with Brown.

27. At no point in time did Officer Wilson order Plaintiff Johnson or Brown to "stop" or "freeze."

28. Without any provocation by Plaintiff Johnson and without any legal justification, Officer Wilson withdrew his weapon and fired it at Plaintiff Johnson and Michael Brown, Jr. as they

> fled and ran away from him, striking Brown several more times.

Appellant's Compl.

The District Court cited to the sequence and timing of these events to conclude the Petitioner was seized and denied qualified immunity to Wilson and Chief Tom Jackson at the pleading stage. Respondents filed an interlocutory appeal regarding Petitioner's claim under 42 U.S.C. § 1983 (2016) pertaining to the question of whether qualified immunity applied to Wilson and Jackson. Respondents also invoked pendant jurisdiction challenging the ruling regarding Petitioner's *Monell* claim against Respondent City of Ferguson, Missouri.

A divided three judge panel of the Eighth Circuit affirmed the denial of qualified immunity argued in Respondents' Motion to Dismiss. While the majority stated a seizure occurred when Petitioner actually stopped as Officer Wilson blocked his path (*Johnson v. City of Ferguson*, 864 F.3d 866, 873 (8th Cir. 2017)), the dissent noted that the question before the Eighth Circuit was alike to that presented in *California v. Hodari D.*, 499 U.S. 621, 626 (1991). *Johnson v. City of Ferguson*, 864 F.3d at 878–79 (Wollman, J., dissenting). Specifically, as "Johnson himself was neither physically restrained nor prevented from proceeding to the sidewalk in compliance with the officer's command rather than fleeing as he did," the dissent pointed out that "'[t]here is no seizure without actual submission.'" *Id.* at 879 (Wollman, J., dissenting) (quoting *Brendlin v. California*, 551 U.S. 249, 254 (2007)).

The Eighth Circuit granted Respondents' Petition for Rehearing en banc, and, by a 6-4 majority,[2] vacated the Circuit panel's opinion. *Johnson v. City of Ferguson*, 926 F.3d 504, 505 (8th Cir. 2019). The majority addressed the totality of the circumstances as alleged by Petitioner and found that Petitioner's "complaint concedes that neither he nor Brown was ordered to stop and remain in place." *Johnson*, 926 F.3d at 506. Rather, Petitioner refused to comply with the Officer's order, and "[t]hat he was able to leave the scene following the discharge of Wilson's weapon gives the lie to his argument that the placement of Wilson's vehicle prevented him from doing so." *Id.* The majority relied upon the principles set forth in *Hodari D.* regarding whether a seizure occurs where "'. . . the subject does not yield.'" *Id.* (quoting *Hodari D.*, 499 U.S. at 626).

The dissent stated Petitioner submitted to Wilson's show of authority by focusing on "the time that Officer Wilson reached through his window and grabbed Brown; threatened to shoot his weapon, wrestled with Brown who struggled to break free, and then twice fired his weapon." *Id.* at 510 (Melloy, J., dissenting). Although Petitioner alleged Wilson discharged his firearm twice and Petitioner ran away, the dissent remarked that Brown was shot, and "[i]f one of the two were seized, both were seized." *Id.* Although Petitioner was commanded to

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[2] Respondents correct pages 4 and Appendix 1a of Petitioner's Petition for Writ of Certiorari where Petitioner misidentified the Circuit Court hearing the matter en banc. Respondents further correct Petitioner's misstatement on page 4 that the Eighth Circuit's (en banc) vote was 7-4.

get to the sidewalk and *not* to "stop" or to "freeze," the dissent also found that the Petitioner stopped walking, that he therefore did not engage in mere passive acquiescence, and that a reasonable person would not have believed himself free to terminate the encounter between the police and himself. *Id.* (Melloy, J., dissenting).

REASONS FOR DENYING CERTIORARI

I. THE FACTS OF THIS CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONER.

This case does not present a "move on" issue. Petitioner was walking in a roadway and was allegedly ordered to get to the sidewalk. *See* MO. REV. STAT. § 300.405.1 (2006) ("Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway."). The Petitioner did not submit to the command. A struggle ensued between Brown and Wilson, in which Petitioner was never physically contacted. Wilson shot Brown during the struggle, and Petitioner ran away, untouched, without ever receiving any command to "stop" or "freeze" during the incident. There was an alleged order to Petitioner and, thereafter, a struggle with a third party. Petitioner did not obey the order and Wilson did not have the ability to further address or enforce his order before Petitioner fled.

This is not a case where an officer successfully escorted an individual to a specific area, such as the circumstances presented in *Bennett v. City of Eastpointe* where the officer escorted a youth to walk his bicycle to a block away and to the other side of Eight Mile Road. 410 F.3d 810, 834 (6th Cir. 2005). Petitioner did not plead Wilson had the opportunity to escort or address him whatsoever given the struggle going on between Brown and Wilson. Wilson had no control over, no possession of or over Petitioner, as is evidenced by Petitioner's disobedience to the command and his subsequent

flight. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.") (internal citations omitted).

This is also not a case where an individual's freedom of movement was restricted by a factor independent of police conduct. *See id.* at 436 (encounter on bus); *see also Brendlin v. California*, 551 U.S. 249, 252 (2007) (passenger in vehicle). Regardless, Petitioner *in fact* disobeyed Wilson's alleged order and terminated the encounter. *See Brendlin*, 551 U.S. at 255.

Respondents object to Petitioner's statement of the question presented. The issues debated and decided below hinged upon whether, in the absence of physical touching, there was a sufficient show of force and whether there must be more than momentary hesitation in order to constitute actual submission. Wilson's order to get on the sidewalk, rather, was a circumstance illustrating both Petitioner's refusal to comply and the lack of Wilson's ability to enforce the order. Petitioner never actually submitted to Wilson, but instead fled. As the dissenting opinion in the en banc decision indicated, the parties did not brief any issue regarding "move-on" orders, below. *Johnson v. City of Ferguson*, 926 F.3d 504, 509 (8th Cir. 2019) (Melloy, J., dissenting). As Wilson's order was a factor regarding noncompliance and not the cause of any actual submission to authority, this case is not a vehicle by which Petitioner's question presented regarding "move-on" orders should be addressed or answered.

Petitioner's question presented pertaining to confinement to a particular space is not discussed within the context of the circumstances before Wilson. As qualified immunity focuses "on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Kisela v. Hughes*, 584 U.S. ___, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449, 453 (2018) (internal quotations and citation omitted). This Court has reiterated:

> Although "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." Ibid. (internal quotation marks omitted). This Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'"
>
> "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Use of excessive force is an area of the law "in which the result

> depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

Kisela v. Hughes, 584 U.S. ___, 138 S. Ct. 1148, 1152–53, 200 L. Ed. 2d 449, 454 (2018) (internal citations omitted). Petitioner's question presented and subsequent discussion of the question presented fails to specify case law purportedly overlooked by the Eighth Circuit, en banc, "squarely governing" the facts at issue. Respondents object to the question presented by the Petitioner as requesting this Court to answer a question posed to a high level of generality and to ignore the key circumstances considered by the courts below.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR DECISIONS OF OTHER CIRCUITS.

This Court has previously stated, "The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield." *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

Petitioner did not brief *Hodari D.*, though the documents contained in his appendices show *Hodari D.* is the seminal case governing the arguments of the parties below and the Eighth Circuit's decision in this matter.

Petitioner's question presented invites this Court to interpret the Fourth Amendment's term "seizure," which, "[f]rom the time of the founding to the present. . . has meant a 'taking possession'" to include a scenario where an individual is not confined to a particular space. *See id.* at 624 (internal citations omitted). Though Petitioner has focused on "move-on" orders in his brief, the touchstone of a seizure is that a taking of possession must result, also stated as a "termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989). Petitioner's question presented regarding whether a seizure can exist assumes a scenario where an officer is able to escort or otherwise address an individual to effect an order. Here, Wilson's was unable to further address or enforce his order for Petitioner to get on the sidewalk, and such order did not result in a "termination of freedom of movement through means intentionally applied." Petitioner himself terminated the encounter by running away before any such *potential* enforcement took place, if it were to ever happen at all. *See Brendlin v. California*, 551 U.S. 249, 255 (2007).

"*Bostick* first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding

the encounter.'" *U.S. v. Drayton*, 536 U.S. 194, 201 (2002) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). Void from the circumstances in this case and the Petition is Petitioner's *compliance and actual submission*. This not only ignores the quintessential consideration to determine whether a seizure has occurred, but also overlooks the public policy set forth by this Court in *Hodari D.:*

> We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges. Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are not obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

Hodari D., 499 U.S. at 627 (internal footnote omitted). Public policy is not served if the term "seizure" were stretched to apply to an individual

who defied an officer's order, only to momentarily hesitate before running away, untouched. Certiorari need not be granted to restate what *Hodari D.* has already stated.

The Eighth Circuit's holding that Petitioner did not actually submit to Wilson is squarely consistent not only with *Hodari D.*, *Brower*, and *Brendlin*, but is consistent with decisions of other courts of appeal. *See U.S. v. Stover*, 808 F.3d 991, 995 (4th Cir. 2015) (defendant only submitted to police authority when confronted by an armed officer in front of his car, but had not submitted prior to that when officers blocked defendant's vehicle, drew their weapons, and approached defendant immediately without asking if they could speak with him); *U.S. v. Salazar*, 609 F.3d 1059, 1065–66 (10th Cir. 2010); *U.S. v. Waterman*, 569 F.3d 144, 145–46 (3rd Cir. 2009) (interpreting *Hodari D.*'s holding regarding submission "would seem to require something more than a momentary pause or mere inaction"); *U.S. v. Baldwin*, 496 F.3d 215, 218–19 (2nd Cir. 2007) ("We hold that, to comply with an order to stop—and thus become seized—a suspect must do more than halt temporarily; he must submit to police authority, for there is no seizure without actual submission.") (internal quotations and citation omitted); *U.S. v. Letsinger*, 93 F.3d 140, 143–45 (4th Cir. 1996) ("[W]e believe that the suspect must clearly acquiesce to the officer's show of authority. . ."); *U.S. v. Hernandez*, 27 F.3d 1403, 1406–07 (9th Cir. 1994) (pausing momentarily, then fleeing, is not a submission to police authority); *U.S. v. Washington*, 12 F.3d 1128, 1132 (D.C. Cir. 1994) ("[The defendant] initially

stopped, but he drove off quickly before [the officer] even reached the car. Because [the defendant] did not submit to [the officer's] order, he was not seized within the meaning of the Fourth Amendment."); *see also Johnson v. City of Ferguson*, 926 F.3d 504, 506 (8th Cir. 2019) (citing to these cases); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) ("The pursuit in and of itself did not constitute a seizure, because it did not produce a stop. . . . Likewise, shots that were fired at the truck and that did not hit Cole were not seizures because they too failed to produce a stop."). Certiorari need not be granted to restate what the courts of appeals have already held.

As referenced in Section I, *supra*, Petitioner has failed to cite to existing precedent regarding the actual issues of this case which "placed the statutory or constitutional question beyond debate" where a non-compliant individual who momentarily hesitated before fleeing and where an officer was unable to control or address the individual constituted a seizure. *Kisela v. Hughes*, 584 U.S. ___, 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449, 454 (2018). Certiorari should not be granted in light the consistency of the holding below with this Court's existing precedent. There is no decision of this Court in conflict with the Eighth Circuit's (en banc) holding. There is no departure from accepted and usual course of judicial proceedings in this matter. The Petitioner has failed to properly pose an unsettled question of law to this Court. *See* U.S. Sup. Ct. R. 10(a) and 10(c).

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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