No. 19-292

IN THE

Supreme Court of the United States

ROXANNE TORRES,

Petitioner,

—v.—

JANICE MADRID and RICHARD WILLIAMSON,

Respondents.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NEW MEXICO, THE INSTITUTE FOR JUSTICE, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, AND THE NATIONAL POLICE ACCOUNTABILITY PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE DECISION BELOW IS INCONSISTENT WITH *HODARI D.* 6

II. THE TENTH CIRCUIT RULE IS AT ODDS WITH BASIC FOURTH AMENDMENT PRINCIPLES. 8

III. THE APPLICATION OF THE TENTH CIRCUIT RULE HAS CREATED A DISTURBING GAP IN ACCOUNTABILITY. 13

IV. THE TENTH CIRCUIT RULE WILL LEAVE A WIDE RANGE OF PHYSICAL FORCE FREQUENTLY DEPLOYED BY POLICE OFFICERS UNREGULATED BY THE FOURTH AMENDMENT................................ 17

  A. Lethal Force 18

  B. Tasers 23

  C. Blunt Force, Including Billy Clubs, Batons, and Closed Fists 27

CONCLUSION.. 32

TABLE OF AUTHORITIES

CASES

Arizona v. Hicks, 480 U.S. 321 (1987)........................ 9

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California v. Hodari D., 499 U.S. 621 (1991) ...*passim*

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457 U.S. 496 (1982)... 16

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576 F. App'x 753 (10th Cir. 2014) 14

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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.

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to that mission is promoting judicial engagement, particularly in cases involving government's infringement on fundamental rights. Many of IJ's cases involve legal challenges to unconstitutional searches and seizures, including legal challenges to civil forfeiture. IJ's Project on Immunity and Accountability is devoted to the simple idea that government officials are not above

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[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.

the law; if citizens must follow the law, then government must follow the Constitution. This case thus falls squarely within IJ's core areas of concern.

The Center for Constitutional Rights ("CCR") is a national non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966 to provide legal support for the civil rights movement, CCR has a long history of litigating landmark civil and human rights cases fighting for racial justice and law enforcement accountability, including cases protecting the Fourth Amendment rights of individuals. Among other of such cases, CCR was lead counsel in the landmark class action case challenging the New York Police Department's unconstitutional "stop and frisk" practices, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. To advance the values and ideals of fairness and equity, The Leadership Conference works with communities

and law enforcement officials to implement 21st Century best practices in policing that enhance community trust and increase officer and public safety. Physical safety is a civil and human right without which society cannot thrive and democracy cannot function. Because this case directly implicates those issues, its proper resolution is a matter of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

The National Police Accountability Project ("NPAP") was founded in 1999 by members of the National Lawyers Guild to address misconduct by police and detention facility officers and their employers. NPAP has more than 550 attorney members throughout the United States who represent plaintiffs in civil actions alleging law-enforcement and detention-facility misconduct. NPAP offers training and support to its attorney and legal worker members, educates the public about police misconduct and accountability, and provides resources for nonprofit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as amicus curiae in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

SUMMARY OF ARGUMENT

This case asks whether an officer's intentional use of physical force to halt a fleeing person amounts to a seizure under the Fourth Amendment. The decision below relied on an outlier Tenth Circuit rule to hold that shooting a fleeing person multiple times is not a seizure unless the bullets not only hit her, but succeed in terminating her movement. The same rule applies not only to other forms of lethal force, but also to less-lethal physical force, such as grabs, punches, baton strikes, and Taser shocks. Under the Tenth Circuit rule, none of these forms of force trigger Fourth Amendment scrutiny unless they succeed in halting the subject, regardless of whether or not that use of force was reasonable under the circumstances.

The Tenth Circuit's rule, followed by no other circuit, is flatly inconsistent with this Court's explanation 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). *Hodari D.* held that where the police merely use a "show of authority," *without any physical force*, a seizure occurs only if the individual accedes to the show of authority. But it expressly distinguished such verbal orders to stop from the intentional use of physical force. That distinction sensibly reflects the difference between words, which do not impinge on an individual's freedom of movement unless the listener actually complies, and physical force, which inflicts a direct restraint on an individual's body, regardless of her reaction. The Tenth Circuit's error was to collapse that critical distinction.

The Tenth Circuit's rule is also at odds with this Court's careful insistence that the Fourth Amendment governs not only formal arrests and full-scale searches, but also less formal or complete intrusions on property, privacy, or one's freedom of movement. It further conflicts with this Court's direction to assess searches and seizures on the basis of the facts and circumstances at the time the officer makes the intrusion—not based on how the subject responds. And for uses of force, 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—and requires greater justification for uses of force that inflict greater harm. To allow officers to use physical force unbounded by any Fourth Amendment inquiry into reasonableness, merely because the force fails to fully immobilize the subject, would run counter to our Fourth Amendment tradition.

The Tenth Circuit's outlier rule has produced wholly arbitrary results. In violent and extended police encounters, the courts in the Tenth Circuit either conduct *no* inquiry into whether *any* of a series of uses of force were reasonable, or apply Fourth Amendment scrutiny only to the last step in an escalating series of uses of force. The only way to avoid these arbitrary results is to reaffirm the rule set forth in *Hodari D.*, namely that the Fourth Amendment requires *all* of these intentional uses of physical force to be reasonable.

To adopt the Tenth Circuit's rule would leave a wide range of physical force deployed by police officers—including blunt force, Tasers, and lethal force—immune from any reasonableness analysis under the Fourth Amendment whenever such force

falls short of terminating a person's movement. Police use of physical force is common across this nation. When officers resort to force in conducting a stop or arrest, it is essential that the Fourth Amendment limits their choices of when and how to punch, electrically shock, choke, or shoot individuals, whether or not that person subsequently reacts with complete submission.

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 believe they are not free to terminate the encounter. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Place*, 462 U.S. 696, 708-09 (1983); *United States v. Drayton*, 536 U.S. 194 (2002). At a minimum, this properly 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 of whether a mere show of authority, *without* any use of physical force, constitutes a seizure.[2] The Court held that an

[2] Tellingly, Respondents have thus far made no effort to squarely distinguish *Hodari D. See* Respondents' Br. in Opp. to Cert. at 7-10. Instead, they rely on language in earlier cases that did not address the central distinction that *Hodari D.*

order to stop that is unaccompanied by physical force and ignored by its target is not a seizure, and therefore is not governed by the Fourth Amendment. *Id.* at 626. In reaching this conclusion, *Hodari D.* expressly divided efforts by police to stop people 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 seizures only if the individual actually submits to the order and stops. As the Court explained, seizure under the Fourth Amendment encompasses the common-law definition of arrest, which "requires *either* physical force . . . *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 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

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draws between physical force and shows of authority. As explained in Petitioner's opening brief on the merits, Respondents' arguments misconstrue these earlier cases and thereby manufacture an artificial tension between these predecessor cases and *Hodari D. See* Pet. Br. at 32-38 (discussing *Brower v. Cty. of Inyo*, 489 U.S. 593 (1989), *Brendlin v. Calif.*, 551 U.S. 249 (2007), *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Mendenhall*, 446 U.S. 544 (1980)).

suffices to apply the deterrent to their genuine, successful seizures." *Hodari D.*, 499 U.S. at 627. But that reasoning does not apply to the categorically distinct context of physical force, which too often exceeds the bounds of reasonableness and always inflicts harm. The use of physical force to restrain a person's movement is more than mere words; it constitutes a tangible intrusion on bodily autonomy, and has long been understood to be an arrest at common law. *See* Pet. Br. at 14-25 (discussing history). A verbal 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.

The Tenth Circuit collapsed that critical distinction, in direct contravention of *Hodari D.*, and misapplied 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 people in an effort to make them halt, from a fist to a Taser to a fusillade of bullets, trigger no scrutiny under the Fourth Amendment unless they *also* stop the individual. As explained further *infra*, this rule would remove from the scope of the Fourth Amendment an alarming share of the physical force used by police nationwide.

II. THE TENTH CIRCUIT RULE CONFLICTS WITH BASIC FOURTH AMENDMENT PRINCIPLES.

The Tenth Circuit rule not only contravenes *Hodari D.*; it is inconsistent with this Court's tradition of jealously guarding persons and property

against unreasonable intrusions under the Fourth Amendment. *See I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) ("The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." (internal cites and quotations omitted)). The Court has long insisted that the Fourth Amendment governs far more than full-scale searches or formal custodial arrests.

The law governing searches, for example, 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 detention 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). Even the seizure of personal property without any physical restraint of the person "intrudes on . . . [the person's] liberty interest" and may "effectively" amount to her seizure, even if

temporary, and even if she may be "technically still free to continue." *Place*, 462 U.S. at 708-09. 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.

For uses of force, 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—and requires greater justification for uses of force that inflict greater harm. *See Scott v. Harris*, 550 U.S. 372, 383 (2007) ("In determining the reasonableness of the manner in which a seizure is affected, we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." (internal cites and quotations omitted)); *see also Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). To determine whether a use of force is unconstitutionally excessive, this Court has directed courts to assess the facts and circumstances surrounding the encounter 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." *Graham v. Connor*, 490 U.S. 386,396 (1989).

Under the Tenth Circuit rule, however, none of the above inquiries even come into play unless,

immediately *after* the officer applies physical force, the person ceases to evade or resist the officer. The rule treats incapacitation as a prerequisite to any inquiry into constitutional reasonableness. That standard, which this Court has reserved exclusively for shows of authority that *do not use any physical force*, is manifestly inadequate where the officer has gone beyond mere words to grab, strike, shock, electrocute, shoot, or otherwise apply physical force to the person.

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 that person's autonomy and freedom of movement, and therefore requires Fourth Amendment protection, "even when it is ultimately unsuccessful." *Hodari D.*, 499 U.S. at 626; *cf. Terry*, 392 U.S. at 16 ("[I]t is nothing less than sheer torture of the English language to suggest that" the pat-down at issue in *Terry* was not a 'search'"). 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 mandate 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 depends not on the facts that precede the use of force, but on the *reaction* of the subject to the officer's use of force. While this may make sense where no physical intrusion on bodily integrity occurs, as in a mere show of authority that can be made ineffectual by being ignored, it does not make sense to hinge Fourth Amendment scrutiny of deadly or other physical force upon the subject's subsequent reaction. It is akin to letting police repeatedly smash a battering ram into a house's front gate without a warrant or any inquiry into the reasonableness of the ramming, so long as the gate does not fall down. [3]

Under the rule applied by the Tenth Circuit below, the Fourth Amendment imposes *no constraint whatsoever* on clearly excessive uses of force—

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[3] 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 police officers would have no Fourth Amendment protection against excessive force if they had "the good fortune to escape without serious injury." *Id.*

including those that severely harm or needlessly endanger the person targeted, fellow officers, or bystanders—based solely on the subject's flight. This result cannot be squared with Fourth Amendment jurisprudence, which is designed to regulate both major and minor government intrusions on persons, property, and privacy.

III. THE APPLICATION OF THE TENTH CIRCUIT RULE HAS CREATED A DISTURBING GAP IN ACCOUNTABILITY.

The Tenth Circuit's rule creates a disturbing gap in accountability, as illustrated by the rule's application thus far in the Circuit. Under the Tenth Circuit's rule, police officers and all other government actors are shielded not only from ultimate liability, but from even a basic inquiry into the reasonableness of their acts of violence, whenever the subject of this violence is less than fully immobilized.

The Tenth Circuit first adopted the rule in *Brooks v. Gaenzle*, 614 F.3d 1213, 1223-25 (10th Cir. 2010), *cert. denied,* 562 U.S. 1200 (2011). 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.

The lower court cases following *Brooks* illustrate the arbitrary line-drawing the rule necessitates. For example, in *United States v. Beamon*, a man responded to a consensual encounter with law enforcement officers aboard a stopped train by running away. A DEA agent grabbed him, causing both of them to fall, and then engaged in an extended scuffle that spilled down the train's stairwell, tumbled out of the train, and into the station. The man got up and continued running until the agent drew his firearm and ordered him to stop, at which point he surrendered. *United States v. Beamon*, 576 F. App'x 753, 754-55 (10th Cir. 2014). The court relied on *Brooks* to hold that the DEA agent did not seize the man at any point in the physical struggle, including by grabbing him and causing him to fall down, because the man "did not submit" and "his movement was not terminated" by the force the agent applied during the grabbing or the scuffle. *Id.* at 758. As discussed in greater detail *infra*, police applications of physical force and police efforts to capture a fleeing person often involve a series of uses of force before the officers manage to achieve control of or disable the person; the *Beamon* decision indicates that only the terminal use of force could ever implicate the Fourth Amendment.

In *Lucero y Ruiz de Gutierrez v. Albuquerque Public Schools*, a school resource officer fired his Taser at an autistic 13-year-old child in order to stop him from cutting class. Although the Taser darts struck and shocked the child on one of his legs, the child continued running until he reached the car of a school aide who was calling to him. *Lucero y Ruiz de Gutierrez v. Albuquerque Pub. Sch.*, No. 18 CV 00077 JAP/KBM, 2019 WL 203171, at *1, *4 n.5 (D.N.M.

Jan. 15, 2019). In the child's subsequent damages suit, the court relied on *Brooks* to hold that being shocked by the Taser was not a seizure because the child did not immediately submit to the school resource officer. *Id.* at *5. Therefore, there would be no inquiry into the reasonableness of the officer's Tasing of the child—let alone a decision regarding the propriety of ultimately imposing liability on the officer or the school.

In *Carbajal v. Lucio*, an officer used his patrol car to intentionally strike a man who was fleeing on a bicycle; the impact knocked the man off his bicycle and onto the ground. However, the man then got up and resumed fleeing. *Carbajal v. Lucio*, No. 10-CV-02862-PAB-KLM, 2016 WL 7228818, at *2 (D. Colo. Dec. 13, 2016). The court relied on *Brooks* to hold that although the officer hit the man with sufficient force to knock him to the ground, the man was never seized because he responded by resuming his flight. *Id.* Again, the court disclaimed any scrutiny of the reasonableness of the officer's decision to ram a car into the man.

In this case, the decision below relied on *Brooks* to hold that when police shot more than a dozen bullets at a woman driving a car, with multiple bullets striking her vehicle, and two bullets striking the driver herself, Pet. App. 4a, 23a, there was no seizure—and therefore no need to evaluate whether these gunshots were reasonable under the Fourth Amendment—because she happened to be able to continue driving away. Pet. App. 8a. Even if the physical ability or resilience of the person being shot or beaten may bear on the ultimate reasonableness inquiry, it should not dictate whether the Fourth Amendment even applies.

As these cases reveal, the Tenth Circuit rule improperly shields police use of physical force from any Fourth Amendment scrutiny in a wide range of applications, and leads to arbitrary and disturbing results. [4]

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[4] In opposing certiorari, Respondent contended that because New Mexico state tort law may provide an adequate remedy, Petitioner's invocation of the Fourth Amendment is unnecessary. Respondents' Br. in Opp. to Cert. at 33-34. That is clearly wrong. The scope of the Fourth Amendment does not vary based on the vagaries of state tort law, and the Tenth Circuit has not limited its holding to those states with alternative tort remedies. Moreover, the purpose of § 1983 was to provide a *federal* remedy that stands independent from state-law remedies. *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled on unrelated grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) (describing § 1983 as independent of and supplementary to any available state-law remedies); *see also Virginia v. Moore*, 553 U.S. 164, 176 (2008) ("[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."); *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) (declining to require exhaustion of state administrative remedies before bringing § 1983 action).

Nor is the Fifth Amendment due process clause an adequate alternative remedy, as it applies only to conduct so egregious that it "shocks the conscience." *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998) (in some contexts, even reckless disregard for human life may not "shock the conscience" in violation of substantive due process). Many uses of physical force that are unreasonable under the Fourth Amendment may fall far short of shocking the conscience but are nonetheless unconstitutional. *Compare Graham*, 490 U.S. at 397 ("[C]onsideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis.") *with Lewis*, 523 U.S. at 836 (holding

IV. 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 scrutiny 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 a 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) (holding jury could find officer's actions unreasonable where teenager accused of underage

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that substantive due process is violated in certain circumstances only if officer acted with "a purpose to cause harm unrelated to the legitimate object of arrest").

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, 371 (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 incapacitating or killing) the subject makes little sense. If the Fourth Amendment is to govern meaningfully 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. Reflecting this severity, an officer using lethal force must establish an especially strong governmental interest to prevail under the Fourth Amendment. *See Scott*, 550 U.S. at 383 (to evaluate use of force, nature and quality of intrusion must be balanced against government interest); *Garner*, 471 U.S. at 11 (probable cause to arrest a person for a felony is not alone sufficient to justify shooting him to prevent his

escape). Yet under the Tenth Circuit rule, the Fourth Amendment does not preclude the use of lethal force—even if the officer has no reason to believe his target poses a danger, has no probable cause to arrest the person, and indeed has no reason whatsoever for singling out this particular individual—so long as the person he shoots does not halt.[5]

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 66 people between 2016 and 2018, resulting in 23 fatalities and 43 non-fatal injuries.[6] 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.[7] And between 2015 and 2018, the

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[5] Notably, the Tenth Circuit rule removes Fourth Amendment scrutiny even if the person has good reasons for deciding not to halt. In this case, Petitioner fled from armed officers who attempted to open her car door because she thought they were carjackers. Pet. Br. at 4-6. When one is being menaced by unknown armed assailants, fleeing is a rational response. *See Marshall ex rel. Gossens v. Teske*, 284 F.3d 765, 771 (7th Cir. 2002) (when 14-year-old boy was pursued by undercover police officers who had their guns drawn and were not displaying police insignia, he "did what any sane person would do if he saw masked men with guns running toward him: he ran like hell.").

[6] New York Police Dep't, *Use of Force Report 2018* (2019), https://tinyurl.com/uv9s8aq; New York Police Dep't, *Use of Force Report 2017* (2018), https://tinyurl.com/tu5d8j6; New York Police Dep't, *NYPD Annual Use of Force Report, 2016* (2017), https://tinyurl.com/w4kd79p.

[7] Austin Police Dep't, *Officer-Involved Shootings: 2008-2017,* 3

Denver Police Department engaged in 36 officer-involved shootings; of these, 17 resulted in fatalities and 16 resulted in non-fatal injuries.[8]

Under the Tenth Circuit rule, when police shoot people in an effort to make them halt, courts are permitted to examine whether the shooting was justified under the Fourth Amendment only if a particular bullet succeeded in terminating the person's movement—and only with respect to that particular bullet. But a police officer's bullet is an undeniably severe intrusion on bodily integrity, autonomy, and freedom of movement. Whether or not the person survives or keeps moving after being shot, the bullet typically inflicts serious damage—tearing through organs, breaking bones, and punching holes through arteries and veins in its path.

The Tenth Circuit 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. Even if forensic experts are able to agree on which officer fired which shots, this leaves the question of which shot first caused the individual to halt. For example, in the 1999 fatal shooting of Amadou Diallo by NYPD officers, four officers fired 41 gunshots. Of these, the Medical Examiner's report identified 19 bullets that struck Diallo, but did not identify the

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(2018), https://tinyurl.com/v97g9t9.

[8] Denver Police Dep't, *Denver Open Data Catalog: An Overview of Denver Officer-Involved Shootings*, 1 (June 11, 2019), https://tinyurl.com/syq2x8d.

sequence in which the bullets struck him or opine on which shot paralyzed him.[9] 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 him.[10] This artificial line-drawing impedes efforts at 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, as in the case before the Court. Shooting at the vehicle during such encounters creates substantial risks to bystanders, as the International Association of Chiefs of Police (IACP) 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

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[9] 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://tinyurl.com/vy2zjx7.

[10] This creates impossible factual quagmires. Applying the Tenth Circuit rule to Diallo's shooting: if a court were to determine that 18 shots were unreasonable but one was reasonable, it would not be possible to hold any officer liable without knowing which particular shot paralyzed him. Moreover, even if it found all 19 shots were unreasonable, the court would not know which officer to hold liable without determining which bullet was the paralyzing shot—something that the medical examiner was unable to determine.

and others in the area."[11] For this reason, both IACP and the Police Executive Research Forum (PERF) have urged police departments to prohibit officers from shooting at moving vehicles unless someone in the vehicle is using or threatening deadly force by means other than the vehicle itself.[12]

Yet the Tenth Circuit's rule leaves many such shootings unregulated by the Fourth Amendment, precisely when the vehicle continues to proceed in spite of—or in some cases, because of—the officer shooting and wounding the driver. Despite the widespread expert admonitions 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.[13] By holding the Fourth Amendment inapplicable to many such encounters, the Tenth Circuit rule would encourage these reckless shootings.

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[11] Int'l Ass'n of Police Chiefs, *National Consensus Policy and Discussion Paper on Use of Force*, 14 (Oct. 2017), https://tinyurl.com/seey8a3.

[12] Police Executive Res. F., *Guiding Principles on Use of Force*, 44 (Mar. 2016), https://tinyurl.com/sr5u2yh.

[13] *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 conducted electrical weapons, are widely used by law enforcement agencies across the country in attempting to stop or disable people. They operate in two possible modes: dart mode (sometimes called "probe mode"), or 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 penetrate 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). The weapon sends a powerful, pulsing electrical shock that is transmitted through the wires and into the subject's body via the darts. The purpose of this electrical shock is 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 lodged too close together or in the wrong parts of the person's body.[14]

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[14] Tasers carry other risks as well. For example, the darts can cause serious injury by penetrating the eye or other sensitive organs. Darts that land too close to the heart increase the risk of death through cardiac arrest. The electricity can ignite flammable liquids or gases, causing the person or objects around the person to burst into flames. Repeated or extended electrical shocks can also lead to heightened risks of death. The

Under the Tenth Circuit rule, there is no seizure from the darts unless they cause the target to stop fleeing, even 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 if the electrical charge successfully incapacitates the person. *See Lucero y Ruiz de Gutierrez v. Albuquerque Pub. Sch.*, No. 18 CV 00077 JAP/KBM, 2019 WL 203171, at *5 (D.N.M. Jan. 15, 2019) (dismissing child's Fourth Amendment claim against officer who Tased him because, although the dart "hit and shocked [the child] on the leg," the child "did not stop . . . but instead ran" after being Tased.).

Tasers in drive-stun mode operate in a single stage: The officer makes physical contact between

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uncontrolled fall to the ground caused by neuromuscular incapacitation can also lead to serious injury or death, especially when the person falls from a significant height or onto a hard surface like concrete or asphalt. *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://tinyurl.com/y8vsdftv; 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://tinyurl.com/wmw5x5e; National Institute of Justice, *NIJ Special Report: Study of Deaths Following Electro Muscular Disruption* (May 2011), https://www.ncjrs.gov/pdffiles1/nij/233432.pdf; John Burton & Peter M. Williamson, *Representing Clients Injured by TASER International Electrical Control Devices*, 26 C.R. Lit & Att'y Fees Annual Handbook 27 (2010); Amnesty Int'l, 'Less Than Lethal'? The use of Stun Weapons in US Law Enforcement (2008), https://tinyurl.com/r7elv82.

the targeted person and the front of the weapon (which has two closely-spaced metal contacts sticking out of its front barrel when the dart-containing cartridge has been removed or fired) and activates the 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 a 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, 1290 (11th Cir. 2011) (excessive force to use Taser in drive-stun mode against person who was not violent, did not disobey orders, did not resist arrest, and did not pose a risk to others); *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, especially when the darts land near the heart

or with sustained or repeated shocks.[15] However, because the Tenth Circuit rule recognizes Taser use (including both dart piercings and electric shocks) as a seizure only at the moment when it causes the person to cease moving, the rule leaves such conduct unregulated by the Fourth Amendment unless and until the person stops, is knocked unconscious, or dies.

This removes Fourth Amendment scrutiny from many uses of Tasers—despite a troubling record of abuse. For example, in 2014, the U.S. Department of 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. U.S. Dep't of Justice, *Findings Letter Regarding Albuquerque Police Department*, 15 (Apr. 10, 2014), https://tinyurl.com/v8xohm8. In one incident, four officers Tased a bicycle rider multiple times after they observed him failing to stop at stop signs. No charges were filed against the rider. *Id.* at 18; s*ee also 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*, 647 F.3d at 1288 (officer used excessive force by Tasing person outside of nightclub who was stepping

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[15] *See* sources collected at *supra* note 14.

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*, 574 F.3d at 497 (officer used excessive force by Tasing nonviolent suspected misdemeanant who was not 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, Batons, and Closed Fists

The same infirmity in the Tenth Circuit rule applies to other uses of physical force that operate through the infliction of pain, such as the use of blunt force or closed fists. Many such uses of physical force represent particularly severe intrusions, often accompanied by severe pain and a risk of catastrophic injury. Yet 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, brain, or torso, but 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 that impacts the lives of many people each year. According to the most recent (2016-2018) data from the NYPD, for example, its officers engaged in many more uses of less-lethal force than they did of lethal force: 2,227 discharges of CEW/Taser weapons (the vast majority of which were in dart mode), 762 uses of OC spray, and 485 uses of other weapons (including impact weapons, mesh blankets, and

canines). NYPD officers also engaged in 16,699 uses of physical force not involving a weapon. During the same time period, the NYPD recorded 159 firearm discharges, including both intentional and unintentional discharges. In other words, for every time that NYPD officers fired a bullet, they engaged in approximately fourteen discharges of CEW/Taser weapons and more than 105 uses of physical force without a weapon.[16] 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.[17]

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.[18]

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[16] 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 6 at 41.

[17] St. Paul Police Dep't, *Police Use-of-Force Incidents Summary Report FY-2016 and FY-2017,* 9 (2018). https://tinyurl.com/t5tnyxn.

[18] 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

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 color.[19] 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

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of Sciences of the United States of America 16793 (Aug. 20, 2019), https://doi.org/10.1073/pnas.1821204116.

[19] *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.").

when approached by police out of a "desire to avoid the recurring indignity of being racially profiled").

Indeed, the perception and *reality* that officers can operate unlawfully without accountability for using excessive force is genuine in communities of color—and deteriorates relationships with police. The resulting negative effect on public safety is profound: people are less likely to cooperate, serve as witnesses, provide information about crimes, and report crimes.[20] This is why law enforcement officials across the country promote best practices to de-escalate encounters in order to avoid the unnecessary use of force.[21] A rule that renders a physical

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[20] U.S. Commission on Civ. and Hum. Rts., *Police Use of Force: An Examination of Modern Policing Practices* 42-43 (2019) (citing NPR, Robert Wood Johnson Found., Harvard T.H. Chan Sch. of Pub. Health, *Discrimination in America: Experiences and Views of African Americans* (2017)) (61 percent of the 802 Black respondents said they believed officers were more likely to use force against African American; as a consequence 31 percent "said that they avoided calling the police due to fear of discrimination"); Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 Nw. U. L. Rev. 1525, 1531 (2017) (when treated illegally or disrespectfully, people are less motivated "to comply with the law, cooperate with authorities, and engage with them"); Nat'l Res. Council, Wesley Skogan & Kathleen Frydl, *Fairness and Effectiveness in Policing: The Evidence* 6 (2004) (a positive perception of law enforcement "increases the stature of the police in the eyes of citizens, creates a reservoir of support for police work, and expedites the production of community safety by enhancing cooperation with the police.").

[21] *See* Lynda Garcia, The Leadership Conference Education Fund, *New Era of Public Safety* 121-35 (Mar. 2019); Int'l Ass'n of Chiefs of Police, *supra* note 11 at 6 (eleven of the most

intrusion to the body a non-event under the Fourth Amendment, devoid of constitutional protections, impedes accountability for excessive force in ways that will amplify these negative effects.

Of course, our Constitution permits police officers to use reasonable measures, including physical force, to stop a person who is fleeing a justified arrest. That we grant them this power, however, does not mean they should be free to use it without limits or without constitutional scrutiny. As this Court noted in *Hodari D.*, the use of physical force raises distinct concerns from a mere show of authority. It intrudes directly on bodily autonomy, and should be governed by the Fourth Amendment whether or not the individual the officer strikes happens to be fully immobilized.

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important law enforcement and labor organizations in the United States, including the Fraternal Order of Police and the Int'l Ass'n of Chiefs of Police, developed a national consensus policy calling for the use of de-escalation techniques to mitigate the need to use force); Police Executive Res. F., *supra* note 12; Police Executive Res. F., *An Integrated Approach to De-Escalation and Minimizing Use of Force* (Aug. 2012); The President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

CONCLUSION

The Court should reverse.

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