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 *AMICI CURIAE* THE AMERICAN ASSOCIATION FOR JUSTICE, THE CATO INSTITUTE, THE DUE PROCESS INSTITUTE, LAW ENFORCEMENT ACTION PARTNERSHIP, REASON FOUNDATION, AND THE R STREET INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

The question presented is:

Does the application of lethal force to restrain someone constitute a "seizure" within the meaning of the Fourth Amendment, even if the force does not immediately stop the person?

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INTEREST OF *AMICI CURIAE*

The following parties, who reflect a diverse set of ideological viewpoints and a shared commitment to ensuring the rule of law, and who are also listed in the Appendix, respectfully submit this brief as *amici curiae*.[1]

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil-justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members frequently represent plaintiffs seeking legal recourse and accountability under 42 U.S.C. § 1983.

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

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[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. *See* Sup. Ct. R. 37.3(a). No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

The Due Process Institute is a bipartisan, nonprofit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, it creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police-community relations through sensible changes to our criminal-justice system.

Reason Foundation is a national, nonpartisan public-policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, online commentary, and policy research reports, and by filing briefs in cases raising significant constitutional issues.

R Street is a nonpartisan public policy research organization. R Street's mission is to engage in policy research and outreach to promote free markets and limited, effective government, including in the area of criminal justice. The Criminal Justice and Civil Liberties Policy program publishes research relating to the criminal-justice system and promotes reforms that prioritize human dignity, public safety,

due process, individual liberty, and fiscal responsibility.

Amici are concerned about the deleterious effect of the Tenth Circuit's rule on the power of citizens to vindicate their constitutional rights and the subsequent erosion of accountability among law-enforcement officials that the rule encourages.

SUMMARY OF ARGUMENT

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

The public demands accountability from law-enforcement officers, and law-enforcement officers deserve clear, objective standards governing their conduct. The rule applied below provides neither, resulting in less accountability for officers accused of misconduct and in subjective conduct standards based on factors that officers cannot control. This robs police misconduct victims of the relief they are entitled to and robs officers of the public trust necessary for effective community policing.

In *California v. Hodari D.*, this Court made clear that "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence . . . [is] the mere grasping or application of physical force with lawful authority, *whether or not it succeeded in sub-*

duing the arrestee." 499 U.S. 621, 624, 626 (1991) ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, *even when it is ultimately unsuccessful*.") (emphasis added). Several circuits and state courts follow *Hodari D.*'s plain language, holding that an officer's intentional application of physical force constitutes a Fourth Amendment seizure, regardless whether the force successfully stops the individual to which it is applied. *See Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012); *Carr v. Tatangelo*, 338 F.3d 1259 (11th Cir. 2003); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *State v. Garcia*, 217 P.3d 1032 (N.M. 2009).

The Tenth Circuit's rule is irreconcilable with *Hodari D.* and the circuits that follow it. The decision below relied on the Tenth Circuit's decision in *Brooks v. Gaenzle*, where the court held that an officer's intentional shooting does not effect a seizure unless the "gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him." 614 F.3d 1213, 1224 (10th Cir. 2010).

Neither this Court's precedent nor the common law supports the Tenth Circuit's rule. This brief will not discuss these arguments in detail, since they are addressed at length by Petitioner. *See* Pet. Br. at 13–29. Instead, this brief focuses on why the Court should clarify its precedent and correct the Tenth Circuit's erroneous interpretation of the Fourth Amendment.

The rule applied below is bad for police and bad for the communities they serve. It immunizes cer-

tain police misconduct from liability, denying justice to victims. At the same time, it exacerbates the public's existing crisis of confidence in law enforcement, and in so doing harms law-enforcement officers themselves. This Court should reverse the Tenth Circuit and return uniformity and predictability to the Court's Fourth Amendment jurisprudence.

ARGUMENT

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

The decision below departs from this Court's precedent and will accelerate an already troubling trend: the public's loss of trust in law enforcement and other government institutions. As instances of police misconduct increasingly dominate the headlines, the rule adopted below stands to shield law-enforcement officers from accountability and deny relief to victims of misconduct. That result further undermines the people's already flagging trust. This Court should correct the Tenth Circuit's flawed interpretation of Fourth Amendment law.

A. Police Misconduct Is a Pressing Public Concern.

Public trust in law enforcement has fallen to record lows, in large part because of public concern about police misconduct. Jeffery M. Jones, *In U.S., Confidence in Police Lowest in 22 Years* (June 19, 2015).[2] Although most law-enforcement officers never use lethal force, *see* Gene Demby, *Some Key Facts*

[2] https://tinyurl.com/qvwnfsr.

We've Learned About Police Shootings Over the Past Year, NPR (Apr. 13, 2015),[3] the minority that engage in fatal confrontations generate a staggering number of fatalities. Between 2015 and 2018, officers shot and killed nearly 1,000 people per year in the United States. Julie Tate et al., *Fatal Force*, Wash. Post Database (last updated Jan. 22, 2020).[4] In 2019 alone, officers fatally shot more than 1,000 people. Julie Tate et al., *Fatal Force*, Wash. Post Database (last updated Feb. 4, 2020).[5] Just as staggeringly, law-enforcement officers injure tens of thousands of people, like Petitioner, every year. From 2006 to 2012, researchers found that approximately 51,000 people per year were injured in encounters with police. Nathan DiCamillo, *About 51,000 People Injured Annually by Police, Study Shows*, Newsweek (Apr. 19, 2017).[6]

Though this volume of officer-involved shootings and injuries is not a new phenomenon, new technology has allowed the public to document and publicize these incidents like never before. Michael Wines et al., *Police Killings Rise Slightly, Though Increased Focus May Suggest Otherwise*, N.Y. Times (Apr. 30, 2015).[7] In particular, cell-phone cameras have captured compelling videos of numerous officer-involved shootings or their aftermaths.

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[3] https://tinyurl.com/wq82ob7.

[4] https://tinyurl.com/yd9uuzul.

[5] https://tinyurl.com/y3jeguy6.

[6] https://tinyurl.com/tqjvb3n.

[7] https://tinyurl.com/ycnfo4xh.

For example, a livestreamed cell-phone video captured the aftermath when a Minnesota police officer shot a motorist during a routine traffic stop after the motorist alerted the officer that he was lawfully carrying a firearm. ABC News, *Philando Castile Police Shooting Video Livestreamed on Facebook*, YouTube (July 7, 2016).[8] Another cell-phone video captured footage of two Baton Rouge police officers shooting a father of five after they had pinned him to the ground. ABC News, *Alton Sterling Shooting Cell-phone Video*, YouTube (July 6, 2016).[9] A cell-phone camera recorded a Pittsburgh police officer shooting an unarmed teenager who ran when police stopped the vehicle in which he was a passenger. Guardian News, *Black Unarmed Teen Antwon Rose Shot in Pittsburgh*, YouTube (June 28, 2018).[10] And a bystander captured video of a Charleston officer shooting a man eight times in the back as he fled from a traffic stop. N.Y. Times, *Walter Scott Death: Video Shows Fatal North Charleston Police Shooting*, YouTube (Apr. 7, 2015).[11]

These four videos alone have been viewed millions of times on YouTube. And similar videos recorded by officer body cameras have attracted similar attention on social-media platforms. L.A. Times, *Body-Cam Video of Daniel Shaver Shooting*, YouTube (Dec. 8, 2017);[12] N.Y. Times, *How Stephon*

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[8] https://tinyurl.com/vmq4suy.

[9] https://tinyurl.com/v3vbaow.

[10] https://tinyurl.com/s2ygaps.

[11] https://tinyurl.com/qyklvsf.

[12] https://tinyurl.com/y8e9qm3l.

Clark Was Killed by the Police, YouTube (June 7, 2018).[13]

Although these and similar videos have led to increased public and media scrutiny of police misconduct,[14] they have not led to any corresponding increase in accountability for law-enforcement officers who engage in misconduct. Law-enforcement agencies seldom impose internal disciplinary measures. Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. Times (Nov. 18, 2015);[15] U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 83 (Mar. 4, 2015) ("Even when individuals do report misconduct, there is a significant likelihood it will not be treated as a complaint and investigated.").[16] Prosecutors rarely bring criminal charges against officers, and they successfully convict officers even less frequently. From 2005 to 2015, only 54 officers were criminally charged in connection with any of the thousands of fatal shootings that occurred in those years; fewer than half were ultimately convicted. Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, Wash. Post (Apr. 11, 2015).[17]

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[13] https://tinyurl.com/wadopzk.

[14] Wines, *supra* n.7.

[15] https://tinyurl.com/y3sr98m4.

[16] https://tinyurl.com/uvf2qdp.

[17] https://tinyurl.com/sdvvk8b.

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

The rule applied below undermines the efficacy of civil remedies—one of the few ways to hold police accountable for misconduct—by insulating a variety of misconduct from judicial review.

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

This Court has held that a seizure occurs the moment an officer intentionally applies physical force to the suspect. *See Hodari D.*, 499 U.S. at 624, 626; *see also* Pet. Br. at 25–29. The decision below turns this rule on its head, determining whether a seizure occurred based on the suspect's reaction rather than on the officer's conduct. Under the Tenth Circuit's rule, an individual who is the victim of an officer's intentional use of force is not "seized" for Fourth Amendment purposes if the force does not stop them, even if that force would have stopped a different person. *See* App. 17a–20a. This distinction

makes no sense. An officer who unreasonably uses deadly force is equally culpable whether he shoots and kills a suspect or merely wounds a suspect who then evades arrest. In either case, the officer's conduct remains the same.

The Tenth Circuit's rule has real consequences, denying even the possibility of recovery to many victims of police misconduct. In situations like those presented here, victims of police shootings will be unable to even argue they were shot unreasonably, let alone recover damages. *See Brooks*, 614 F.3d at 1219 (deputy did not effect Fourth Amendment seizure by shooting a suspect who temporarily evaded capture).

In other cases, victims of non-lethal force will likewise be unable to recover under Section 1983. An individual who is grabbed and thrown to the ground but only temporarily "slowed" has not been seized under the Tenth Circuit's rule. That was the case in *United States v. Beamon*, 576 F. App'x 753 (10th Cir. 2014). There, the plaintiff was traveling on the upper-level of a train when law-enforcement officers boarded and approached him. *Id.* at 754. One of the officers positioned himself behind the plaintiff and stood in the train's aisle. *Id.* at 755. When the plaintiff tried to pass, the officer "grabbed" him. *Id.* at 758. Both fell down the stairwell and continued to scuffle. *Id.* At that point, the court held that a seizure had not yet occurred. *Id.* at 757–58. Only after the officer later ordered the plaintiff to the ground at gunpoint, and the plaintiff obliged, did a seizure result. *Id.* In other words, a "scuffle," "grab," "tumble," and the officer's exercise

of "physical force" did not effectuate a seizure under the Tenth Circuit's rule. *Id.*

Similarly, under the Tenth Circuit's rule, no seizure has taken place when an officer intentionally strikes an individual with his vehicle if the individual continues to temporarily flee. In *Carbajal v. Lucio*, a law-enforcement officer was pursuing the bicycle-riding plaintiff by car. No. 10-CV-02862-PAB-KLM, 2016 WL 7228818, at *2–3 (D. Colo. Dec. 13, 2016). The officer subsequently rammed the car against the plaintiff on purpose, "knocking Plaintiff off the bicycle, onto the hood of the vehicle and then to the ground." *Id.* at *2. But because the plaintiff successfully fled after falling to the ground, the application of physical force did not constitute a seizure. *Id.* Likewise, a court in the Eastern District of Michigan, applying *Brooks*, found no seizure when a police officer tackled a fleeing suspect twice during a chase. *See United States v. Brown*, No. 12-CR-20342, 2013 WL 489828, at *4 (E.D. Mich. Feb. 8, 2013).

The Tenth Circuit's rule has even been applied to deny recovery sought on behalf of a 13-year-old middle school student with Autism. *See Lucero Y Ruiz De Gutierrez v. Albuquerque Pub. Sch.*, No. 18 CV 00077 JAP/KBM, 2019 WL 203171 (D.N.M. Jan. 15, 2019). There, the student, M.B., left campus without permission. *See id.* at *1–2. When a school resource officer attempted to bring M.B. back to school, M.B. ran. The officer allegedly deployed a taser that struck M.B.'s leg and shocked him, but M.B. kept running. *See id.* The district court, relying on *Brooks*, granted summary judgment for defendants

on the plaintiff's excessive-force claim. *See id.* at *5 ("[E]ven if Officer Dennis deployed a taser that struck M.B., no Fourth Amendment seizure occurred because M.B. continued running . . . .").

As Petitioner has shown, the question presented arises repeatedly in federal and state courts across the country. *See* Pet. Br. at 44–45. Unless this Court reverses the Tenth Circuit's erroneous interpretation of the Fourth Amendment, this body of case law will only continue to grow.

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

Around the same time *Carrillo-Ortiz* was decided, another district court in New Mexico relied on the decision below to dismiss an excessive-force claim brought by the victim of a police shooting. In *Brown v. City of Las Cruces Police Dep't*, an officer shot the plaintiff in the leg while he was fleeing from police.

No. CIV 17-0944 JB/JHR, 2019 WL 3956167, at *9 (D.N.M Aug. 21, 2019), *report and recommendation adopted in relevant part*, 2019 WL 4296858 (D.N.M. Sept. 11, 2019). After being shot, the plaintiff continued to flee and barricaded himself in a residence before being extracted by police. *Id.* The magistrate judge recommended dismissal of the plaintiff's complaint, reasoning that because the officer's "attempt to seize Plaintiff was unsuccessful, and Plaintiff did not submit to [the officer's] assertion of authority, [the officer] did not seize Plaintiff and cannot therefore be liable for an unreasonable seizure by use of excessive force." *Id.* at *8–9.

On the other hand, courts reach the right result when they follow *Hodari D.* and hold that an intentional application of physical force constitutes seizure. In one such case, the court held that an officer shooting a fleeing suspect in the chest, allegedly unprovoked, would constitute a seizure. *See Dukes v. Miami-Dade Cty.*, No. 05-22665-CIV, 2007 WL 9701813, at *4 n.2 (S.D. Fla. Dec. 26, 2007), *aff'd*, 290 F. App'x 300 (11th Cir. 2008). But in the Tenth Circuit, a court would reach the opposite conclusion because the suspect "kept driving after he was shot and did not yield immediately to [the officer's] intentional shooting." *Id.*

Other courts have similarly reached the correct result where law-enforcement officers apply physical force to a plaintiff. *See, e.g.*, *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1208–09 (8th Cir. 2013) (holding that officer's "bull rush" into plaintiff, which forced him "backward into the side of a truck, broke three ribs, [and] punctured one lung" consti-

tuted "more than enough physical force to effect a seizure," without regard to whether plaintiff then "believed that he was not free to leave") (quotation marks omitted); *Tatangelo*, 338 F.3d at 1268 (holding that plaintiff "was seized . . . when the bullet struck or contacted him" even though he "was able to run across the street to his house to seek refuge"); *Garcia*, 217 P.3d at 1038 ("To ascertain whether the officer's application of pepper spray to Defendant's body was physical force sufficient to constitute a seizure, it is irrelevant whether Defendant's movement was restrained, affected or deterred").

Not all of these cases resulted in a finding of a Fourth Amendment violation, and for good reason: The Fourth Amendment has a "reasonableness" standard that recognizes "the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397. But the Tenth Circuit, unlike these courts, cuts the Fourth Amendment inquiry short prior to the reasonableness analysis.

Section 1983 serves as a vital bulwark against official wrongdoing, *see Pearson*, 555 U.S. at 231, particularly in the context of law enforcement misconduct, where other avenues for accountability are all too often ineffective or ignored. The Tenth Circuit's rule undermines Section 1983's central purpose by shielding officers from accountability and denying victims relief based on factors that have nothing to do with officers' conduct. This Court should reverse the Tenth Circuit's decision in order to restore uniformity among the circuits on this important issue

and empower the courts to enforce accountability for public officials as contemplated by Section 1983.

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

The Tenth Circuit's erroneous interpretation of the Fourth Amendment harms law-enforcement officers by holding them to a subjective and unpredictable standard.

Public trust is a law-enforcement officer's most powerful currency, and it is critical to allowing officers to safely and effectively perform their duties. *See* Inst. on Race and Justice, Northeastern Univ., *Promoting Cooperative Strategies to Reduce Racial Profiling* at 20–21 (2008) ("Being viewed as fair and just is critical to successful policing in a democracy.").[18] If the public does not trust the police or perceives the police as unfair, "it will undermine their effectiveness." *Id.*; *accord* Fred O. Smith, *Abstention in a Time of Ferguson*, 131 Harv. L. Rev. 2283, 2356 (2018) ("[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.");[19] *Investigation of the Ferguson Police Department* at 80 (A "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts

[18] https://tinyurl.com/y3tqws78.

[19] https://tinyurl.com/vfgnerg.

to prevent and investigate crime.").[20] Not surprisingly, then, officers have overwhelmingly reported increased concern about their safety and additional difficulties in performing their duties because of lost public trust following recent highly publicized police shootings. Rich Morin, et al., *Behind the Badge*, Pew Research Ctr. 65, 80 (2017) (more than 90% of officers reported that their colleagues were increasingly concerned about their safety and more than 85% reported increased difficulties in performing their duties).[21]

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

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[20] *Supra*, n.16.

[21] https://tinyurl.com/tujyxxv.

The proper seizure rule offers a clear, objective standard for assessing an officer's conduct: An officer seizes a suspect for Fourth Amendment purposes when the officer applies physical force to the suspect with the intent to restrain him. By contrast, the rule applied below is subjective and unpredictable, so it does little to advance accountability. The Tenth Circuit's rule assesses the constitutionality of an *officer's action* based on the *suspect's reaction*. This makes it impossible for an officer to know whether a particular application of force will effect a seizure. For example, an officer who shoots a suspect multiple times may correctly face a Section 1983 excessive-force claim if the suspect is incapacitated by the shooting, but the same officer may escape any potential liability—and accountability—if the suspect stumbles away or drives a short distance before being apprehended. But a suspect's ability to flee after an officer's use of force has no bearing on the appropriateness of the officer's decision to use force or on the need to hold the officer accountable for his actions.

Unpredictability is a familiar hallmark of police misconduct cases. Indeed, even in cases where a seizure is found to have occurred, the doctrine of qualified immunity may prevent a plaintiff from recovering based on little more than chance. "Substantial uncertainty and unpredictability have become the norm in qualified immunity cases because of the inherent manipulability of the test." *Federal Courts - Qualified Immunity - Sixth Circuit Denies Qualified Immunity to Police Officer for Arrest for Speech at Public Meeting - Leonard v. Robinson, No. 05-1728,*

2007 WL 283832 (6th Cir. Feb. 2, 2007), 120 Harv. L. Rev. 2238, 2242–43 (2007).[22] This uncertainty is particularly on display in cases where an officer is found to have violated a plaintiff's constitutional rights, but the court denies the aggrieved plaintiff any recovery.

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

[22] https://tinyurl.com/y5v7k4zg.

[23] https://tinyurl.com/y4b9khqe.

tall," "weighed two hundred and sixty-five pounds," and "was only 10-15 feet away" from the gun. *Id.*

In light of the uncertainty and non-uniformity created by the qualified immunity doctrine, it is especially important that this Court overturn the court below to at least ensure uniform predictability on the threshold question of when a seizure occurs. So long as liability—and accountability—turn on issues of chance, public trust in law enforcement will continue to dwindle, and officers' ability to effectively and safely carry out their vital jobs will likewise suffer.

CONCLUSION

For the foregoing reasons and those in Petitioner's brief, the Court should reverse the Tenth Circuit's decision.

Respectfully submitted,

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APPENDIX

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