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 THE RUTHERFORD INSTITUTE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

JEFFREY T. GREEN*
JOHN L. GIBBONS
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000
jgreen@sidley.com

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1201 East Speedway Boulevard
Tucson, AZ 85721
(520) 621-3984

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Amici Curiae
* Counsel of Record

February 7, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICI 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 National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association headquartered in Washington, D.C. Founded in 1958, NACDL's mission is to identify and reform flaws and inequities in the criminal justice system. Drawing on the collected expertise of the nation's criminal defense bar, NACDL files amicus briefs in federal and state courts across the nation in those cases that present issues of importance to criminal defendants, criminal defense lawyers, and the criminal-justice system as a whole. NACDL is committed to enhancing the capacity of the criminal defense bar to safeguard fundamental constitutional rights, including those secured by the Fourth Amendment.[1]

---

[1] In accordance with Supreme Court Rule 37, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment below because, without the Fourth Amendment's protection, Ms. Torres and plaintiffs like her would be left without any remedy for serious injuries inflicted by government officials. Furthermore, the Tenth Circuit's approach is inconsistent with principles undergirding this Court's post-*Graham* cases. And, finally, this case highlights a broader jurisprudential imbalance. In short, the law grants far too much deference to police officers, at the expense of citizens' constitutional rights. For these reasons, in addition to those set forth in Ms. Torres' principal brief, this Court should reverse the judgment below and permit Ms. Torres' Fourth Amendment claims to proceed.

ARGUMENT

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

The Tenth Circuit's ruling means that objectively unreasonable police action that seriously injured the target of that action is not subject to Fourth Amendment scrutiny simply because the officer's attempt to detain the target is initially unsuccessful. This approach is incorrect, not least because it would deprive plaintiffs like Ms. Torres of any remedy for serious injuries suffered at the hands of police officers. The Fourth Amendment is the "explicit textual source of constitutional protection against . . . physically intrusive governmental conduct." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). Accordingly, this Court instructs that "*all* claims that law

---

amici curiae, their members, and their counsel made any monetary contribution to its preparation and submission. Petitioner and Respondents have consented to the filing of this brief.

enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" must be analyzed under the Fourth Amendment. *Id.*

For all intents and purposes, no other constitutional provision is available to civil-rights defendants for excessive force claims in this context. "The Constitution contains no freestanding prohibition of excessive force"; rather, "[t]here are four constitutional provisions that . . . forbid the use of excessive force in certain circumstances." *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2477 (2015) (Scalia, J., dissenting). If the Fourth Amendment has no application here, the only other apposite constitutional provision would be the Fourteenth Amendment, which prohibits "any use of force[] when it is used to 'deprive' someone of 'life, liberty, or property without due process of law.'" *Id.* But any possibility of due-process relief would be merely illusory. Due-process challenges to police conduct are subject to the stringent "threshold question [of] whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento* v. *Lewis*, 523 U.S. 833, 847 n.8 (1998).

Plaintiffs satisfy this demanding standard only if they can show "the conduct was 'intended to injure in some way unjustifiable by *any* government interest,' or in some circumstances if it resulted from deliberate indifference." *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1906 (2018) (emphasis added) (citing *Lewis*, 523 U.S. at 849–50). This standard, which is much more exacting than the Fourth Amendment's reasonableness standard, thus sets a nearly insurmountable burden for any plaintiff. And it would make little sense to force Ms. Torres to assert a due-process claim anyway, because such a claim in this context would inevitably circle back

to Fourth Amendment principles. The officers would argue that their conduct was justified because they were acting in self-defense or attempting to stop a fleeing suspect; these are quintessential Fourth Amendment "reasonableness" considerations, best analyzed in a Fourth Amendment case. See, *e.g.*, *Tennessee* v. *Garner*, 471 U.S. 1, 18 (1985) (discussing force in "situations where the officer reasonably believes that the action is in defense of human life").

In short, by limiting plaintiffs like Ms. Torres to futile due-process claims, the Tenth Circuit locks the door and throws away the key on meritorious claims that will unavoidably present Fourth Amendment questions. And, as discussed below, no alternative avenue for redress exists.

State tort claims—such as false arrest, false imprisonment, assault, and battery—may be available to plaintiffs as a theoretical matter. But in reality they are insufficient, for two reasons. The first is that state tort claims are just that: claims for injuries caused by tortious conduct, not by constitutional violations. "Violation of local law does not necessarily mean that federal rights have been invaded." *Screws* v. *United States*, 325 U.S. 91, 108 (1945). Thus, this Court has said that even "[t]he fact that a [person] is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any rights protected or secured by the Constitution or laws of the United States." *Id.* at 108–09; *Baker* v. *McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."); *Shaw* v. *Granvil*, Civ. No. 14-1078 SCY/KBM, 2016 WL 10267676, at *11 (D.N.M. May 23, 2016) ("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"). Plainly, state tort claims do not remedy or vindicate constitutional violations.

Notwithstanding the formal separation between constitutional and state-law claims, police officers still manage to wield the unavailability of constitutional relief to undercut state torts. The Tenth Circuit, for example, recently affirmed a district court's conclusion that "[b]ecause . . . Defendants did not employ unconstitutionally excessive force in effectuating Mr. Park's arrest, . . . they could not be liable for assault and battery under New Mexico law." *Park* v. *Gaitan*, 680 F. App'x 724, 744 (10th Cir. 2017); see also *Navarro* v. *N.M. Dep't of Pub. Safety*, No. 2:16-cv-1180-JMC-CG, 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."). Heads, the officer wins; tails, the plaintiff loses.

Common-law tort claims are insufficient anyway in light of the "good faith" defense that tips the scales in favor of defendant-officers. See *Johnson* v. *City of Roswell*, 752 F. App'x 646, 652–53 (10th Cir. 2018). New Mexico courts state that officers "are the judges of the force necessary to enable them to make arrests or to preserve the peace." *Mead* v. *O'Connor*, 344 P.2d 478, 479–80 (N.M. 1959). To that end, so long as the court believes an officer acted 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." *Id.* at 480. So had Ms. Torres brought a state tort suit, she would have been

three steps behind from the outset because of the heavy burden New Mexico law imposes.[2] And it goes without saying that a motion to exclude evidence is utterly useless to someone like Ms. Torres, who was never charged with a crime.[3]

Nor is it likely that the officers will be prosecuted by the state, despite the vindication and benefits that might provide Ms. Torres.[4] In many cases, the "working relationship between the prosecutor and the police fails to keep the two at arm's length and can often lead to a conflict of interest between the prosecutor's duty to investigate a civilian complaint or prosecute a brutality case, and the prosecutor's alliance with the accused officer." Sa'id Weikili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 Pac. L.J.

---

[2] These principles are not exclusive to New Mexico. *Accord Odom* v. *Wayne Cty*., 760 N.W.2d 217, 224–26 (Mich. 2008) (applying similar principles under Michigan law).

[3] Even a motion to exclude would be unavailable in some jurisdictions. *See Evans* v. *Poskon*, 603 F.3d 362, 364 (7th Cir. 2010) ("The exclusionary rule is used in only a subset of all constitutional violations—and excessive force in making an arrest or seizure is not a basis for the exclusion of evidence."); *see also United States* v. *Mathis*, 568 F. App'x 149, 150 n.1 (3d Cir. 2014) ("Moreover, the exclusionary rule does not automatically apply to evidence seized following the application of excessive force.").

[4] Ms. Torres may be able to use findings from criminal prosecutions offensively against the officers via collateral estoppel in a civil suit. Additionally, criminal convictions against the officers could make Ms. Torres eligible for "reimbursement for medical services, mental health counseling, lost wages, and other costs incurred as a result of the crime," paid by the New Mexico Crime Victims Reparation Commission. *New Mexico: Compensation & Assistance*, Office for Victims of Crimes, http://bit.ly/2RQGnN3 (last visited Feb. 2, 2020); *see also Compensation Application*, Crime Victims Reparation Commission New Mexico, http://bit.ly/2tkkmwB (last visited Feb. 2, 2020).

171, 188 (1994); see also Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1496 (2016) ("It is unfair to demand that local prosecutors, who work closely with the police and rely on them for professional and political advancement, investigate and prosecute law enforcement when they are accused of committing crimes."). The primary source of career advancement for prosecutors is convictions, and essential to securing convictions is a good relationship with police investigators. See Levine, *supra*, at 1472 (quoting Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 34, 47 (2007)). So a prosecutor who "reports police crimes or advocates zealous prosecution of the police will necessarily run afoul of law enforcement's good graces, which may [negatively] impact conviction rates" and the prosecutor's career. *Id.* Even if line prosecutors are "insulated from police pressure, their elected bosses are unable to avoid it and may well feel pressure to instruct their employees to decline to bring charges in cases where the crimes are not high profile or in the public's view." *Id.*

Resort to federal prosecution is similarly unlikely. Limited resources and general resistance to federal intrusion inhibit the Department of Justice ("DOJ") from providing a meaningful remedy for constitutional rights violations. 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). One study has concluded that, from 1995 to 2015, federal prosecutors declined to pursue civil rights allegations against law enforcement officers 96 percent of the time. See *U.S. police escape federal charges in 96 percent of rights cases: newspaper*, Reuters (Mar. 13, 2016), https://reut.rs/2ScKxh1. Another study found that, in one year, DOJ received 10,129 civil rights complaints, yet only 22 resulted in DOJ filing an official

misconduct case. John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 810 (2000). Between 1981 and 1990, DOJ sought criminal charges in one percent or less of the civil rights complaints it received. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 Fordham L. Rev. 3189, 3203 (2014). And even when charged, police officers avoid conviction more often than not; in fact, prosecutions under 18 U.S.C. § 242 had the highest acquittal rate of any federal felony from 2003 to 2009. Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 Calif. L. Rev. 1573, 1609 (2012). Perhaps this is due, in part, to the unusually stringent statutory requirement that DOJ prove both willful action *and* specific intent to deprive the victim of a constitutional right. 18 U.S.C. § 242.

At bottom, *Graham*'s Fourth Amendment directive and the Tenth Circuit's definition of "seizure" are in conflict. On one hand, a civil rights plaintiff *must* walk through the Fourth-Amendment door to gain relief. On the other hand, a civil-rights plaintiff cannot walk through that door if the government's attempted seizure, no matter how excessive the force used, is unsuccessful. This hardly seems consistent with the Fourth Amendment's explicit command that "[t]he right of the people to be secure in their *persons* . . . shall not be violated." U.S. Const. amend. IV (emphasis added). 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 injury. One of the first duties of government is to afford that protection." *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803); see also *Ashby* v. *White* (1703) 92 Eng. Rep. 126, 136; 2 Ld. Raym. 938, 954 ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it . . . and in-

deed it is a vain thing to imagine a right without a remedy; for . . . want of a right and want of a remedy are reciprocal.").

Common sense dictates that "an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him." *Whitehead* v. *Keyes*, 85 Mass. 495 (3 Allen 495), 501 (1862). The Tenth Circuit's decision not only departs from the original meaning of the Fourth Amendment, but also deprives plaintiffs like Ms. Torres of the Fourth Amendment's important protections as a *threshold* matter—without any reasonableness analysis. Courts should scrutinize these officers' shooting of Ms. Torres under the well-established reasonableness standard, regardless of whether that action succeeded in stopping her.

II. THE DECISION BELOW CONTRADICTS THIS COURT'S JURISPRUDENCE

Furthermore, the Tenth Circuit's approach is inconsistent with the way this Court has reviewed excessive-force cases in the past. *Graham* specifically held that "*all* claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." 490 U.S. at 392–99. Pursuant to that mandate, this Court has consistently applied Fourth Amendment principles without regard to whether the subject was able to flee. As *California* v. *Hodari D.* correctly observed, "the word 'seizure' readily bears the meaning of a laying on of hands or applications of physical force to restrain movement, even when it is ultimately unsuccessful." 499 U.S. 621, 626 (1991).

Simply put, the Tenth Circuit's approach finds no support in the way this Court has actually applied the Fourth Amendment.

For example, in *Brosseau* v. *Hogan*, the Court asked whether "it was objectively unreasonable" for an officer "to use deadly force against [the plaintiff] *in an attempt* to prevent his escape." 543 U.S. 194, 202 (2004) (Stevens, J., dissenting) (emphasis added). The Court, per curiam, ultimately resolved the case on qualified immunity grounds, but expressed no doubt that the officers' actions implicated the Fourth Amendment—despite the fact that the plaintiff, after being shot, "continued down the street" for a half block. *Id.* at 197.

Likewise, in *Plumhoff* v. *Rickard*, 572 U.S. 765, 769 (2014), a fleeing suspect (Rickard) lost control of his vehicle, "spun out," and crashed into a police cruiser. Finding himself "in danger of being cornered," Rickard "put his car into reverse in an attempt to escape." *Id.* Officers fired three shots at the vehicle, but Rickard ultimately was able to make it onto another street and drive away. *Id.* at 770. As he drove away, the officers fired twelve shots at him, and he ultimately "died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase." *Id.* The Court specifically held that the officers' decision to shoot Rickard was reasonable and did not violate the Fourth Amendment. *Id.* at 777–78. It made no difference at all that "even after all the shots had been fired, [Rickard] managed to drive away and to continue driving until he crashed." *Id.* at 778.

Most recently, in *City & Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1770–71 (2015), police officers confronted a mentally unstable women wielding a knife. The officers first "began pepper-spraying Sheehan in the face, but Sheehan would not drop the knife." *Id* at 1771. They were able to subdue her only

after shooting her multiple times. *Id.* The Court specifically held that the officer's decision to pepper-spray Sheehan was objectively reasonable. *Id.* at 1775. As with *Brosseau*, there was no suggestion that the Fourth Amendment might not apply, even though the Court noted specifically that the officers had "*tried* to subdue Sheehan with pepper spray," but she nevertheless "kept coming at the officers." *Id.* (emphasis added). These post-*Graham* cases indicate a fundamental understanding by this Court that the Fourth Amendment applies to physical force used in attempted seizures, regardless of their success.

The decision below is also incompatible with this Court's decisions defining Fourth Amendment searches. In *United States* v. *Jones*, the FBI attached a tracking device to the underside of Jones's Jeep Cherokee. 565 U.S. 400, 403 (2012). The government argued that no search had occurred because "Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all." *Id.* at 406. Justice Scalia, on behalf of the Court, squarely rejected this argument, saying that a search occurred because "[t]he Government physically occupied private property for the purpose of obtaining information." *Id.* at 404. The "reasonable expectation of privacy" standard added to, but did not displace, the original trespass-based understanding of Fourth Amendment searches. *Id.* at 406–07. So too here, where government officials intruded on Ms. Torres's bodily integrity "for the purpose of" seizing her. *Id.* at 404. Under the analogous principles set forth in *Jones*, this physical contact, intended to effect a seizure, was enough to bring the Fourth Amendment's guarantee that she be "secure in [her] person[]" into play.

Finally, the Tenth Circuit's rule also creates an absurd discrepancy: significant violence by government officials, as in this case, becomes effectively immune from judicial review while at the same time courts scrutinize significantly less-intrusive conduct. See *Terry* v. *Ohio*, 392 U.S. 1, 7, 16 (1968) (officer "grabbed" a suspect, "spun" him around, and "patted down the outside of his clothing"); *Sibron* v. *New York*, 392 U.S. 40, 67 (1968) (policeman "grabbed" a suspect by collar); *Brendlin* v. *California*, 551 U.S. 249, 255, 263 (2007) (seizure of both passenger and driver "from the moment [a car stopped by the police comes] to a halt on the side of the road"). In sum, the Tenth Circuit's holding is inconsistent with fundamental understandings that underlie this Court's Fourth Amendment cases, clashes with analogous "search" caselaw, and would lead to an absurd exception in the law for violent actions that inflict serious harm but fail to immediately immobilize the victim.

III. THE TENTH CIRCUIT'S RULING EXPANDS THE UNJUSTIFIABLY SIGNIFICANT DISPARITY THAT ALREADY EXISTS BETWEEN LIABILITY FOR CIVILIANS AND FOR POLICE OFFICERS

As the law currently stands, this Court has the primary responsibility, through its constitutional interpretations, for striking the proper balance between legitimate police force and constitutional rights. When Congress enacted 42 U.S.C. § 1983, it did not codify any statutory rights against excessive force. Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham*, 490 U.S. at 393–94 (quoting *Baker*, 443 U.S. at 144 n.3). Thus, Congress left to this Court the primary role of balancing society's countervailing interests in this area.

To determine whether an intrusive government action is legitimate, this Court weighs "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." *Garner*, 471 U.S. at 8. For example, in *Garner*, this Court held that using deadly force to prevent an unarmed suspect from escaping violates the Fourth Amendment. *Id.* at 3. *Garner* and *Hodari D.* struck the proper balance.

But this Court's recent § 1983 and Fourth Amendment jurisprudence has significantly tilted this balance in favor of police officers. See 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 protection of government force. To put it bluntly, police officers get away with actions that would unquestionably incur both civil and criminal liability for ordinary civilians. Some difference is necessary, but the disparity we have today indicates broader, fundamental imbalance.[5]

Officers shot Ms. Torres twice while she fled, believing they were carjackers. Pet. App. 2a–4a. Yet the

---

[5] The law governing the primary remedy for Fourth Amendment violations—the exclusionary rule—also slants in officers' favor, with various carve-outs like the "good faith" exception. *See United States* v. *Leon*, 468 U.S. 897 (1984); *Hudson* v. *Michigan*, 547 U.S. 586 (2006) (holding that evidence need not be excluded when police violate the "knock-and-announce" rule during a search).

Tenth Circuit's analysis says that the Fourth Amendment does not prohibit such conduct. This functions to create 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, someone who intentionally blows cigar smoke in another's face commits a battery, *Leichtman* v. *WLW Jacor Commc'ns*, 634 N.E.2d 697, 699 (Ohio Ct. App. 1994) (per curiam). So does someone who tries to massage a coworker's shoulder from behind, *Paul* v. *Holbrook*, 696 So. 2d 1311, 1312 (Fla. Dist. Ct. App. 1997); pushes another's hat back in order to see his face and identify him, *Seigel* v. *Long*, 53 So. 753, 753–54 (Ala. 1910)[6]; wakes someone up by shaking, *Richmond* v. *Fiske*, 35 N.E. 103, 103 (Mass. 1893); attempts to search another's pockets, *Piggly-Wiggly Ala. Co.* v. *Rickles*, 103 So. 860 (Ala. 1925); or taps someone on the shoulder with insulting questions, *Crawford* v. *Bergen*, 60 N.W. 205, 205 (Iowa 1894); see also *Adams* v. *Commonwealth*, 534 S.E.2d 347, 349–51 (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" requirement. See, *e.g.*, *State* v. *Walch*, 213 P.3d 1201, 1209–10 (Or. 2009) (en banc) (holding that mov-

---

[6] The common-law rule was later superseded by Alabama statute. *Johnson* v. *State*, 629 So. 2d 708, 709–10 (Ala. Ct. Crim. App. 1993).

ing a kidnapping victim as little as five feet satisfies 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 (Cal. 2006) (victim moved twenty-five feet down a roadside embankment).

Consider robbery as well. 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 (Fla. Dist. Ct. App. 2000). A thief who grabs a bag from a victim's shoulder also commits 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, 418 (Miss. Ct. App. 1999) (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 purse-snatchings in his past, federal law requires a 15-year minimum sentence. 18 U.S.C. § 924(e)(1), (2)(B). Comparing those to the officers' actions at issue in this case, it is clear that something is amiss.

Take another self-defense principle, proportionality. 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); Paul H. Robinson, *Criminal Law Defenses* § 131 (2019). As such, citizens may generally use deadly force only in response to a threat of death and 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, 1170–71 (N.M. 2010) ("punch to 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 tense situations, 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 (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").

In sum, Ms. Torres' case paints a clear picture of the risks of the Tenth Circuit's approach. This Court should recalibrate the balance in our society's laws—more respect for individual liberty, and less accommodation of police excessive force.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888

JEFFREY T. GREEN*
JOHN L. GIBBONS
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000
jgreen@sidley.com

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1201 East Speedway Boulevard
Tucson, AZ 85721
(520) 621-3984

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Amici Curiae

February 7, 2020

* Counsel of Record