

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 OF *AMICUS CURIAE* CATO INSTITUTE
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Police officers shot Petitioner, but she drove away and temporarily eluded capture. In this excessive force suit, the district court granted summary judgment for the officers on the ground that no Fourth Amendment “seizure” occurred. The Tenth Circuit affirmed, reasoning that an officer’s application of physical force is not a seizure if the person upon whom the force is applied evades apprehension.

The question presented is:

Is an unsuccessful attempt to detain a suspect by use of physical force a “seizure” within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a “seizure,” as the Tenth Circuit and the D.C. Court of Appeals hold?

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the deleterious effect of the Tenth Circuit's rule on the power of citizens to vindicate their constitutional rights, and the subsequent erosion of accountability among law enforcement officials that the rule encourages.

SUMMARY OF ARGUMENT

In recent years, public trust in our government institutions has fallen to record lows. Our law enforcement officers in particular face a crisis of confidence. As highly publicized police shootings and other instances of police misconduct have gone unaddressed in the courts and internally within law-enforcement agencies, officers have reported serious concerns about their ability to safely perform their duties without the support and trust of the commu-

¹ The parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

nities that they serve. The rule applied below threatens to drive a deeper wedge between officers and the public at large, leaving victims of police misconduct without relief and officers without the public trust that forms the foundation of effective community policing.

In *California v. Hodari D.*, this Court made clear that “the quintessential ‘seizure of the person’ under our Fourth Amendment jurisprudence . . . [is] the mere grasping or application of physical force with lawful authority, *whether or not it succeeded in subduing the arrestee.*” 499 U.S. 621, 624, 626 (1991) (“The 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.*”) (emphases added). Several circuits and state courts follow *Hodari D.*’s plain language, holding that an officer’s intentional application of physical force constitutes a Fourth Amendment seizure, regardless of whether the force successfully stops the individual to which it is applied. See *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012); *Carr v. Tangelo*, 338 F.3d 1259 (11th Cir. 2003); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *State v. Garcia*, 217 P.3d 1032 (N.M. 2009).

The Tenth Circuit’s rule is irreconcilable with *Hodari D.* and the circuits that follow it. The decision below relied on the Tenth Circuit’s decision in *Brooks v. Gaenzle*, where the court held that an officer’s intentional shooting does not effect a seizure unless the “gunshot . . . terminate[s] [the suspect’s] movement or otherwise cause[s] the government to

have physical control over him.” 614 F.3d 1213, 1224 (10th Cir. 2010).

Neither this Court’s precedent nor the common law supports the Tenth Circuit’s rule. This brief will not discuss these arguments in detail, since they are addressed at length in the petition. *See* Pet. 17–26. Instead, this brief focuses on why it is critical for the Court to clarify its precedent and correct the Tenth Circuit’s erroneous interpretation of the Fourth Amendment now.

The rule applied below immunizes certain police misconduct from liability, thus denying justice to victims. At the same time, it exacerbates an existing crisis of confidence between law enforcement and the public, and in so doing harms law-enforcement officers themselves. This Court should grant the petition and return uniformity and predictability to the Court’s Fourth Amendment jurisprudence.

ARGUMENT

I. The Tenth Circuit’s Rule Denies Justice to Victims of Police Misconduct.

The decision below departs from this Court’s precedent at a crucial time for this country. As instances of police misconduct increasingly dominate the headlines and public confidence in law enforcement tumbles, the rule adopted below stands to shield law-enforcement officers from accountability and deny relief to victims of misconduct. That result undermines both our government institutions and the people’s trust in them. This Court should correct the Tenth Circuit’s flawed interpretation of Fourth Amendment law.

A. Police Misconduct Is a Pressing Public Concern.

Law-enforcement misconduct has become an issue of pressing public concern in the United States. Although most law-enforcement officers never use lethal force, *see* Gene Demby, *Some Key Facts We've Learned About Police Shootings Over the Past Year*, NPR (Apr. 13, 2015),² the minority that are engaged in fatal confrontations generate a staggering number of fatalities. Between 2015 and 2018, officers shot and killed nearly one thousand people per year in the United States. Julie Tate et al., *Fatal Force*, Wash. Post Database (last updated Mar. 31, 2019).³ This year alone, more than 675 people have died from law-enforcement-involved shootings (so far). Julie Tate et al., *Fatal Force*, Wash. Post Database (last updated Oct. 3, 2019).⁴ And for those like Petitioner who were involved in non-lethal use-of-force incidents with police, the numbers are as stark. From 2006 to 2012, researchers found that approximately 51,000 people per year were injured in encounters with police. Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, Newsweek (Apr. 19, 2017).⁵

Officer-involved shootings, even at this rate, are not a new phenomenon. Michael Wines et al., *Police Killings Rise Slightly, Though Increased Focus May*

² <https://n.pr/2IQ1RBV>.

³ <https://wapo.st/2KB6B3e>.

⁴ <https://tinyurl.com/y3jeguy6>.

⁵ <https://bit.ly/2gTs1bo>.

Suggest Otherwise, N.Y. Times (Apr. 30, 2015).⁶ The prevalence of new technology, however, has allowed members of the general public to document and share these incidents like never before.

For example, a cell-phone camera livestreamed on Facebook the aftermath of a Minnesota officer shooting a motorist during a traffic stop for a broken taillight, after the motorist alerted the officer that he was lawfully carrying a firearm. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YouTube (July 7, 2016).⁷ Another cell-phone video captured footage of two Baton Rouge officers shooting a father of five after they had pinned him to the ground. ABC News, *Alton Sterling Shooting Cellphone Video*, YouTube (July 6, 2016).⁸ A cell-phone camera recorded a Pittsburgh police officer shooting an unarmed teenager who ran when police stopped a vehicle suspected in another shooting. Guardian News, *Black Unarmed Teen Antwon Rose Shot In Pittsburgh*, YouTube (June 28, 2018).⁹ And a bystander captured video of a Charleston officer shooting a man eight times in the back as he fled from a traffic stop. N.Y. Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YouTube (Apr. 7, 2015).¹⁰ These videos alone have been viewed millions of times on YouTube, not

⁶ <https://tinyurl.com/ycnfo4xh>.

⁷ <https://bit.ly/29K1koJ>.

⁸ <https://bit.ly/2lKODNH>.

⁹ <https://bit.ly/2KAocbM>.

¹⁰ <https://bit.ly/1PkUn96>.

to mention similar videos recorded by officer body cameras that have attracted similar attention on social media platforms. L.A. Times, *Body-Cam Video Of Daniel Shaver Shooting*, YouTube (Dec. 8, 2017);¹¹ N.Y. Times, *How Stephon Clark Was Killed by the Police*, YouTube (June 7, 2018).¹²

Although public scrutiny of police misconduct has increased thanks to new technology and increased media focus,¹³ accountability for law-enforcement officers engaging in such misconduct is often absent. Internal disciplinary measures are rarely imposed. Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. Times (Nov. 18, 2015);¹⁴ U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 83 (Mar. 4, 2015) (“Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated.”).¹⁵ Successful criminal prosecutions are few and far between. From 2005 to 2015, only 54 officers were criminally charged in connection with the thousands of fatal shootings that occurred during the same period, and less than half were ultimately convicted. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015).¹⁶ Against this backdrop,

¹¹ <https://www.youtube.com/watch?v=VBUUx0jUKxc>.

¹² <https://www.youtube.com/watch?v=L3Qsx2QMRIU>.

¹³ Wines, *supra* n.6.

¹⁴ <https://tinyurl.com/y3sr98m4>.

¹⁵ <https://perma.cc/XYQ8-7TB4>.

¹⁶ <https://wapo.st/2Nd12GG>.

it is unsurprising that public trust in law enforcement is at record lows. Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years* (June 19, 2015).¹⁷

B. The Tenth Circuit’s Rule Prevents Victims of Police Misconduct from Obtaining Redress.

With other means of accountability often lacking, a robust civil remedy is especially important for victims of police misconduct. The rule applied below, however, undermines the efficacy of this critical check by insulating a variety of misconduct from judicial review.

Section 1983 claims help “hold public officials accountable when they exercise power irresponsibly,” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), by providing a “damages remedy to protect the rights of citizens” who have been deprived of their federally guaranteed rights, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Relief under Section 1983 flows from the deprivation of an individual’s constitutional rights, see *West v. Atkins*, 487 U.S. 42, 48 (1988), and in cases such as this one, where a plaintiff has alleged that a law-enforcement officer used excessive force against her, the threshold issue is whether the plaintiff was “seized” within the meaning of the Fourth Amendment, see *Graham v. Connor*, 490 U.S. 386, 395 (1989).

Under the correct rule, a seizure occurs the moment an officer intentionally applies physical force to

¹⁷ <https://bit.ly/2lQhCj3>.

the suspect. *See Hodari D.*, 499 U.S. at 624, 626; *see also* Pet. 17–18. The decision below turns this rule on its head: measuring whether a seizure occurred based on the reaction of the suspect rather than on the officer’s conduct. Under the Tenth Circuit’s rule, an individual who is the victim of an officer’s intentional use of force is not “seized” for Fourth Amendment purposes if they are not stopped by the force, even if that force would have stopped a different person. *See* App. 17a–20a.

This distinction makes little sense. An officer unreasonably using deadly force is no less culpable because a particular suspect can temporarily evade arrest after they have been shot, whereas others would have been incapacitated or killed. The present circuit split also has the effect of producing inconsistent results based on where the use of force occurred. Under the current state of affairs, a victim who is shot by police but temporarily evades capture can seek damages for an unconstitutional seizure in Nebraska (the Eighth Circuit), Arizona (the Ninth Circuit), and Florida (the Eleventh Circuit), but will be denied recovery under Section 1983 if the shooting occurred in New Mexico (the Tenth Circuit), as in this case. An individual’s ability to recover under the same federal remedy statute applying the same federal standard to assess violations of the same constitutional provision should not be left to such happenstance.

This issue is not merely academic. The result of applying the Tenth Circuit’s rule will most often be to deny any availability of recovery to various victims of police misconduct. In situations like those

presented in this case, victims of police shootings will be left without relief. *See Brooks*, 614 F.3d at 1219 (deputy did not effect Fourth Amendment seizure by shooting a suspect who temporarily evaded capture). In other cases, victims of non-lethal physical force will not be able to recover under Section 1983. An individual who is grabbed and thrown to the ground but only temporarily “slowed” has not been seized under the Tenth Circuit’s rule. *See United States v. Beamon*, 576 F. App’x 753, 758 (10th Cir. 2014). Nor has there been a seizure if an officer intentionally strikes an individual with his vehicle if the individual continues to temporarily flee. *See Carbajal v. Lucio*, No. 10-CV-02862-PAB-KLM, 2016 WL 7228818, at *2–3 (D. Colo. Dec. 13, 2016).

The Tenth Circuit’s rule has even been applied to deny recovery sought on behalf of a 13-year-old middle school student. *See Lucero Y Ruiz De Gutierrez v. Albuquerque Pub. Sch.*, No. 18 CV 00077 JAP/KBM, 2019 WL 203171 (D.N.M. Jan. 15, 2019). There, the student, M.B., who suffers from Autism, left campus without permission. *See id.* at *1–2. When a school resource officer attempted to bring M.B. back to school, M.B. ran and the officer allegedly deployed a taser that struck M.B.’s leg and shocked him. *See id.* The district court relied on *Brooks* and granted summary judgment for defendants on the plaintiff’s excessive force claim. *See id.* at *5 (“[E]ven if Officer Dennis deployed a taser that struck M.B., no Fourth Amendment seizure occurred because M.B. continued running . . .”).

As the Petition shows, the question presented arises repeatedly in federal and state courts

throughout the country. Pet. 9–17. Unless this Court corrects the Tenth Circuit’s erroneous interpretation of the Fourth Amendment, this body of case law will only continue to grow. Two recent district court cases make this point painfully clear.

Less than a month ago, a district court in New Mexico dismissed a Section 1983 claim brought by a plaintiff who had been shot *ten times* by police officers after an attempted “controlled buy” of narcotics. See *Carrillo-Ortiz v. N.M. State Police*, No. 18-CV-334-NF-KHR, 2019 WL 4393989, at *1–5 (D.N.M. Sept. 13, 2019). The plaintiff, who was unarmed, drove a short distance after being shot before calling his mother, who found him lying on the road and bleeding from multiple gunshot wounds. *Id.* at *1. Relying on the decision below, the court dismissed plaintiff’s excessive force claim, concluding that “there was no seizure during the Defendants’ shooting at Plaintiff and his car” because he continued driving after being repeatedly shot. *Id.* at *5.

Around the same time *Carrillo-Ortiz* was decided, another district court in New Mexico relied on the decision below to dismiss an excessive force claim brought by a police-shooting victim. In *Brown v. City of Las Cruces Police Department*, an officer shot the plaintiff in the leg while he was fleeing from police. No. CIV 17-0944 JB/JHR, 2019 WL 3956167, at *9 (D.N.M Aug. 21, 2019), *report and recommendation adopted in relevant part*, 2019 WL 4296858 (D.N.M. Sept. 11, 2019). After being shot, the plaintiff continued to flee and barricaded himself in a residence before being extracted by police. *Id.* The magistrate judge recommended dismissal of the

plaintiff's complaint, reasoning that because the officer's "attempt to seize Plaintiff was unsuccessful, and Plaintiff did not submit to [the officer's] assertion of authority, [the officer] did not seize Plaintiff and cannot therefore be liable for an unreasonable seizure by use of excessive force." *Id.* at *8–9.

Section 1983 serves as a vital bulwark against official wrongdoing. *See Pearson*, 555 U.S. at 231. Moreover, as discussed above, it takes on particular importance in the context of law enforcement misconduct, where other avenues for accountability are all too often ineffective. The Tenth Circuit's rule undermines Section 1983's central purpose by shielding officers from accountability and denying victims relief based on matters of pure chance. This Court should grant certiorari to restore uniformity among the circuits on this important issue and empower the courts to enforce accountability for public officials as contemplated by Section 1983.

II. The Tenth Circuit's Rule Harms Law Enforcement by Eroding Public Trust.

The Tenth Circuit's erroneous interpretation of the Fourth Amendment harms not just victims of police misconduct, but law-enforcement officers themselves.

Policing is dangerous, difficult work. Community policing strategies focus on building trust and engagement between law enforcement and the people they protect. *See Int'l Ass'n of Chiefs of Police, IACP National Policy Summit on Community-Police Relations* 15–16 (Jan. 2015) (communication, partnership, and trust form the basis of strong community-

police relationships).¹⁸ This is because public trust is a law-enforcement officer's most powerful currency, and it is critical to allowing officers to safely and effectively perform their duties. See Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008) (“Being viewed as fair and just is critical to successful policing in a democracy.”)¹⁹

“When the police are perceived as unfair in their enforcement, it will undermine their effectiveness.” *Id.*; accord Fred. O. Smith, *Abstention in a Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018) (“When a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.”); *Investigation of the Ferguson Police Department* at 80 (A “loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.”).²⁰ In the wake of recent highly publicized police shootings, officers overwhelmingly reported increased concerns about their safety and additional difficulties in performing their duties because of lost public trust. Rich Morin, et al., *Behind the Badge*, Pew Research Ctr. 65, 80 (2017) (more than 90% of officers reported that their colleagues were increasingly concerned about their safety and

¹⁸ <https://tinyurl.com/y3dj5t3t>.

¹⁹ <https://tinyurl.com/y3tqws78>.

²⁰ *Supra*, n.15.

more than 85% reported increased difficulties in performing their duties).²¹

Given the importance of public trust to effective policing, it makes sense that these law-enforcement officers show strong support for measures that foster a perception of fairness in the community. *See id.* at 72 (majority of respondents agree “that today in policing it is very useful for departments to require officers to show respect, concern and fairness when dealing with the public”). These same officers agree that more must be done to increase transparency and accountability. Recognizing that their colleagues who engage in misconduct are all too often not held to account, *id.* at 40 (72% of respondents disagreed that “officers who consistently do a poor job are held accountable”), officers have looked to technology (like body cameras), *id.* at 68, and, most importantly, clear standards to promote accountability, *id.* at 40.

The proper rule offers readily discernable standards for assessing an officer’s conduct—an officer has seized a suspect for Fourth Amendment purposes if the officer has applied intentional physical force to the suspect. By contrast, the rule applied below does little to advance objectives of accountability. At a time when law enforcement and the communities they serve seek clear standards for holding officers responsible for misconduct, the Tenth Circuit’s rule injects unpredictability into what should otherwise be a straightforward exercise. Because the rule below fixes the constitutionality of an officer’s actions

²¹ <https://pewrsr.ch/2z2gGSn>.

on the *suspect's reaction*, there is no way for an officer to know, *ex ante*, whether the application of force will effect a seizure. For example, an officer who shoots a suspect multiple times may correctly face a Section 1983 excessive force claim if the suspect is incapacitated by the shooting, but may escape any potential liability (and accountability) if the suspect is able to stumble away or drive a short distance before being apprehended. But whether or not a suspect is immediately stopped by an officer's use of force says little, if anything, about the appropriateness of the officer's decision to use force or the need to hold the officer accountable for his actions.

Such unpredictability is a familiar hallmark of police misconduct cases. Indeed, even in cases where a seizure is found to have occurred, the doctrine of qualified immunity may prevent a plaintiff from recovering based on little more than chance. "Substantial uncertainty and unpredictability have become the norm in qualified immunity cases because of the inherent manipulability of the test." *Federal Courts - Qualified Immunity - Sixth Circuit Denies Qualified Immunity to Police Officer for Arrest for Speech at Public Meeting - Leonard v. Robinson, No. 05-1728, 2007 WL 283832 (6th Cir. Feb. 2, 2007)*, 120 Harv. L. Rev. 2238, 2242–43 (2007).²² This uncertainty is particularly on display in cases where an officer is found to have violated a plaintiff's constitutional rights, but the court denies the aggrieved plaintiff any recovery.

²² <https://tinyurl.com/y5v7k4zg>.

Applying the “clearly established law” standard announced in *Harlow*, 457 U.S. at 818, courts often deny victims of police misconduct redress, even where an officer acted deliberately or in bad faith in violating the victim’s constitutional rights, because a factually analogous case had not arisen in the jurisdiction. Cf. Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445, 455 (2000) (“[J]udges within the same circuit, when presented with the same set of facts and precedent to apply, can arrive at opposite conclusions as to whether the law has been clearly established.”).²³ As one example, a divided Ninth Circuit upheld a grant of qualified immunity to a police officer who, during a traffic stop, directed the vehicle’s driver to sit on the officer’s car, pointed a gun at the driver’s head, and threatened to kill him if he declined to surrender on weapons charges. See *Thompson v. Rahr*, 885 F.3d 582, 588 (9th Cir. 2018). The majority reasoned that the unlawfulness of the officer’s actions had not been “clearly established” because the stop had occurred at night, the driver had a prior conviction for firearms possession, and the driver “stood six feet tall,” “weighed two hundred and sixty-five pounds,” and “was only 10-15 feet away” from the gun. *Id.*

In light of the uncertainty and non-uniformity created by the qualified immunity doctrine, it is especially important that this Court grant this petition, to at least ensure uniform predictability on the threshold question of when a seizure occurs. So long

²³ <https://tinyurl.com/y4b9khqe>.

as liability—and accountability—are left to turn on issues of chance, public trust in law enforcement will continue to diminish, and officers' ability to effectively and safely carry out their important jobs will likewise suffer.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for certiorari.

Respectfully submitted,

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