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 THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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 detaininga 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*

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. As part of its mission, The Rutherford Institute resists the erosion of fundamental civil liberties that some would ignore in a desire to increase the power and authority of law-enforcement officers. The Rutherford Institute believes that allocating ever-growing amounts of power to law enforcement paves the way for unconscionable intrusions on private citizens' lives.

The Rutherford Institute supports the petition in this case because it is committed to ensuring the Fourth Amendment's continued vitality. The Tenth Circuit's position (and that of the D.C. Circuit) leaves victims of police brutality in six states and the District of Columbia without any remedy if, having been shot or injured, they manage to flee their assailants. Furthermore, these holdings reflect a broader and fundamental imbalance in our society's laws.[1]

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioner and Respondents have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Two additional arguments highlight the importance of the question that Ms. Torres' case presents. First, the Tenth Circuit's reasoning effectively amounts to a determination that the Fourth Amendment does not prohibit police officers from *shooting* innocent bystanders as long as the bystanders flee, and so strips Ms. Torres (and others like her) of any possible redress for the egregious injuries she suffered. Second, the result in this case serves to emphasize just how uneven our society's "playing field" is. Civilians can be civilly and criminally liable for the most minor of physical contact; the officers' actions here could hardly be described as minor, and yet two circuits would absolve them of any liability under § 1983. As the institution most often responsible for striking the proper balance between police power and personal liberties, this Court should act to narrow this imbalance.

ARGUMENT

I. IF THE FOURTH AMENDMENT DOES NOT PROTECT MS. TORRES, SHE WILL HAVE NO REMEDY AT ALL

Ms. Torres has brought a claim under 42 U.S.C. § 1983 because it is the most appropriate vehicle for vindicating civil rights deprivations by government officials. She asserted violations of the Fourth Amendment because she had to do so; under this Court's jurisprudence, no other constitutional provision came into play. This Court has doctrinally cabined all pre-arrest excessive force claims to the Fourth Amendment. See *Graham* v. *Connor*, 490 U.S. 386, 394 (1989) (holding that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigato-

ry stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard" rather than any other constitutional provisions). Denying her any redress for the excessive force the officers used when they shot her as she sat in her car, would "render[] the protections of the Fourth Amendment hollow." *Mullenix* v. *Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

To be sure, Ms. Torres theoretically has other civil remedies available to her: State tort claims of false arrest, false imprisonment, assault, and battery. But state-law torts do not offer her redress for constitutional violations, just for common-law torts. See *Shaw* v. *Granvil*, No. 14-1078, 2016 WL 10267676, at *11 (D.N.M. May 23, 2016) ("Further, the Court notes that the analysis of whether a defendant law enforcement officer committed battery under New Mexico law is different than the analysis of whether that same officer should be held liable for allegedly violating a plaintiff's federal constitutional rights."). And, at any rate, these remedies exist only in theory; they have little chance of succeeding under New Mexico law. While the New Mexico Tort Claims Act waives immunity for law enforcement officers, see N.M. Stat. Ann. § 41-4-12, any liability under state law is subject to a "good faith" defense that tilts heavily in favor of police officers. See *Johnson* v. *City of Roswell*, 752 F. App'x 646, 652–53 (10th Cir. 2018); *Mead* v. *O'Connor*, 344 P.2d 478, 479–80 (N.M. 1959) ("Officers, within reasonable limits, are the judges of the force necessary to enable them to make arrests or to preserve the peace. When acting in good faith, the courts will afford them the utmost protection, and they will recognize the fact that emergencies arise when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries

exercise afterwards upon investigations in court."). In fact, these are functionally duplicative of § 1983 claims; since the Tenth Circuit found no Fourth Amendment violation, it would have been obligated to reject any state battery claims as a matter of course. See *Youbyoung Park* v. *Gaitan*, 680 F. App'x 724, 744 (10th Cir. 2017) ("Because the district court concluded in its Fourth Amendment analysis that Defendants did not employ unconstitutionally excessive force in effectuating Mr. Park's arrest, the district court found . . . that they could not be liable for assault and battery under New Mexico law. We agree with the district court's conclusion . . . ."); see also *Navarro* v. *N.M. Dep't of Pub. Safety*, No. 2:16-cv-1180, 2018 WL 4148452, at *12 (D.N.M. Aug. 30, 2018) ("Because the Court concluded that Defendants did not employ unconstitutionally excessive force, Defendants cannot be liable for assault and battery under New Mexico law.").

Ms. Torres is without any other available remedy. A Fourth Amendment claim could be addressed in the context of a criminal case, through a motion to exclude the evidence. Ms. Torres would have been able to introduce evidence in open court of the officers' use of excessive force, and seek judicial disapproval of the officers' actions. But, as Ms. Torres was never charged or prosecuted—she was essentially an innocent bystander to the police's planned operation—she has never had a chance to contest the unlawful seizure in court.

Nor is there any realistic chance that the officers will be successfully prosecuted thereby affording Ms. Torres potential restitution or access to funding for

victims.[2] District attorneys (often elected) must overcome significant political and institutional obstacles to bring charges against police officers in use-of-force cases. See Tara L. Senkel, *Civilians Often Need Protection From the Police: Let's Handcuff Police Brutality*, 15 N.Y.L. Sch. J. Hum. Rts. 385, 401–02 (1999); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1464 (2016). The relationships between police and local prosecutors creates a strong incentive not to prosecute, or even investigate. And even if investigated, few officers actually stand trial. Grand jurors, for example, are often predisposed to trust police officers' actions. Joshua Hegarty, *Who Watches the Watchmen? How Prosecutors Fail to Protect Citizens from Police Violence*, 37 Mitchell Hamline L.J. Pub. Pol'y & Prac. 305, 319–26 (2017); Kate Levine, *How We Prosecute the Police*, 104 Geo. L.J. 745, 755–57 (2016). Even in the rare circumstance of prosecution, the cases are highly emotional, politically fraught, and rarely successful. See Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face*

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[2] This would directly benefit Ms. Torres if she were able to use findings from criminal prosecutions offensively against the officers via collateral estoppel in a civil suit. Additionally, criminal convictions could validate Ms. Torres' claims for "reimbursement for medical services, mental health counseling, lost wages, and other costs incurred as a result of the crime," or other forms of assistance from the New Mexico Crime Victims Reparation Commission. *See New Mexico: Compensation and Assistance*, Office for Victims of Crimes (last visited Sept. 24, 2019), https://ovc.ncjrs.gov/ResourceByState.aspx?state=nm; *see also Compensation Application*, Crime Victims Reparation Commission New Mexico (last visited Sept. 24, 2019), https://www.cvrc.state.nm.us/cvrc-application/ (victim eligibility is determined on a case-by-case basis). And, of course, seeing the officers who assaulted her criminally convicted would powerfully vindicate Ms. Torres' personal dignity, even if she has no direct interest in such a proceeding.

Charges in Tamir Rice Shooting Death, N.Y. Times (Dec. 28, 2015), https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html; Sheryl Gay Stolberg & Jess Bidgood, *All Charges Dropped Against Baltimore Officers in Freddie Gray Case*, N.Y. Times (July 27, 2016), https://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case.html.

In some cases, federal prosecutors also have jurisdiction to bring criminal charges against law enforcement officers, 18 U.S.C. § 242, but such cases are very rare and difficult as a result of statutory requirements and lack of resources. Quite simply, the Department of Justice has neither time nor money to investigate any given police-brutality case under § 242.[3] See Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act As A Blueprint for Police Reform*, 105 Calif. L. Rev. 263, 273 (2017). And, as with local prosecution, federal convictions are few and far between even if the grand jury hands down indictments. Section 242 requires that DOJ prove, beyond a reasonable doubt, both willful action *and* specific intent to deprive the victim of a constitutional right. 18 U.S.C. § 242. Small wonder that federal prosecutors have little real power to hold

[3] Historically, DOJ prosecutions under § 242 have been limited. *See* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 810–11 (2000) ("The Division reviewed 10,129 civil rights complaints during that year. It filed only seventy-nine cases, including both grand jury cases and 'non-felonies not requiring Grand Jury approval'; of those, only twenty-two were 'official misconduct' cases, some of which were police abuse cases."); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 Fordham L. Rev. 3189, 3202–04 (2014) ("[T]he DOJ only sought criminal charges in less than 1 percent of the cases. Among those cases where the DOJ actually went to trial on § 242 violations, acquittals were not uncommon.").

police officers responsible for their misdeeds. See John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 809–11 (2000); Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 Utah L. Rev. 149, 179–80 (1993); *Screws* v. *United States*, 325 U.S. 91, 101–05 (1945).

In any event, civil law must be able to provide remedies for constitutional violations that fall short of criminal, as most do. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injuries. One of the first duties of government is to afford that protection."); *Couch* v. *Steel* (1854), 118 Eng. Rep. 1193, 1197; 3 El. & Bl. 402, 412 ("As far as the public wrong is concerned, there is no remedy but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable[.]"); Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 Harv. L. Rev. 453, 465 (1933) ("One whose conduct has not been flagrant enough to be criminal may nevertheless have been negligent if the legislature has seen fit to provide criminal punishment only for highly reprehensible acts.").[4] This Court has declared that

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[4] *See also* Lord Holt's opinion in *Ashby* v. *White* (1703), 92 Eng. Rep. 126, 136; 2 Ld. Raym. 938, 953, that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are

the first, and effectively only, line of defense is the Fourth Amendment. *Graham*, 490 U.S. at 395.

Ms. Torres has no viable path to vindicating her constitutional rights through the New Mexico state courts or by federal criminal prosecution. Unless this Court acts, Ms. Torres' constitutional rights will never be vindicated. She was shot twice in the back, while running away from people she believed were trying to harm her, and her attackers will return to policing unchastened. See *Marbury*, 5 U.S. at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

II. A SIGNIFICANT AND UNJUSTIFIABLE DISPARITY EXISTS BETWEEN TORT AND CRIMINAL LIABILITY STANDARDS FOR CIVILIANS VERSUS LIABILITY STANDARDS FOR POLICE OFFICERS

The abuses the colonies had endured under British rule led the Framers to worry about granting the federal government too much power. For example, "[i]t is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton* v. *New York*, 445 U.S. 573, 583 (1980). Of course, government must have *some* power to intrude on individual autonomy where justified; otherwise each citizen would become a "law unto himself." *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878). Lockean thinkers like the Framers, in fact, saw the

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reciprocal." Justice Holmes cited this approvingly in *Nixon* v. *Herndon*, 273 U.S. 536, 540 (1927).

social contract as an effort to curtail each individual's absolute freedom in this regard, for the good of the whole. See also Max Weber, *Politics as a Vocation*, *in* From Max Weber: Essays in Sociology 77–78 (H.H. Gerth & C. Wright Mills eds. & trans., Routledge 2001) (observing that society necessarily entrusts government with a monopoly on the legitimate use of physical force to control and reduce private violence). But the government's authority needed to be strictly curtailed to prevent abuse.

As a result, the Bill of Rights protected the people's individual rights and freedom from the government's unreasonable intrusion. The Fourth Amendment guaranteed "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. VI. In other words, the Fourth Amendment embodies the principle that government should not interfere with its citizens' daily lives without good cause. See *Payton*, 445 U.S. at 585 ("It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. . . . Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment 'reached farther than the concrete form' of the specific cases that gave it birth, and 'apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life.'" (quoting *Boyd* v. *United States*, 116 U.S. 616, 630 (1886)); *Brinegar* v. *United States*, 338 U.S. 160, 177 (1949) (reasoning that defendant would have been "entitled to proceed on his way without interference" if "good cause" did not exist).

To determine whether an intrusive government action is legitimate, this Court, in interpreting the Fourth Amendment and § 1983, weighs "the nature

and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests [at stake.]" *California* v. *Hodari D.*, 499 U.S. 621, 643 n.15 (1991). Thus, as the law currently exists, this Court has effectively assumed responsibility for striking the proper balance between legitimate police force and respect for the individual. For example, in *Tennessee* v. *Garner*, this Court held that using deadly force to prevent an unarmed suspect from escaping violates the Fourth Amendment. 471 U.S. 1, 3 (1985). As the Court noted, deadly force in such circumstances frustrated both the individual's "unmatched" interest in his own life, as well as the individual and society's right in the "judicial determination of guilt and punishment." *Id.* at 9. On balance, the government's interests in effectively enforcing its criminal laws are insufficient to justify the use of deadly force against a "nonviolent" suspect. *Id.* at 10.

But this Court's recent jurisprudence has significantly tilted this balance in favor of police officers. See *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (observing a "disturbing trend" in qualified immunity cases that this Court "routinely displays an unflinching willingness" to reverse lower courts to grant officers immunity but rarely does so to allow claims to go forward); see also William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82 (2018) ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials."). The disparities between the illegal-use-of-force threshold for police (high) and for civilians (low) suggests that this Court has not struck the optimal balance for society. Specifically, it suggests too little respect for individual liberties and too much protec-

tion of government use of force. Put bluntly, police officers "get away" with actions that would unquestionably result in both civil and criminal liability for ordinary civilians. Some difference may be necessary to account for difficult and dangerous circumstances that officers occasionally must confront, but the gaping disparity that exists today indicates a broader, fundamental imbalance.

These officers shot Ms. Torres twice while she, believing they were carjackers, was fleeing them. Pet. App. 2a–4a. Yet the Tenth Circuit's analysis (and that of every other circuit to adopt the Tenth Circuit's approach) says that the Constitution does not prohibit such conduct. This is an extraordinarily—and unjustifiably—high bar for wrongful use of force.

In contrast, virtually *any* unwanted physical contact by a private citizen with another can lead to civil liability. Take the common-law battery, where the "unwanted" nature of the physical contact itself suffices to render any contact unlawful. As such, there is a battery when someone intentionally blows cigar smoke in the guest's face, *Leichtman* v. *WLW Jacor Comm.*, *Inc.*, 634 N.E.2d 697, 699 (Ohio Ct. App. 1994) (per curiam); tries to massage a female coworker's shoulder from behind, *Paul* v. *Holbrook*, 696 So. 2d 1311, 1311–12 (Fla. Dist. Ct. App. 1997); forcibly pushes another's hat back in order to see his face and identify him, *Seigel* v. *Long*, 53 So. 753, 753–54 (Ala. 1910); wakes someone up, *Richmond* v. *Fiske*, 35 N.E. 103, 103 (Mass. 1893); attempts to search another's pockets, *Piggly-Wiggly Ala. Co.* v. *Rickles*, 212 Ala. 585, 587 (1925); or lays a hand on someone's shoulder, *Crawford* v. *Bergen*, 60 N.W. 205, 205–06 (Iowa 1894); cf. *Adams* v. *Commonwealth*, 534 S.E.2d 347, 349 (Va. Ct. App. 2000) (affirming the assault-and-

battery conviction of a high schooler who had pointed a laser pointer at a police officer).

Similar principles govern common-law criminal offenses like kidnapping. In most states, little or any forced movement at all satisfies kidnapping's "asportation" (moving the victim) requirement. See, *e.g.*, *State* v. *Walch*, 213 P.3d 1201, 1202, 1207 (Or. 2009) (en banc) (holding that moving a kidnapping victim as little as five feet satisfies kidnapping's asportation requirement, which "does not require that a defendant take a victim a specific distance, nor does it require that the distance be substantial"); *People* v. *Dominguez*, 140 P.3d 866, 873–74 (Cal. 2006) (sufficient that the victim was forcibly moved down a roadside embankment to an orchard twenty-five feet away).

Definitions of common-law robbery are similarly broad. In Florida, a pickpocket who grabs the victim's fingers and "peel[s] [them] back" to steal money has committed robbery. *Sanders* v. *State*, 769 So. 2d 506, 507–08 (Fla. Dist. Ct. App. 2000). And a thief who grabs a bag from a victim's shoulder also commits Florida robbery, so long as the victim instinctively holds on to the bag's strap for a moment. *Benitez-Saldana* v. *State*, 67 So. 3d 320, 322–23 (Fla. Dist. Ct. App. 2011); see also *Snyder* v. *Commonwealth*, 55 S.W. 679, 679 (Ky. 1900) (robbery where the defendant shoved the victim); *Chaney* v. *State*, 739 So. 2d 416, 417–18 (Miss. Ct. App. 1999) (robbery where defendant turned victim's pants pocket inside out, causing victim to fall down); *State* v. *Gorham*, 55 N.H. 152, 153 (1875) (robbery where defendant put one arm around victim's neck to whisper while he picked the victim's pocket). What's more, these seemingly petty crimes count as "violent felon[ies]" under the federal Armed Career Criminal Act. *Stokeling* v.

United States, 139 S. Ct. 544, 550 (2019); 18 U.S.C. § 924(e)(2)(B). So if a defendant is convicted of violating 18 U.S.C. § 922(g) and has three of these purse-snatching incidents in his past, federal law requires a fifteen-year minimum sentence. 18 U.S.C. § 924.

Even the basic element of proportionality shows our society's imbalance. At common law, use of force is justified only if the defender actually and reasonably believes the force is necessary to defend against that an imminent injury to himself or third party, and creates a risk of harm that is not grossly disproportionate to the interest that is being protected. Wayne R. LeFave, Substantive Criminal Law §§ 10.4–10.7 (3d ed. 2018); 2 Paul H. Robinson, Criminal Law Defenses § 131 (2019). As such, citizens may generally use deadly force only in response to an objectively realistic threat of death or serious bodily harm. See*, e.g.*, *People* v. *Johnson*, 117 N.E.2d 91, 96 (Ill. 1954) (shooting not justified as defendant "was not under a reasonable apprehension of death or great bodily harm" when he was struck on the back of his head); *State* v. *Lucero*, 228 P.3d 1167, 1170 (N.M. 2010) ("punch in the face" not sufficient to justify use of deadly force, as it was "not the type of force that creates a high probability of death, results in serious disfigurement, results in loss of any member or organ of the body, or results in permanent prolonged impairment of the use of any member or organ of the body"). Considering that officers act with state authority and are trained to de-escalate the situation with proper force, one could say that a *more* rigorous proportionality requirement to police uses of force governed by the Fourth Amendment is appropriate. See Rachel A. Harmon, *When is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1182–83 (2008). But this Court has opted for what functions as a significantly less-

rigorous standard. See *Pearson* v. *Callahan*, 555 U.S. 223, 239 (2009) (suggesting in qualified immunity cases courts may "quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question"); *Kisela*, 138 S. Ct. at 1155–56 (Sotomayor, J., dissenting) (criticizing the majority decision to grant qualified immunity to an officer who shot a "calm-looking" and "stationary" woman holding a kitchen knife, because there is no case law directly on point). The expansion of qualified immunity has already stacked the deck against § 1983 claims. Failing to correct the Tenth Circuit's erroneous analysis and resolve the circuit split would exacerbate this inequity even more.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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