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 OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been committed to eradicating the pernicious influence of racial discrimination in the criminal justice system. LDF has served as counsel of record in multiple cases before this Court challenging such discrimination. *See*, *e.g.*, *Swain v. Alabama*, 380 U.S. 202 (1965); *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Ham v. South Carolina*, 409 U.S. 524 (1973); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Buck v. Davis*, 137 S. Ct. 759 (2017). LDF has also submitted *amicus curiae* briefs to this Court in numerous cases to provide its expertise on matters pertaining to race and the criminal justice system. *See*, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Johnson v.*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* state that both parties have filed blanket consent to the filing of *amicus briefs*.

California, 543 U.S. 499 (2005); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Berghuis v. Smith*, 559 U.S. 314 (2010); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012); *Tolan v. Cotton*, 572 U.S. 650 (2014); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

LDF is especially concerned with policing policies and practices that target and disproportionately harm communities of color, especially African Americans. For over a decade, LDF has represented a class of African American and Latino public housing residents and their guests in a federal lawsuit challenging the unlawful policing of public housing residences in New York City. *See Davis v. City of New York*, No. 10-cv-699 (S.D.N.Y.). Since 2015, LDF's Policing Reform Campaign has worked to address issues of unconstitutional police practices, to eliminate racial bias and profiling in policing, and to end police violence against citizens. LDF has also testified before the United States Congress, as well as the President's Task Force on 21st Century Policing, about the prevalence of racial bias in police use of deadly force, and the need to eliminate racial bias in the criminal justice system in order to foster confidence and trust in our public institutions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized that the Fourth Amendment, including its proscription against unreasonable searches and seizures, is "the very

essence of constitutional liberty." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971), *holding modified by Horton v. California*, 496 U.S. 128 (1990) (quoting *Gouled v. United States*, 255 U.S. 298, 303–04 (1921)). As such, "[t]he right of personal security is also protected by the Fourth Amendment . . . because its protection [is] viewed as 'implicit in the concept of ordered liberty.'" *Ingraham v. Wright*, 430 U.S. 673 n.42 (1977) (citation omitted).

Ignoring these pronouncements, the Court of Appeals for the Tenth Circuit determined, as a matter of law, that Petitioner Roxanne Torres was not "seized" when two officers fired thirteen bullets into her moving car—striking her twice in the back—because she was able to continue driving. A Fourth Amendment seizure, under the lower court's reasoning, requires more than an officer exerting physical force to make the targeted suspect stay during an encounter with police—the individual must *in fact* stay.

This reasoning ignores both precedent and history. As this Court has made clear, a "seizure" under the Fourth Amendment occurs when police either apply any amount of physical force to a person or take action that would make a reasonable person feel not free to leave an interaction. Neither test permits an analysis of the specific response of the target of the police conduct. In fact, this Court has emphasized that this Fourth Amendment inquiry "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Michigan v. Chestnut*, 486 U.S. 567, 574 (1988).

Importantly, affirming the decision below risks undermining an important vehicle by which police are held accountable for unlawful use of force, with particular harm to African-American communities that are too often subject to police violence to this day. If this Court takes the extraordinary position that a police officer deliberately shooting at and wounding an individual is not a Fourth Amendment "seizure," many innocent victims of police shootings will be left without a remedy. Such a striking departure from this Court's longstanding precedent would defy common sense, demanding that, in order to obtain any constitutional relief, individuals wounded by an officer remain in place and risk death while the officer, trained to "shoot to kill," continues to fire at will. Affirming the Tenth Circuit's reasoning would also undermine this Court's clear prohibition in *Tennessee v. Garner*, 471 U.S. 1 (1985), against using deadly force on fleeing suspects who do not constitute a threat to officers or the public.

The lower court's decision to immunize many police shootings from Fourth Amendment scrutiny is particularly troubling for African-American communities, which have disproportionately been victims of police violence that has often involved weapons. From the very inception of modern American law enforcement, weapons—and firearms specifically—have been deployed as a means of policing and oppressing African-American communities. Today, far too many police officers continue to draw and use guns as a means of unjustified control of African Americans, rather than for valid law enforcement reasons. The Tenth Circuit's decision leaves these countless people without recourse.

Accordingly, this Court should preserve the protections long recognized under the Fourth Amendment, which are especially vital to African-American individuals who are at greatest risk of police violence. The decision below must be reversed.

ARGUMENT

I. A Police Officer's Discharge of a Firearm Is A Quintessential Fourth Amendment Seizure.

In the seminal case, *Terry v. Ohio*, this Court explained that a Fourth Amendment seizure occurs when an officer restrains the "liberty of a citizen" in one of two ways: *either* by "physical force" *or* by "show of authority." 392 U.S. 1, 19 n.16 (1968). A seizure by "physical force" occurs by the "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). A seizure by "show of authority," by contrast, occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980). Importantly, the *Mendenhall* test employs an "objective standard" that "calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Chestnut*, 486 U.S. at 574.

A police officer who draws and fires a weapon, as in the instant case, implicates both types of seizure. *Mendenhall* recognized that "the display of a weapon by an officer"—even without it actually being drawn

or fired—can be a "show of authority" that communicates to a reasonable person that they are not free to leave. 446 U.S. at 554. That makes sense because reasonable people know that police officers have special permission to carry guns and to use them if necessary.

Courts have thus recognized that when an officer approaches an individual with their hands resting on their holstered gun, that display of authority signals the ability to use deadly force and conveys to a reasonable person that they are not free to ignore the officer and go about their day. *See, e.g.*, *United States v. Smith*, 794 F.3d 681, 683 (7th Cir. 2015) (officer approaching defendant with hand on gun was relevant to finding there was a seizure); *Liberal v. Estrada*, 632 F.3d 1064, 1083 (9th Cir. 2011) (holding that an "officer's action of putting his hand on his gun, without drawing it, let[s] [a person] know that there could be adverse consequences for any failure to submit to authority") (internal quotation marks omitted).

Plainly, then, an officer who unholsters their gun and actually points it at a person signals to any reasonable person that they are not free to turn around and walk away. That is, by definition, a "show of authority" that would convey to a reasonable person that they are not "free to 'disregard the police and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)); *see also United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001) (seizure occurred where officers were outside of defendant's apartment with guns drawn).

The seizure in this case involves an even greater show of authority. It does not involve an officer simply putting a hand on a gun or pointing it at someone. It involves two officers actually firing their weapons and wounding a suspect. When an officer shoots a person, a seizure has occurred. Indeed, the *Hodari D.* Court explained that, at common law, "an arrest is effected by *the slightest application* of physical force." 499 U.S. at 625 (emphasis added). If the slightest application of physical force is enough to effect an arrest, then the use of *deadly force* must certainly be a Fourth Amendment seizure. *See Garner*, 471 U.S. at 7 (stating that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (describing a non-fatal police shooting as "deadly force").

Moreover, according to this Court's precedent, which the Tenth Circuit failed to follow, the actual restraint of an individual is not dispositive as to whether a seizure has occurred. In *Hodari D.*, this Court stated that 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*." 499 U.S. at 626 (emphasis added). To hold otherwise defies the reality of a potentially deadly encounter with a police officer who has decided to discharge a weapon. Under the Tenth Circuit's rationale, the application of the Fourth Amendment would hinge on an individual's unpredictable physical reaction to state violence. This interpretation would exclude from constitutional review egregious scenarios where an individual, posing no threat, continued movement after an officer

struck them with a bullet. The Constitution must compel otherwise.

II. The Decision Below Risks Eviscerating the Primary Vehicles for Ensuring Accountability for Egregious Police Misconduct.

This Court has time and again recognized that the Fourth Amendment is the "principal mode of discouraging lawless police misconduct." *Terry*, 392 U.S. at 13 (citation omitted); *accord Illinois v. Krull*, 480 U.S. 340, 350 (1987) (noting that the Fourth Amendment "was aimed at deterring police misconduct"). The paradigmatic example of "police misconduct" is an unreasonable shooting of a civilian, and the Fourth Amendment's protections are essential to preventing such egregious misconduct. The Tenth Circuit's decision, however, would immunize a significant number of police shootings from Fourth Amendment scrutiny, thereby leaving even heinous examples of police misconduct unchecked.

Indeed, civil rights suits, brought under 42 U.S.C. § 1983, play a vital role in reforming abusive police practices and deterring Fourth Amendment violations by law enforcement that disproportionately harm African-American communities. A history of anemic accountability practices within police departments[2] and diminished oversight by the United

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[2] *See infra* Part III.C.

States Department of Justice ("DOJ")[3] have heightened the importance of individual civil suits. Such legal actions create an essential opportunity to transparently assess the reasonableness of officer's use of force.[4] Such transparency is especially important in light of African-American' existing fears of officers' routine use of excessive levels of force.[5]

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[3] Since 2017, DOJ has publicly reduced its role in investigating constitutional violations within police departments, noting "It is not the responsibility of the federal government to manage non-federal law enforcement agencies." Press Release, Office of the Att'y Gen., *Memorandum for Heads of Department Components and United States Attorneys* (March 31, 2017), https://www.justice.gov/opa/press-release/file/954916/download

[4] Officers suspected of using excessive force are rarely charged and are rarely convicted. *See* Philp M. Stinson, *Police Shootings: A New Problem or Business as Usual?*, Uprooting Criminology Blog (2015), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1050&context=crim_just_pub; Reuben Fischer Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FiveThirtyEight (Nov. 25, 2014), https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/. The grand jury process cloaks officer indictments—and, more typically, failures to indict—in secrecy. *See* Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings —Challenges and Solutions*, 52 Harv. C.R.-C.L.L. Rev. 397, 405 (2017).

[5] Rich Morin & Renee Stepler, Pew Research Center, The Racial Confidence Gap in Police Performance 5 (Sept. 29, 2016), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2016/09/ST_2016.09.29_Police-Final.pdf (finding that only 33% of African-American respondents believe local police do an "excellent or good job" when it comes to using the right amount of force for each situation).

Thirty years ago, this Court held that the Fourth Amendment, and no other constitutional provision, governs the use of force by a police officer before detention. *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (footnote omitted). Damages suits also became a primary vehicle for relief because, except in limited circumstances, plaintiffs are barred from seeking an injunctive remedy to reform police practices. *City of Los Angeles v. Lyons*, 461 U.S. 95, 137 (1983) (Marshall, J., dissenting) ("We now learn that wrath and outrage cannot be translated into an order to cease the unconstitutional practice, but only an award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate."). And, even in damages claims under the Fourth Amendment, the increasingly broad reach of qualified immunity prevents recovery in all but the most egregious of circumstances. *See Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases." (internal citations omitted)).

Given the exclusive nature of the civil damages remedy under the Fourth Amendment for victims of police misconduct like Ms. Torres, which are already

limited by various judicial constraints, the question before the Court takes on particular importance: if police use of force must be examined within the confines of the Fourth Amendment, then courts should not sidestep the "reasonableness" analysis by categorically removing certain uses of force from Fourth Amendment scrutiny. This is especially true when, like the instant case, the misconduct at issue involves police use of deadly force.

Indeed, affirming the Tenth Circuit's decision below would upend this Court's seminal holding in *Tennessee v. Garner*, which specifically prohibited the use of "deadly force to prevent the escape of an apparently unarmed suspected felon . . . unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3 (emphasis added). Yet, under the Tenth Circuit's analysis, an officer's unreasonable use of deadly force on an unarmed fleeing suspect, who posed no threat to others, would be beyond constitutional scrutiny merely because the officer missed the mark. Such an arbitrary result is patently at odds with this Court's precedent and creates arbitrary distinctions that defy common sense.

It is, therefore, incumbent on this Court to maintain its longstanding interpretation of "seizure," as set forth in *Hodari D.*, to provide civilians—African-American in particular—a meaningful opportunity to hold officers accountable for their excessive use of force. A contrary ruling would immunize officers' actions despite their intent to

restrain, apprehend, and even kill a suspect, simply because they were unsuccessful in their efforts.

III. Preserving This Court's Longstanding Precedent Regarding Fourth Amendment Seizure Is Especially Important Given Law Enforcement's Historically Oppressive Use of Weapons in African-American Communities.

From the earliest days of modern policing, the threat of gun violence has been used to communicate a lack of freedom and subject African Americans to state control. Today, police shootings remain disturbingly frequent, with victims disproportionately being African American. By exempting a category of police shootings from Fourth Amendment scrutiny, the decision below will make it even more difficult to remedy state-sponsored violence, thus exacerbating the reasonable fear of such violence that continues to define the lived experiences of too many African Americans.

A. Law Enforcement Historically Employed Oppressive Practices, Including Use of Firearms, to Control and Intimidate African Americans Before and After Emancipation.

Policing in America has its roots in the control of African-American communities in the Southern colonies; scholars have identified slave patrols as the

first publicly funded police agencies.[6] In 1704, for example, the Carolina colonies created America's first Patrol Act,[7] which required militia captains to form special patrols to "take up all slaves which they shall meet without their master's plantation which have not a permit or ticket from their masters, and the same punish."[8] They were authorized by law to use force, including weapons, against violators they caught.[9] The Carolinas were not alone. Nearly all Southern colonies and states empowered slave patrols to act on their behalf for the purpose of apprehending slaves.[10] Throughout the South, these entities exacted unspeakable terror on African Americans as agents of the colonial or state governments.

Slave patrollers earned a reputation for brutality: they carried out their duties, armed with guns, whips, and hounds.[11] In the seminal work, *Twelve Years a Slave*, Solomon Northup explained:

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[6] Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas 69, 103 (2003); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 Am. J. Police 51, 66 (1988).

[7] Reichel, *supra* note 6, at 59.

[8] 2 Statutes at Large of South Carolina 255 (Thomas Cooper ed.) (1837).

[9] Robin D.G. Kelley & Earl Lewis, *To Make Our World Anew: A History of African Americans* 193 (2000).

[10] Reichel, *supra* note 6, at 66–67 (noting how slave patrols in Tennessee, Louisiana, Arkansas, Georgia, Missouri, and Mississippi were uniformly authorized to act as agents of their respective local governments).

[11] Hadden, *supra* note 6, at 113, 123–24.

> Patrollers, whose business it is to seize and whip any slave they may find wandering from the plantation[,] have the right, either by law, or by general consent, to inflict discretionary chastisement upon a black man caught beyond the boundaries of his master's estate without a pass, and even to shoot him, if he attempts to escape.[12]

Following the formal abolition of slavery, Southern states immediately devised new means of controlling African Americans through police enforcement of "Black Codes," which, among other things, "limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 390 (1978) (Marshall, J. dissenting). These were "poorly disguised substitutes for slavery" that "defined racial status; . . . forbade [blacks from] owning firearms or other weapons; controlled the movement of blacks by systems of passes; required proof of residence; prohibited the congregation of groups of blacks; restricted blacks from residing in certain areas; and specified an etiquette of deference to whites . . . ." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 672 (1987) (Brennan, J., concurring in part, dissenting in part, and concurring in the judgment) (footnote omitted) (citation omitted).

Police violence was key in enforcing the Black Codes. For example, police officers instigated and participated in the 1866 Memphis riot, which resulted

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[12] Solomon Northup, *Twelve Years a Slave* 180–81 (1977).

in the mass murder of scores of African-American men, women, and children.[13] In the weeks leading up to the riot, white policemen had been arresting African Americans on baseless excuses, including the violation of curfew laws invalidated by the end of slavery.[14] These police often used force without warning.[15] In congressional testimony following the riot, scores of white witnesses described police abuse administered to African-American residents—the arrest of an African American for even a minor charge often prompted a severe beating by the all-white Memphis police force.[16] By the time order was restored two days later, 46 African Americans had been killed and at least five African-American women had been raped.[17] Although the Memphis Police Department was immediately placed under the supervision of a state board, no officers were arrested or fired.[18]

Less than three months later, a similar massacre occurred in New Orleans during a Louisiana state

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[13] Bobby L. Lovett, *Memphis Riots: White Reaction to Blacks in Memphis*, May 1865-July 1866, 38 Tenn. Hist. Q. 9, 22 (1979); Southern Poverty Law Ctr., Ku Klux Klan: A History of Racism and Violence 13 (6th ed. 2011), https://www.splcenter.org/20110228/ku-klux-klan-history-racism.

[14] James Gilbert Ryan, *The Memphis Riots of 1866: Terror in a Black Community During Reconstruction*, 62 J. Negro Hist. 243, 245 (1977).

[15] *Id*.

[16] *Id*. at 244.

[17] Ryan, *supra* note 14, at 243; Lovett, *supra* note 13, at 30.

[18] Lovett, *supra* note 13, at 30.

constitutional convention, which had been convened to challenge the established white government.[19] In response to racial taunts from a white observer,[20] a single shot was fired from within an assembly of 200-300 African-American marchers in support of the convention—hitting no one.[21] Rather than arresting the suspected shooter, the police officers on the scene fired a volley of shots into the crowd.[22] As one historian described, "[m]any Negroes who approached individual policemen, begging to be arrested, were shot down in cold blood."[23] According to official accounts, 38 individuals were killed and 146 were wounded—34 of the dead and 119 of the wounded were African American.[24] No officer was arrested or punished for the massacre.[25]

The transformation of antebellum slave patrols into late-nineteenth-century police forces was thus a change in name only. Police violence in African-American communities continued, unabated, with the blessing of the state. Little would change through the mid-twentieth century and the birth of the Civil Rights Movement.

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[19] Donald E. Reynolds, *The New Orleans Riot of 1866: Reconsidered*, 5 La. Hist. 5, 6–7 (1964).

[20] *Id*. at 11.

[21] *Id*. at 11-12.

[22] *Id*. at 12.

[23] *Id*. at 13.

[24] *Id*.

[25] *Id*.

B. African-American Civil Unrest in the Mid-Twentieth Century, a Response in Part to Unconstitutional Police Violence, Led to the Expansive Use of Weaponry by Police.

The mid-twentieth century witnessed massive social upheaval as African-American citizens engaged in nonviolent, civil disobedience in the face of excessive—and often deadly—force by law enforcement. Indeed, the public display of police brutality, embodied by the actions of Birmingham Public Safety Commissioner Bull Connor, brought "the nation to its conscience to recognize the injustice" of the Jim Crow South.[26] Perhaps most infamous was "Bloody Sunday" on March 7, 1965, when approximately 600 peaceful protesters in Selma, Alabama challenged their disenfranchisement in a march across the Edmund Pettus Bridge.[27] These protestors were met by state troopers and sheriff deputies, who "beat[them] with night sticks and bull whips, trampl[ed them] with horses, and releas[ed] the tear gas."[28]

The police violence inflicted on African-American civil rights protesters was not limited to night sticks and tear gas. Law enforcement also used firearms in

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[26] *See* David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 227-28 (1986).

[27] John Robert Lewis, *The King Legacy*, 30 Vt. L. Rev. 349, 356 (2006).

[28] *Id*.

response to civil rights protests. Indeed, the nonviolent march that led to Bloody Sunday was spurred by the death of Jimmy Lee Jackson, who was fatally shot by a state trooper a few weeks earlier as he was trying to protect his mother from a police beating during a peaceful demonstration in nearby Marion, Alabama.[29] During another demonstration in 1963—in the aftermath of the bombing of the 16th Street Baptist Church in Birmingham, Alabama, which killed four young African-American girls—police killed Johnny Robinson, a sixteen-year-old African-American teenager, by shooting him in the back as he ran away.[30]

Police confrontation with African Americans came to a head during a series of civil uprisings in predominantly African-American, urban neighborhoods in the mid-1960s. One of the largest in history occurred during the summer of 1965 in the Watts neighborhood of South Central Los Angeles, in connection with an aggressive encounter between officers and a African-American family during a routine traffic stop.[31] The ensuing six days of civil

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[29] *Id.* at 355.

[30] Claude Sitton, *Birmingham Bomb Kills 4 Negro Girls In Church; Riots Flare; 2 Boys Slain*, N.Y. Times (Sept. 16, 1963), https://www.nytimes.com/1963/09/16/archives/birmingham-bomb-kills-4-negro-girls-in-church-riots-flare-2-boys.html; United Press Int'l, *Six Dead After Church Bombing*, Washington Post (Sept. 16, 1963), http://www.washingtonpost.com/wp-srv/national/longterm/churches/archives1.htm.

[31] Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 64–65

unrest resulted in 34 deaths, over a thousand injuries, and an estimated $200 million in property damage.[32] Thirty-one of the 34 deaths were Watts residents killed by law enforcement authorities, including Fenbroy Morrison George, an African-American man who was fatally shot by police while attempting to save the belongings of his wife and three children from their burning home.[33]

A presidential task force that was formed to investigate the causes of the Watts uprising determined unequivocally that it was motivated in large part by abusive policing.[34] The report noted that Los Angeles police considered the African-American community to be a "hostile territory to be kept in check by a continuous show of force."[35] Indeed, the

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(Harv. Univ. Press, 1st ed. 2016); *see also* Fanna Gamal, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 Cal. L. Rev. 979, 990 (2016); Anta Plowden, *Bringing Balance to the Force: The Militarization of America's Police Force and Its Consequences*, 71 U. Miami L. Rev. 281, 286–87 (2016).

[32] Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 Wake Forest L. Rev. 611, 641 (2016); *see also* Gamal, *supra* note 31, at 990–91; Plowden, *supra* note 31, at 286–87.

[33] Hinton, *supra* note 31, at 69.

[34] Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 Harv. C.R.-C.L. L. Rev. 305, 324–25 (2017). At the time of the uprising, South Los Angeles was 81% African American, with 27% of families living in poverty and 65% of adults older than age 25 not having a high school degree. Gamal, *supra* note 31, at 991.

[35] Brown, Jr., *supra* note 34, at 326 (2017).

Chief of the Los Angeles Police Department, William Parker, stated that the Watts uprising was "very much like fighting in Viet Cong," and both state and local law enforcement "quickly established blockades and posted signs throughout the riot zone that threatened to kill residents ('Turn left or get shot," one declared)."[36]

Subsequent uprisings in Newark and Detroit followed similar patterns to Watts. In Newark, which saw widespread unrest for six days in July 1967, 24 individuals died—all but two of whom were African American.[37] Victims of police violence included 12-year-old Michael Pugh, who was fatally shot in front of his house by the National Guard as he took out the trash after curfew, and Hattie Gainer, a 54-year-old grandmother whose daughter was told by police that they had "made a mistake" and "shot the wrong person."[38] Likewise, Detroit experienced five days of unrest after police raided a bar in a predominantly African-American neighborhood, resulting in the deaths of 43 people, 32 of whom were African American.[39]

In both Newark and Detroit, like Watts, police brutality and the "growing animosity between white patrolmen" and African-American residents were the underlying cause of the violent uprisings.[40] Similar conclusions were reached by the National Advisory

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[36] Hinton, *supra* note 31, at 69.

[37] *Id*. at 109.

[38] *Id*.

[39] *Id*. at 106.

[40] *Id*. at 110.

Commission on Civil Disorders (called the "Kerner Commission" after its chair, Illinois Governor Otto Kerner), which was established by President Lyndon Johnson in response to the widespread African-American civil unrest during the summer of 1967. The Kerner Commission noted "a widespread belief among Negroes in the existence of police brutality and in a 'double standard' of justice and protection—one for Negroes and one for whites."[41]

What followed the release of the Kerner Commission's report was not a comprehensive plan to address unlawful police shootings and brutality in African-American communities, but instead the provision by the federal government of "new military-grade weapons and surveillance technologies"[42] to state and local law governments to assist with urban control. Ultimately, federal spending increased exponentially—from $10 million in 1965 to about $850 million in 1973—to support state and local law enforcement with the "mission . . . to expand supervision and control in low-income urban communities."[43]

Police violence, including deadly force from police shootings, in African-American communities played a central role in instigating widespread protests in the 1960s. Yet, instead of remedying the underlying grievances of these protests, the state response has been to further weaponize law enforcement to control African-American communities, particularly in urban

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[41] *Id*. at 5.

[42] Hinton, *supra* note 31, at 13.

[43] *Id*. at 2–3.

areas, and leave in place the oppressive police tactics that too often lead to unjustified use of lethal force.

C. Far Too Many Law Enforcement Agencies Throughout the Country Presently Continue the Excessive Use of Weapons in African-American Communities.

Regrettably, the excessive use of weapons in African-American communities by law enforcement officers is hardly a relic of the past. The data are clear that officers continue to threaten, and actually use, weapons against African Americans without legally sufficient justification. Media stories of officer-involved shootings of African Americans have recently brought this dangerous form of state-sponsored discrimination into glaring relief, spurring national conversations about race and policing.

The federal government's own data have consistently shown that African Americans are disproportionately subject to force of all levels in encounters with law enforcement.[44] In the past two

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[44] Bureau of Justice Statistics, *Police Use of Nonfatal Force, 2002-2011* (2015), https://www.bjs.gov/content/pub/pdf/punf0211.pdf; *see also* Phillip Atiba Goff *et al.*, Ctr. for Policing Equity, The Science of Justice: Race, Arrests, and Police Use of Force 4 (2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf; Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, Working Paper 22399, Nat'l Bureau of Econ. Research (2018), https://www.nber.org/papers/w22399; Justin Nix et al., *A Bird's*

decades alone, DOJ determined that numerous police departments routinely use firearms, tasers, or other weapons inappropriately and disproportionately against African Americans. In Baltimore, for example, African Americans—who account for just over 60% of the population—experienced almost 90% of force used by police.[45] DOJ found similarly striking racial disparities in police departments in several other cities, including Ferguson and New Orleans.[46]

Equally troubling is the relative frequency with which many officers use weapons without sufficient legal justification. In DOJ's investigations of multiple police departments, officers were found to "fire their guns . . . against unarmed or fleeing suspects who do not pose a threat of serious harm,"[47] use tasers "as an all-purpose tool bearing no risk,"[48] "too hastily resort to . . . [t]asers,"[49] and employ other weapons in clearly

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Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias, 16 Criminology & Pub. Pol'y 309, 309 (2017).

[45] U.S. Dep't of Justice, Investigation of the Baltimore City Police Department 61 (2016) (hereafter, "DOJ Baltimore Rep.").

[46] U.S. Dep't of Justice, Investigation of the Ferguson Police Department 28, 62 (2015) (hereafter, "DOJ Ferguson Rep.") (noting that African Americans, just 67% of the Ferguson population, were the victims of 88% of police use of weapons); U.S. Dep't of Justice, Investigation of the New Orleans Police Department 39 (2011) (hereafter, "DOJ New Orleans Rep.") (finding that African Americans were the subject of 84% of uses of force despite being only 59% of the total population).

[47] U.S. Dep't of Justice, Investigation of the Cleveland Division of Police 13 (2014) (hereafter, "DOJ Cleveland Rep.").

[48] DOJ Ferguson Rep. at 30.

[49] DOJ Cleveland Rep. at 13

inappropriate situations.[50] In Seattle, 57% of officers' use of batons were found unnecessary and inappropriate.[51] In Albuquerque, "officers were not justified under federal law in using deadly force in the majority of [officer-involved shootings]."[52]

A lack of accountability allows such practices to run rampant. Problems of underreporting,[53] anemic investigation,[54] and the rarity of departmental discipline[55] render attempts at internal oversight largely meaningless. In a recent survey of police officers, an overwhelming 72 percent believed that officers who consistently do a poor job are not held

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[50] *See, e.g.*, U.S. Dep't of Justice, Investigation of the Puerto Rico Police Department 33–35 (2011) (hereafter, "DOJ Puerto Rico Rep.") (documenting inappropriate uses of batons, tasers, and firearms); U.S. Dep't of Justice, Investigation of the Seattle Police Department 4, 9 (2011) (hereafter, "DOJ Seattle Rep.") (concluding that over *half*—57%—of uses of batons were unnecessary and excessive).

[51] DOJ Seattle Rep. at 4, 9.

[52] Ltr from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Dep't of Justice, to Hon. Richard J. Berry, Mayor of Albuquerque 10 (Apr. 10, 2014) (hereafter, "DOJ Albuquerque Rep.").

[53] *See, e.g.*, DOJ Ferguson Rep. at 38 ("[O]fficers frequently do not report the force they use at all.").

[54] *See, e.g.*, DOJ New Orleans Rep. at 19 ("The investigations generally did not include the investigative steps or analysis necessary to make a credible determination of whether the use of force was lawful.").

[55] *See, e.g.*, U.S. Dep't of Justice, Investigation of the Chicago Police Department 68 (2017) (hereafter, "DOJ Chicago Rep.") (noting that internal review process sustained only 1.4% of all complaints of excessive force).

accountable by internal accountability practices.[56] Those protections that do exist are particularly illusory for African-American communities; white victims of police violence are significantly more likely to have complaints of misconduct investigated and substantiated than African-American victims.[57] As such, reliance on internal investigations alone means that people "will continue to be subjected to preventable harm at the hands of police."[58]

Underpinning these studies are the stories of countless innocent African Americans who have been injured or killed by police too hasty to draw guns. In recent years, as public awareness of police brutality has increased, juries have convicted police officers for unjustifiably shooting and killing unarmed African-American people such as Akai Gurley, Walter Scott, and LaQuan McDonald.[59] Most recently, the nation

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[56] Rich Morin, *et al.*, Behind the Badge, Pew Research Center (Jan. 11, 2017), http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/.

[57] *See, e.g.*, DOJ Chicago Rep. at 68–69 (noting that white complainants were three times more likely to have allegations of excessive force upheld than African American complainants were).

[58] DOJ Puerto Rico. Rep. at 32.

[59] *See*, *e.g.*, Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. Times (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html; Meridith Edwards & Dakin Andone, *Ex-South Carolina cop Michael Slager gets 20 years for Walter Scott killing*, CNN.com (Dec. 7, 2017), https://www.cnn.com/2017/12/07/us/michael-slager-sentencing/index.html; Mark Berman, *Former Chicago police*

grappled with the case of Atatiana Jefferson, who was shot inside her home within seconds of police arriving.[60] The officer who shot her awaits trial today.[61]

But countless more African Americans are shot by police officers who are not—and may never be—held accountable for similarly unjustified conduct. Tamir Rice, a twelve-year-old in Cleveland, Ohio, was playing with a toy gun when police officers pulled up and shot him "[w]ithin one to two seconds" of arriving.[62] Philando Castile was pulled over for a routine traffic stop and, just eight seconds later, was fatally shot by police.[63] This reality for African

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officer Jason Van Dyke sentenced to more than 6 years for killing Laquan McDonald, Wash. Post (Jan. 18, 2019), https://www.washingtonpost.com/national/former-chicago-police-officer-jason-van-dyke-sentenced-to-more-than-6-years-for-killing-laquan-mcdonald/2019/01/18/e3c0e140-1b38-11e9-8813-cb9dec761e73_story.html.

[60] *Woman Shot Dead by Texas Police Through Bedroom Window*, BBC News (Oct. 13, 2019), https://www.bbc.com/news/world-us-canada-50032290.

[61] Jesus Jimenez, *Former Fort Worth officer Aaron Dean indicted on murder charge in shooting of Atatiana Jefferson*, Dallas Morning News (Dec. 20, 2019), https://www.dallasnews.com/news/2019/12/20/former-fort-worth-officer-aaron-dean-indicted-on-murder-charge-in-shooting-of-atatiana-jefferson/.

[62] Kimberly A. Crawford, *Report of Deadly Force: Tamir Rice*, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Tamir%20Rice%20Investigation/Crawford-Review%20of%20Deadly%20Force-Tamir%20Rice.pdf.

[63] Amy Held, *Authorities Release Dashcam Video From Shooting of Philando Castile*, NPR (June 20, 2017),

Americans—in which they are often mere seconds from death in even the most banal of police encounters—continues to shape their experiences with police.

These and numerous other killings of innocent African Americans by police officers, who have opened fire without justification, have galvanized national attention and concern about how police deploy weapons, and the contours of the Fourth Amendment's proscriptions on the conduct of officers.[64] Since 2015, more than 2,500 police departments have shot and killed at least one person.[65] Law enforcement agencies shoot and kill an average of three people each day—over 1,000 each year.[66] Further, for every person fatally shot, studies estimate that two more people are shot non-fatally.[67] And these figures are likely only a fraction of the

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https://www.npr.org/sections/thetwo-way/2017/06/20/533711841/authorities-release-dashcam-video-from-shooting-of-philando-castile.

[64] Chiraag Bains, *When Backing the Blue Backfires*, The Marshall Project (Sept. 20, 2017), https://www.themarshallproject.org/2017/09/20/when-backing-the-blue-backfires.

[65] Joe Fox, et al., *What We've Learned about Police Shootings 5 Years After Ferguson*, Wash. Post (Aug. 9, 2019), https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/?arc404=true.

[66] Lynn Peeples, *What the Data Say About Police Shootings*, Scientific American (Sept. 5, 2019), https://www.scientificamerican.com/article/what-the-data-say-about-police-shootings/.

[67] *Id*.

number of people at whom officers draw their guns but do not shoot.

Racial disparities persist in this use-of-force landscape. African-American men remain approximately 2.5 times more likely than white men to be shot by police during their lifetimes.[68] One in 1,000 African-American males can expect to die at the hands of police.[69] In fact, police shootings are a leading cause of death among young African-American men in United States.[70]

These statistics counsel in favor of *more* scrutiny of police officers' use of their weapons, not less. But the Tenth Circuit's rule undermines the main framework by which courts can examine an officer's conduct. *See supra*, Section II. It opens the door to countless more unjustified shootings against innocent people, a burden that will disproportionately affect African-American communities.

CONCLUSION

African Americans' lived experiences in the United States demonstrate the need to guarantee constitutional protections to those most vulnerable to abuse by officers acting with state authority. The Fourth Amendment serves this key function, giving individuals harmed by police the power to review

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[68] *Id.*

[69] Amina Khan, *Getting Killed by Police is a Leading Cause of Death for Young Black Men in America*, L.A. Times (Aug. 16, 2019), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men.

[70] *Id.*

whether an officer's actions—and especially their decision to use force—were sufficiently reasonable. Affirming the Tenth's Circuit's ruling would curtail this critical judicial oversight. And it would significantly expand the circumstances under which officers could use weapons without recourse, even against the innocent. As history shows, African Americans will disproportionately bear the costs of such abusive police practices.

Accordingly, *amicus curiae* respectfully urges this Court to reverse the Tenth Circuit's ruling, and reinstate Ms. Torres's claims.

Respectfully submitted,

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