No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

—v.—

JANICE MADRID AND RICHARD WILLIAMSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NEW MEXICO, IN SUPPORT OF PETITIONER

David D. Cole
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(212) 549-2500
dcole@aclu.org

Carl Takei
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Jeffery P. Robinson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
810 Third Avenue, Suite 500
Seattle, Washington 98104

Leon Howard
ACLU OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as amicus. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of New Mexico is an affiliate of the ACLU and shares this mission and concerns.

SUMMARY OF ARGUMENT

This case presents a basic question that has significant implications for Fourth Amendment jurisprudence as a whole: Does an officer's intentional use of physical force on a fleeing person amount to a seizure of that person regulated by the Fourth Amendment, or is the person seized only if that force causes the person to halt? The decision below relies on an aberrant Tenth Circuit rule to hold that shooting a fleeing person multiple times is not a seizure unless those bullets not only hit her, but succeed in terminating her movement. For the reasons set forth below, the decision below is wrong and the Tenth Circuit rule it applies should be

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented in writing to the filing of this brief.

repudiated. The Tenth Circuit's rule is inconsistent with *Hodari D.*'s holding that under the Fourth Amendment, a "seizure" includes any "laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). The Tenth Circuit's rule is also at odds with basic Fourth Amendment principles, in ways that create a dangerous gap in accountability. It will leave a wide range of physical force deployed by police officers—including blunt force, chokeholds, Tasers, and lethal force—wholly unregulated by the Fourth Amendment. For these reasons, the Court should grant the writ of certiorari and reverse.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH *HODARI D.*

The Fourth Amendment prohibits unreasonable searches and seizures. The Court has long held that a seizure includes more than a formal arrest, reaching various situations in which police conduct would cause an ordinary person to not feel free to terminate the encounter. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Drayton*, 536 U.S. 194 (2002). At a minimum, this includes all situations in which police apply physical force as part of an attempt to exert control over an individual's freedom of movement.

In *California v. Hodari D.*, 499 U.S. 621, 626 (1991), the Court confronted the question whether a show of authority, *without* any use of physical force, also constitutes a seizure. The Court held that because an order to stop that is unaccompanied by physical force and ignored by its target is neither a

search nor seizure, it is not governed by the Fourth Amendment. *Id.* at 626. In reaching this conclusion, *Hodari D.* divided efforts by police to stop citizens into two distinct categories: (1) those based on the application of physical force to the individual's body, which are always seizures; and (2) those based on a mere "show of authority," such as an order to stop, which become a seizure only if the individual actually submits to the authority and stops. As the Court explained, "[a]n arrest requires *either* physical force (as described above) or, where that is absent, submission to the assertion of authority." *Id.* (emphasis in original). With respect to physical force, the Court explained, "[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*." *Id.* (emphasis added).

The Tenth Circuit rule applied in this case ignores that critical distinction, in direct contravention of *Hodari D.*, and applies the standard for a mere show of authority to the actual use of lethal force. Under the Tenth Circuit rule, all uses of physical force that strike citizens in an effort to make them halt, from a chokehold to a Taser to a fusillade of bullets, are unregulated by the Fourth Amendment unless they *also* stop the individual. As explained further *infra*, this rule would remove a substantial share of the injurious physical force used by police nationwide from the scope of the Fourth Amendment.

The Tenth Circuit initially went wrong in *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-25 (10th Cir. 2010). There, the court held that when police shot a man in an attempt to halt his flight, he was not

seized because he continued to flee after being shot. The court reasoned that even if the gunshot wound caused him to have "pained or slowed movement," it would not be a seizure unless the officer's bullet were to "terminate the suspect's movement." *Id.* at 1223-25. The *Brooks* court explicitly avoided deciding whether "a momentary termination of a subject's movement" through application of physical force would be a seizure. *Id.* at 1225. This Court denied certiorari in *Brooks*, 562 U.S. 1200 (2011), and the Tenth Circuit continued to apply its new rule in subsequent cases. *See Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) (family fleeing police in minivan not seized by police gunshots at minivan "because, in fleeing, they were not submitting to the officers"); *United States v. Beamon*, 576 F. App'x 753, 758 (10th Cir. 2014) (DEA agent never seized man despite grabbing him, scuffling with him, and falling down stairs with him, because the man "did not submit" and "his movement was not terminated").

The decision below relies on this aberrant line of jurisprudence to hold that when police shoot more than a dozen shots at a person driving a car, with multiple bullets striking her vehicle, and two bullets striking the driver herself, Pet. App. 4a, 23a, there is no seizure, and therefore no Fourth Amendment requirements, if she continues to drive. Pet. App. 8a.

This result, and the Tenth Circuit rule it reflects, improperly shields from Fourth Amendment regulation all police use of physical and even deadly force short of that which succeeds in halting a person in her tracks. The Court should grant review and reverse.

II. THE TENTH CIRCUIT RULE IS AT ODDS WITH BASIC FOURTH AMENDMENT PRINCIPLES.

In addition to contravening *Hodari D.*, the Tenth Circuit rule is inconsistent with this Court's jealous safeguarding of police intrusions on persons or property. Fourth Amendment law imposes significant limitations on the state's authority to intrude on individual privacy and autonomy. The law governing searches presumptively requires the police to have a warrant based on probable cause before intruding on a person's property or reasonable expectation of privacy. *Fla. v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012). The Court has held that the Fourth Amendment governs a wide range of such intrusions, including bringing a drug-sniffing dog onto a front porch, even where there is no physical intrusion into the home itself, *Jardines,* 569 U.S. at 7-9; using a thermal imaging device to detect heat emanating from a home, *Kyllo v. United States*, 533 U.S. 27, 35 (2001); and merely lifting a turntable a few inches to reveal its serial number, *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

The Court has similarly interpreted the restriction on seizures to apply to far more than formal arrests. A temporary stop on the street is a seizure, *Terry v. Ohio*, 392 U.S. at 19, as is any police encounter that a reasonable person would not feel free to terminate. *Fla. v. Royer*, 460 U.S. 491, 501 (1983). Temporary stops require reasonable suspicion. *Terry*, 392 U.S. at 27. Full-scale arrests require probable cause and a warrant, absent exigent circumstances. *Royer,* 460 U.S. at 499. And the use of lethal force is a form of seizure that requires

still more: "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1 (1985). As *Garner* illustrates, the Fourth Amendment's requirement that seizures be "reasonable" regulates not just the *fact* of a seizure, but the *means* by which a seizure is conducted. The Court has held that "the Fourth Amendment provides an explicit textual source of constitutional protection against … physically intrusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 395 (1989). To determine whether a use of force is unconstitutionally excessive, it has directed courts to assess the facts and circumstances from the standpoint of a reasonable officer, including such factors as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Under the Tenth Circuit rule, however, none of the above inquiries even come into play unless, *after* the officer applies physical force, the person actually stops moving. That standard, which this Court has reserved for shows of authority that *do not use any physical force*, is manifestly inadequate where the officer has gone beyond mere words to grab, choke, electrocute, shoot, or otherwise apply physical force to the person. Just as any intrusion on property is a trespass (and if done to gather information, a search, *Jardines*, 569 U.S. at 7), so, too, any application of physical force to the body of an individual, or in the *Hodari D.* Court's words, "laying on of hands," concretely and tangibly invades their autonomy, and therefore deserves Fourth Amendment protection,

"even when it is ultimately unsuccessful." *Hodari D.*, 499 U.S. at 626. The Tenth Circuit's requirement that such "laying on of hands" must successfully terminate the person's movement to trigger Fourth Amendment scrutiny is exactly the kind of "rigid all-or-nothing model of justification and regulation" that this Court warned in *Terry* would "obscure[] the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation." *Terry*, 392 U.S. at 17.

The Tenth Circuit's standard is also at odds with another fundamental principle of Fourth Amendment jurisprudence: namely, the idea that the constitutional inquiry should focus on the officer's actions in light of the facts known to the officer *at the time*, and not on events that arise *after* the officer's actions. *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). The Tenth Circuit rule, by contrast, depends not on the officer's own actions and decisions, nor on the subject's actions *prior* to the use of force, but on the *reaction* of the subject to the officer's use of force.[2] This is akin to letting police

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[2] The Tenth Circuit's standard is also inconsistent with the excessive force analysis in the context of use of force by prison officials. In the Eighth Amendment context, an incarcerated person who is subjected to malicious physical force "does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010). Yet under the Tenth Circuit rule, people outside of prisons who are physically assaulted by a police officer would have no Fourth Amendment

repeatedly smash a battering ram into a house's front gate without a warrant so long as the gate does not fall down.

The Court in *Hodari D.* justified its treatment of "show of authority" cases by noting that "[s]ince 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. But that reasoning should not be extended to the categorically distinct context of actual physical force, because the use of physical force is more than mere words; it constitutes a tangible intrusion on bodily autonomy. An order does not bruise, break bones, puncture the skin, or inflict pain. Physical force can, and often does. And each blow inflicts the same physical harm, as well as a significant bodily intrusion, regardless of whether the person reacts by fleeing or halting.

Under the rule applied by the Tenth Circuit below, the Fourth Amendment imposes *no constraint whatsoever* even on clearly excessive uses of force, including those that severely harm or needlessly endanger the person targeted, fellow officers, or bystanders. This result cannot be squared with the general tenor of Fourth Amendment jurisprudence, which is designed to regulate police intrusions, large or small, on persons, property, or privacy.

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protection against excessive force if they had "the good fortune to escape without serious injury." *Id.*

III. THE TENTH CIRCUIT RULE WILL LEAVE A WIDE RANGE OF PHYSICAL FORCE FREQUENTLY DEPLOYED BY POLICE OFFICERS UNREGULATED BY THE FOURTH AMENDMENT.

The Tenth Circuit rule limits Fourth Amendment regulation to those uses of force that *succeed* in halting an individual, and leaves unregulated every other use of force—no matter how severe or damaging. In addition to contravening basic Fourth Amendment principles, this rule ignores the real-world scenarios in which police officers choose to use physical force, and frustrates accountability for serious intrusions on bodily integrity and autonomy.

Attempting to take control of a subject who is refusing to submit to police authority is an exceedingly common justification for a police officer to use physical force. Not surprisingly, courts have often confronted situations in which an officer engaged in multiple uses of force before gaining control over a person. *See, e.g., Meyers v. Baltimore Cty., Md.*, 713 F.3d 723, 733-34 (4th Cir. 2013) (holding that where officer shocked decedent with Taser ten times over the course of the encounter, the first three shocks were reasonable but the last seven were not); *Campbell v. City of Springboro, Ohio*, 700 F.3d 779, 785-88 (6th Cir. 2012) (teenager accused of underage drinking escaped police custody and was tracked by a police dog that bit her, then let go when she pried it off her leg, then clamped down again until she lost consciousness); *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 858 (7th Cir. 2010) (holding that material disputes of fact remained regarding the extent to which decedent attempted to

evade officers and the actual amount of force used, where officer shocked decedent with Taser between six and twelve times before killing him); *Bates ex rel. Johns v. Chesterfield Cty., Va.*, 216 F.3d 367, 372 (4th Cir. 2000) (holding that officer acted reasonably "[a]t every stage of the . . . incident" when he shoved plaintiff, then grabbed him by the wrist, then grabbed him by the throat and wrestled him to the pavement).

Treating physical force, including lethal force, as a seizure only when it succeeds in achieving control of (or killing) the person being seized makes little sense. If the Fourth Amendment is to play a meaningful role in governing the state's application of physical force, each application should be evaluated for its reasonableness, rather than categorically exempting a large swath of dangerous physical encounters from any Fourth Amendment constraints.

A. Lethal Force

The most serious use of force is lethal force. The Fourth Amendment permits an officer to arrest a person for "even a very minor criminal offense" so long as the officer has probable cause to believe the person committed the offense in his presence. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). But lethal force is subject to a higher standard. As this Court held in *Tennessee v. Garner*, probable cause is not alone sufficient to justify deadly force. *Garner*, 471 U.S. at 11. Yet under the Tenth Circuit rule, the Fourth Amendment has nothing to say when the police shoot someone without probable cause or even a hunch, and no matter how minor the

suspected wrongdoing, so long as the person shot does not halt.

It is common for uses of lethal force to wound rather than kill. According to data from the New York Police Department ("NYPD"), its officers shot a total of 51 people between 2016 and 2017, resulting in 18 fatalities and 33 non-fatal injuries.[3] Similarly, between 2008 and 2017, the Austin, Texas Police Department engaged in 57 officer-involved shootings; of these, 56% were fatal and 27% resulted in non-fatal injuries.[4] The same pattern holds true in Denver, in the Tenth Circuit: Between 2015 and 2018, the Denver Police Department engaged in 36 officer-involved shootings; of these, 17 resulted in fatalities and 16 resulted in non-fatal injuries.[5]

A police officer's bullet is an undeniably severe intrusion on bodily integrity. Whether fatal or not, it typically inflicts serious damage—tearing through organs, breaking bones, and punching holes through arteries and veins in its path. Yet under the Tenth

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[3] New York Police Dep't, *Use of Force Report 2017* (2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/use-of-force/use-of-force-2017.pdf; New York Police Dep't, *NYPD Annual Use of Force Report, 2016* (2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/use-of-force/use-of-force-2016.pdf.

[4] Austin Police Dep't, *Officer-Involved Shootings: 2008-2017,* 3 (2018), http://www.austintexas.gov/sites/default/files/files/Police/OIS_Report_2017.pdf

[5] Denver Police Dep't, *Denver Open Data Catalog: An Overview of Denver Officer-Involved Shootings*, 1 (June 11, 2019), http://data.opencolorado.org/dataset/84a08f6d-1522-4297-a804-362dd84c85af/resource/d7e66d73-0ac6-4927-a087-e84e3cba4330/download/denverpoliceofficerinvolvedshootings.pdf.

Circuit rule, courts would be permitted to examine whether a police shooting was justified under the Fourth Amendment only if a particular bullet succeeded in terminating the person's movement.

This rule would raise particular factual problems where, for example, one cannot determine which bullet stopped an individual. In many cases, multiple officers fire multiple shots, and it is often difficult to ascertain which officer fired which shots—let alone which shot first caused the individual to halt. For example, in the 1999 fatal shooting of Amadou Diallo by NYPD officers, four officers fired a collective total of 41 gunshots. Of these, the Medical Examiner's report identified 19 bullets that struck Diallo, but did not identify the sequence in which the bullets struck him or opine on which shot paralyzed Diallo.[6] Yet under the Tenth Circuit's rule, in situations like Diallo's, the only shot that would have to satisfy Fourth Amendment standards is the one that actually succeeded in stopping the person—something that is impossible for each officer to know at the moment they pull the trigger. This artificial line-drawing impedes accountability for unreasonable uses of lethal force.

Another common example of the use of lethal force arises when officers try to arrest people in moving automobiles. Shooting at the vehicle during such encounters creates substantial risks to

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[6] Amy Waldman, *THE DIALLO SHOOTING: THE OVERVIEW; 4 Officers Enter Not-Guilty Pleas To Murder Counts in Diallo Case*, N.Y. Times (Apr. 1, 1999), https://www.nytimes.com/1999/04/01/nyregion/diallo-shooting-overview-4-officers-enter-not-guilty-pleas-murder-counts-diallo.html

bystanders, as the International Association of Chiefs of Police has explained: "Even if successfully disabled, the vehicle might continue under its own power or momentum for some distance thus creating another hazard. Moreover, should the driver be wounded or killed by shots fired, the vehicle might proceed out of control and could become a serious threat to officers and others in the area."[7]

Yet the Tenth Circuit would leave many such shootings unregulated by the Fourth Amendment, precisely where the vehicle continues to proceed despite—or in some cases, because of—the officer shooting and wounding the driver. Despite the widespread expert agreement that shooting at moving vehicles poses unacceptable risks, many police departments continue to authorize their officers to do so, and a significant number of police shootings continue to involve moving vehicles.[8] By holding the Fourth Amendment inapplicable to many such encounters, the Tenth Circuit rule would encourage these reckless shootings.

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[7] Int'l Ass'n of Police Chiefs, *National Consensus Policy and Discussion Paper on Use of Force*, 14 (Oct. 2017), https://www.theiacp.org/sites/default/files/all/n-o/National_Consensus_Policy_On_Use_Of_Force.pdf.

[8] *See* Sharon R. Fairley, *The Police Encounter with A Fleeing Motorist: Dilemma or Debacle?*, 52 U.C. Davis L. Rev. Online 155, 161 (2018) ("[T]his particular type of officer-involved shooting incident is fairly prevalent as these incidents represent a significant proportion of the federal circuit court cases addressing the use of deadly force.").

B. Tasers

Tasers, or electroconductive weapons, are widely used by law enforcement agencies across the country. They operate in two possible modes: dart mode (sometimes called "probe mode"), and drive-stun mode. Because these two modes involve distinct forms of physical force, the Tenth Circuit rule has different implications for each.

In dart mode, the officer begins by firing two sharp metal darts at the target. The darts are designed to penetrate through up to two inches of clothing, and up to one-half inch into bare skin, and remain connected to the weapon via insulated metal wires. *Bryan v. MacPherson*, 630 F.3d 805, 810 (9th Cir. 2010). Next, the officer uses a trigger on the weapon to send a high-voltage electrical shock through the wires, which is transmitted into the subject's body via the darts. The purpose of the electrical shock is not only to inflict pain, but to cause "significant, uncontrollable muscle contractions." *Oliver v. Fiorino*, 586 F.3d 898, 903 (11th Cir. 2009). Sometimes, however, the electrical shock will inflict pain but fail to cause these uncontrollable muscle contractions—typically because the darts did not lodge in the correct parts of the person's body.[9]

Under the Tenth Circuit rule, there is no seizure from the darts before they are electrified unless they cause the target to stop fleeing, even

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[9] Dart tasers carry other risks as well. For example, a dart that lands too close to the heart increases the risk of death through cardiac arrest. Repeated or extended electrical shocks can also lead to heightened risks of death.

though the darts puncture the skin and the wire physically connects the officer's weapon to the subject's body. Instead, the Tenth Circuit rule considers the use of a Taser to be a seizure only after the officer activates the electrical charge, and then only if the voltage successfully incapacitates the person.

Tasers in drive-stun mode operate in a single stage: The officer makes physical contact between the targeted person and the front of the weapon (which has two closely-spaced metal contacts sticking out of its front barrel) and activates a high-voltage electrical shock. Unlike a Taser in dart mode, a Taser in drive-stun mode operates purely by inflicting pain rather than neuromuscular incapacitation. Thus, whether the person continues moving or not depends on how they react to the severe pain inflicted by the electrical charge. This combination of severe pain and physical contact is a significant intrusion. *See Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 902 (4th Cir. 2016) ("Deploying a taser is a serious use of force."); *Mattos v. Agarano*, 661 F.3d 433, 443 (9th Cir. 2011) (en banc) (evaluating reasonableness of using Taser in drive-stun mode in light of "the magnitude of the electric shock at issue and the extreme pain that Brooks experienced."); *Fils v. City of Aventura*, 647 F.3d 1272, 1289 (11th Cir. 2011) (finding "no meaningful distinction" between excessive force analysis for use of pepper spray and use of Taser for pain compliance); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009) (excessive force to use Taser in drive-stun mode against person who "posed at most a minimal safety threat" and "was not actively resisting arrest or attempting to flee.").

However, the Tenth Circuit rule makes the applicability of the Fourth Amendment depend not on the circumstances in which the officer chose to inflict such physical pain in the first place, but on the reaction of the person suffering this intrusion.

There are risks of death when an officer uses a Taser in either mode, especially with sustained or repeated shocks.[10] However, because the Tenth Circuit rule does not recognize the first step of dart mode as a seizure at all, and does not recognize the electrical shock in either mode as a seizure unless it causes the person to cease moving, the rule essentially gives a free pass for officers to administer sustained or repeated shocks—regardless of whether it is reasonable to do so—until the person stops trying to flee, is knocked unconscious, or dies.

This removes Fourth Amendment scrutiny from most uses of Tasers—despite a troubling record of abuse, including in one of the major cities of the Tenth Circuit. In 2014, the U.S. Department of

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[10] *See, e.g.*, Peter Eisler, Jason Szep, Tim Reid & Grant Smith, *Shock Tactics: A 911 Plea for Help, a Taser Shot, a Death - and the Mounting Toll of Stun Guns*, Reuters (Aug. 22, 2017), https://www.reuters.com/investigates/special-report/usa-taser-911/; Douglas P. Zipes, *Sudden Cardiac Arrest and Death Following Application of Shocks From a TASER Electronic Control Device*, 125 Circulation 2417 (Apr. 30, 2012), https://ahajournals.org/doi/full/10.1161/CIRCULATION AHA.112.097584; National Institute of Justice, *NIJ Special Report: Study of Deaths Following Electro Muscular Disruption* (May 2011), https://www.ncjrs.gov/pdffiles1/nij/233432.pdf;; Amnesty International, 'Less Than Lethal'? The use of Stun Weapons in US Law Enforcement (2008), https://www.amnesty.org/download/Documents/52000/amr510102008en.pdf

Justice's Civil Rights Division concluded that the Albuquerque Police Department had a pattern of "officers using force that is unnecessary and unreasonable against individuals who pose little, if any, threat, or who offer minimal resistance" and that "an overwhelming majority" of these incidents involved Tasers.[11] In one incident described in the DOJ findings letter, multiple officers Tased a bicycle rider multiple times after they observed him failing to stop at stop signs. No charges were filed against the rider, and none of the four officers involved activated their lapel cameras during the incident.[12] Abusive use of Tasers is a problem in other circuits as well. *See, e.g.*, *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092 (9th Cir. 2013) (officer used excessive force by Tasing perceptibly frightened bystander with no advance warning because bystander failed to comply with order to "get back," after bystander had already complied with contradictory order to "stop"); *Fils v. City of Aventura*, 647 F.3d 1272, 1288 (11th Cir. 2011) (officer used excessive force by Tasing person outside of nightclub who was stepping away from officers with his hands up, was not threatening or resisting officer, and had not disobeyed any police orders, but had described officers as "motherfuckers"); *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009) (officer used excessive force by Tasing nonviolent suspected misdemeanant who was not

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[11] U.S. Dep't of Justice, *Findings Letter Regarding Albuquerque Police Department*, 15 (Apr. 10, 2014), https://www.justice.gov/sites/default/files/usao-nm/legacy/2015/01/20/140410DOJ-APD Findings Letter.pdf

[12] *Id*. at 18.

fleeing, not actively resisting arrest, and whose "principal offense, it would appear, was to disobey the commands to terminate her call to the 911 operator").

C. Blunt Force, Including Billy Clubs, Truncheons, Closed Fists, and Chokeholds

The same infirmity in the Tenth Circuit rule applies to other uses of force that operate through the infliction of pain, such as the use of blunt force or chokeholds. Despite the fact that many such uses of physical force represent particularly severe intrusions, often accompanied by severe pain, the Tenth Circuit rule makes determinative the person's response to force, rather than the reasonableness of the use and type of force. Thus, an officer could use blunt force to permanently damage a person's arms, legs, or trunk, but this would not be governed by the Fourth Amendment if the person managed to flee despite their injuries.

Police use of physical force is a recurrent issue. According to the most recent (2016-2017) data from the NYPD, for example, its officers engaged in many more uses of less-lethal force than they did of lethal force: 1,229 discharges of CEW/Taser weapons (the vast majority of which were in dart mode), 551 uses of OC spray, and 363 uses of other weapons (including impact weapons, mesh blankets, and canines). NYPD officers also engaged in 10,186 uses of physical force not involving a weapon. During the same time period, the NYPD recorded 124 firearm discharges, including both intentional and unintentional discharges. In other words, for every time that NYPD officers fired a bullet,

they engaged in approximately ten discharges of CEW/Taser weapons and more than 82 uses of physical force without a weapon.[13] Data from the St. Paul, Minnesota Police Department showed a similar ratio: Between 2016 and 2017, officers used Tasers 22 times as often as they discharged firearms, and used soft and hard empty hand techniques about 89 times as often as they discharged firearms.[14]

As the data reviewed above illustrate, these scenarios are not hypothetical. There is no official comprehensive national database on police use of force, lethal or otherwise. But there is little doubt that police use of force is common. Indeed, one recent study found that police encounters are a leading cause of death for young men in the United States, and especially for African American men—1 in 1,000 of whom can expect to be killed by police.[15]

Flight from the police is also common, especially for people who have had past negative interactions with police or who do not trust police officers—a category that includes many people of

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[13] New York Police Dep't, *Use of Force Report 2017*, *supra* note 3 at 34; New York Police Dep't, *NYPD Annual Use-of-Force Report*, 2016, *supra* note 3 at 41.

[14] St. Paul Police Dep't, *Police Use-of-Force Incidents Summary Report FY-2016 and FY-2017,* 9 (2018). https://www.stpaul.gov/sites/default/files/Media%20Root/Use%20of%20Force%20Report%202016%20and%202017_4.pdf

[15] Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 34 Proceedings of the Nat'l Academy of Sciences of the United States of America 16793 (Aug. 20, 2019), https://doi.org/10.1073/pnas.1821204116

color.[16] Indeed, one state supreme court has held that, for people who have been subjected to repeated racial profiling, fleeing from police officers is equally likely to signify distrust of the police as it is to signify consciousness of guilt. *Com. v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (holding that because "black males in Boston are disproportionately and repeatedly targeted for FIO [field interrogation and observation] encounters," such individuals might flee when approached by police out of a "desire to avoid the recurring indignity of being racially profiled.").

Of course, police officers may use reasonable measures, including physical force, to stop a person who is fleeing arrest. That we grant them this power, however, does not mean they should have a free pass to use unreasonable physical force—and to inflict

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[16] *See, e.g.*, Kristin Henning, *Boys to Men: The Role of Police in the Socialization of Black Boys*, at 73 *in* Angela J. Davis, ed., Policing the Black Man: Arrest, Prosecution, and Imprisonment (2017) ("The long history of negative interactions with the police has socialized a generation of black boys to avoid contact with the police whenever possible. Young black males now routinely run from police to avoid face-to-face contact, decline to seek police assistance when they have been injured, and refuse to assist police during criminal investigations."); Stanley A. Goldman, *Running from Rampart*, 34 Loy. L.A. L. Rev. 777, 785 (2001) (Los Angeles Police Department's Rampart police scandal "provides us with an unfortunate yet excellent illustration of why, just as it was true over a hundred years ago, many a reasonable and innocent person might well find it prudent to run upon the arrival of the police."); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 680 (1994) ("African Americans, as more frequent targets of undesirable treatment by police than whites, are naturally more likely to want to avoid contact with the police.")

serious harm with that force—on anyone who is fleeing, merely because that force failed to stop the person.

CONCLUSION

The Court should grant the writ of certiorari and reverse.

Respectfully Submitted,

David D. Cole
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(212) 549-2500
dcole@aclu.org

Jeffery P. Robinson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
810 Third Avenue, Suite 500
Seattle, Washington 98104

Carl Takei
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Leon Howard
ACLU OF NEW MEXICO
P.O. Box 566
Albuquerque, NM 87103

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