No. 22-2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROXANNE TORRES,

Plaintiff-Appellant,

v.

JANICE MADRID, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Charlotte Schwartz
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUTES AND CONSTITUIONAL PROVISIONS

TABLE OF AUTHORITIES – cont'd

Page(s)

BOOKS, ARTICLES, AND OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1983, a landmark civil rights statute dating to the Reconstruction era, provides a right to sue "[e]very person" who under color of state law or custom deprives another person of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Filing suit under Section 1983, Roxanne Torres sought to vindicate her Fourth Amendment rights after police shot her in the back as she drove away from them. As the Supreme Court recently recognized, this shooting was a "seizure" within the meaning of the Fourth Amendment, and the officers' conduct was therefore permissible only if it was "reasonable." *Torres v. Madrid*,

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

141 S. Ct. 989, 993 (2021). But rather than address the question of the officers' reasonableness, the district court dismissed Torres's case by misapplying two judicially created doctrines that limit accountability under Section 1983. Contrary to the district court's ruling, neither qualified immunity nor the rule of *Heck v. Humphrey* bars this suit, and Torres's case should be allowed to proceed.

In July 2014, Torres sat in her car in a parking lot when two police officers attempted to open her car doors. App. Vol. II at 307-09. As she drove off, they shot at her multiple times, striking her twice in the back. *Id.* at 309. Torres was nonetheless able to continue driving for some time and eventually received medical treatment. *Id*. She later pleaded no contest to aggravated fleeing from a law enforcement officer and assault upon a peace officer. *Id.* at 309-10.

Torres subsequently filed suit under Section 1983, alleging that the police officers violated her Fourth Amendment rights when they used deadly force against her as she fled. *Id.* at 310. The case made its way up to the Supreme Court on the question of "whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting." *Torres*, 141 S. Ct. at 993. In ruling in Torres's favor, the Court observed that its existing precedent "largely covered this ground" in that prior case law held that "the application of force to the body of a person with intent to restrain" constitutes a seizure for purposes of the Fourth Amendment, "no matter whether the arrestee escaped." *Id.* at 995. But the Court

declined to say whether the question in this case was covered by precedent because it "independently reach[ed] the same conclusions," namely that shooting someone who nevertheless evades capture is still a seizure. *Id.*

Despite winning before the Supreme Court, Torres was once again denied relief on remand, not because the district court concluded that the officers' conduct was permissible, but because it held that they were entitled to qualified immunity. App. Vol. II at 312-317. The doctrine of qualified immunity is a judicial creation of the late twentieth century. As Justice Thomas has pointed out, the text of Section 1983 "ma[kes] no mention of defenses or immunities." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). "Instead, it applies categorically to the deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from denial of certiorari). Since the 1980s, however, qualified immunity has shielded government actors from civil liability under Section 1983 "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotation marks omitted). That doctrine, as applied by the courts, has "gutt[ed] the deterrent effect of the Fourth Amendment," *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting), enabling the very abuses of government power that Section 1983 was meant to deter.

Given that qualified immunity is at odds with Section 1983's text and history, courts should be especially careful to respect the limits of the doctrine that the Supreme Court has prescribed to prevent it from acting as a complete barrier to recovery. But the district court in this case mangled the qualified immunity analysis, wrongly expanding the scope of the doctrine.

To start, it reasoned that the officers were entitled to qualified immunity because the question of whether a Fourth Amendment "seizure" occurs when the police shoot someone who temporarily eludes capture was unsettled at the time they shot Torres. *See* App. Vol. II at 313-17. But that analysis is fundamentally flawed because it relies on a fact not known at the time the officers fired at Torres, that is, that Torres would be able to escape their use of deadly force. Qualified immunity is premised on the notion that an officer is entitled to "'fair warning' that his conduct deprived his victim of a constitutional right." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 265 (1997)). Therefore, "[f]acts an officer learns after [an] incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam).

The proper inquiry thus should have been whether it was clearly established that using deadly force was excessive in situations like the one the officers confronted when they shot Torres. It plainly was, because since 2009 it has been

"clearly established that an officer may not use deadly force to stop a fleeing vehicle when a reasonable officer would have perceived he was in no immediate danger at the time he fired." *Reavis v. Frost*, 967 F.3d 978, 995 (10th Cir. 2020) (citing *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009)).

The district court ignored this binding precedent. It also dismissed out of hand any precedent addressing officers shooting at people who were fleeing that did not involve "a moving vehicle," App. Vol. II at 316, even though the Supreme Court has made clear that cases involving "fundamentally similar facts" are not necessary to provide the "fair warning" that qualified immunity requires, *Hope*, 536 U.S. at 740-41 (quotation marks omitted). Indeed, the Court recently held that officers should not have been granted qualified immunity when "no reasonable correctional officer could have concluded" that their conduct was constitutional under the facts of the case. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (quotation marks omitted). And there need not be factually identical precedent for a court to hold that a reasonable officer should have recognized that their conduct was unconstitutional. By dismissing any precedent that did not involve a "moving vehicle," in one sentence and with no further analysis, *see* App. Vol. II at 316, the district court committed the same analytical error the Supreme Court corrected in *Taylor*.

Both of these rulings are deeply mistaken and expand qualified immunity beyond what the Supreme Court has countenanced. Rather than allow that doctrine

to become a license for impunity, this Court should reverse the district court's order and reaffirm the important limits on qualified immunity that the decision below disregards.

The district court also concluded that Torres's claims are barred by another limit on Section 1983's reach—the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars claims when a judgment in favor of the plaintiff would "necessarily imply the invalidity" of a conviction, *id.* at 487. The district court came to this conclusion even as it recognized that an excessive force claim in this case "is not necessarily inconsistent with Ms. Torres's convictions." App. Vol. II at 317. Because, in the district court's view, some of Torres's factual allegations would cast doubt on her convictions, *Heck* applied. *Id*. But *Heck* bars claims only when a judgment in favor of the plaintiff would "necessarily" imply the invalidity of a conviction, 512 U.S. at 487, not whenever any of the plaintiff's factual allegations are incompatible with that conviction. Because the district court's order departs from this important limitation, this Court should reverse.

ARGUMENT

I. Qualified Immunity Is at Odds with the Text and History of Section 1983 and this Court Should Not Expand It Further.

In the wake of the Civil War, amid the Southern states' continuing refusal to respect individual liberties, particularly of African Americans, a new generation of Framers crafted the Fourteenth Amendment to compel state officers "at all times to

respect [the] great fundamental guarantees" of the Bill of Rights, Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). But that turned out to be insufficient. Several years after the Amendment's ratification, Southern intransigence continued, with states "permit[ting] the rights of citizens to be systematically trampled upon." Cong. Globe, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe). Recognizing the need for a means of enforcing the rights newly guaranteed by the Constitution, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," ch. 22, 17 Stat. 13 (1871), the first section of which is codified as 42 U.S.C. § 1983.

Section 1983 was modeled on Section 2 of the Civil Rights Act of 1866. *See* Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger). But Section 1983 provided a civil, not criminal, remedy. To safeguard fundamental liberties, Congress concluded that the nation needed to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Id.* 376 (Rep. Lowe). The remedy that Section 1983 created "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And the legislators who enacted Section 1983 understood that it would be interpreted broadly to promote its goals. Cong. Globe, 42d Cong. 1st Sess. App. 68 (1871) (Rep. Shellabarger) ("This act is . . . in aid of the preservation of

human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . As has been again and again decided by your own Supreme Court of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes.").

Essential to the remedial goals of Section 1983 was the principle that exceptions to liability would be construed narrowly. The Congress that enacted Section 1983 insisted that "whoever interfered with the rights and immunities granted to the citizens by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility of the party injured when he brings suit for redress either at law or in equity." *Id.* at App. 310 (Rep. Maynard). In this manner, Section 1983 paralleled its 1866 predecessor: in debates preceding the enactment of Section 2 of the Civil Rights Act of 1866, legislators repeatedly debated and rejected exemptions for law enforcement officers, such as constables and sheriffs. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (Sen. Trumbull) (arguing that exempting state officials from penalty for actions taken under color of law improperly "places officials above the law"). Because arguments for such sweeping exemptions had already been rejected in the criminal context of the 1866 Act, the broad reach of what would become Section 1983 was comparatively uncontroversial. *See Briscoe v. LaHue*, 460 U.S.

325, 361 (1983) (Marshall, J., dissenting) ("Of all the measures in the Ku Klux Klan Act, § 1 [codified at § 1983] generated the least controversy since it merely provided a civil counterpart to the far more controversial criminal provision in the 1866 Act.").

For these reasons, the text of Section 1983 "on its face admits of no defense of official immunity," but rather "subjects to liability '[e]very person' who, acting under color of state law, commits the prohibited acts" in violation of federal law." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting 42 U.S.C. § 1983). Nevertheless, in many areas, "where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1992). Applying that principle in *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court "held that Congress did not intend § 1983 to abrogate . . . [c]ertain immunities [that] were so well established in 1871, when § 1983 was enacted, that we presume that Congress would have specifically so provided had it wished to abolish them." *Buckley*, 509 U.S. at 268 (quotation marks omitted). Tracing the history of common law immunities, the Supreme Court has held that legislative and judicial immunity were so firmly established in American law by 1871 that had the members of the Forty-Second Congress wished to abolish those immunities in the context of Section 1983, they "would have specifically so provided." *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *see Tenney*, 341 U.S. at 372.

Central to these decisions were historical findings that these immunities were so well established in the common law and so important to the functioning of government that Section 1983's authors could not have meant to abrogate them by implication. But the Supreme Court departed from this historically grounded approach when it addressed immunity for police officers in *Pierson v. Ray*. At common law, police officers had never enjoyed broad immunity from suit, and "constitutional restrictions on the scope of [their] authority w[ere] routinely applied throughout the nineteenth century" in damages actions. James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. 148, 167 (2021). Indeed, throughout the nineteenth century, courts treated law enforcement as "a 'ministerial' act" that was "subject to ordinary law" and not shielded by judicial or "quasi-judicial" immunity. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 Stan. L. Rev. Online (forthcoming) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746068#. Notably, officers enjoyed no general immunity based on a good-faith belief in the legality of their actions. Thus, "[i]f [a] plaintiff was assaulted and beaten" by a police officer "without authority of law," the plaintiff was "entitled to recover, whatever may have been the defendant's motives." *Shanley v. Wells*, 71 Ill. 78, 81 (1873).

Instead of concluding from this history that there was no common law immunity for police officers that Congress needed to abrogate in 1871, *Pierson v.*

Ray held that defenses that would be available to officers in the face of analogous common law torts could be asserted by Section 1983 defendants. *Pierson*, 386 U.S. 557 (because police officers sued for false arrest may assert "the defense of good faith and probable cause," that defense "is also available to them in the action under [Section] 1983").

Despite its shortcomings, *Pierson*'s holding was at least tethered to "limitations existing in the common law." *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). What followed was the transformation of qualified immunity into a doctrine based primarily on "the Justices' individual views of sound public policy," with no connection to statutory text and history. David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 501 (1992).

Tellingly, "it was in the context of *Bivens* that matters of policy took the reins completely and the Court abandoned any common law underpinnings to immunity doctrine." Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 Seattle U. L. Rev. 939, 955 (2014). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a *Bivens* action against federal officials, the Court announced a new formulation of qualified immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

person would have known." *Id.* at 818.

Even though *Harlow*'s new formulation of qualified immunity arose in a *Bivens* action, with no statute to interpret, the Court "made nothing of that distinction," *Burns v. Reed*, 500 U.S. 478, 498 n.1 (1991) (Scalia, J., dissenting), and later applied *Harlow*'s novel standard to Section 1983, *see Wyatt*, 504 U.S. at 165-67. The end result is a doctrine that "lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983—to provide a remedy for the violation of federal rights." *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

Given that modern qualified immunity is at odds with the text and history of Section 1983, this Court should be especially vigilant in safeguarding the limits that the Supreme Court has placed on its application. Because the district court's order expands the scope of qualified immunity in contravention of Supreme Court precedent, as the following Section discusses, this Court should reverse.

II. The Officers in this Case Are Not Entitled to Qualified Immunity.

A. Facts that Arose After the Officers Shot Torres Are Irrelevant to the Qualified Immunity Analysis.

As discussed above, there is no basis in the text, history, or common law backdrop of Section 1983 for the modern formulation of qualified immunity that the Supreme Court adopted in *Harlow v. Fitzgerald*. But as much as *Harlow* and the decisions following it departed from a proper interpretation of Section 1983, they at

least recognized that qualified immunity analysis must be "limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." *Hernandez*, 137 S. Ct. at 2007 (quotation marks omitted).

The decision below, however, is at odds with that Supreme Court precedent. The district court spent several pages explaining this case's trajectory through the courts, reasoning that the question the Supreme Court decided in this case—that a shooting is a Fourth Amendment seizure even when the person shot subsequently eludes capture—was not settled at the time the officers shot Torres. Consequently, according to the district court, the officers did not deprive Torres of a clearly established right. App. Vol. II at 313-317.

But whether or not that question was settled has no bearing on the constitutionality of the officers' conduct when they pulled the trigger. As the Supreme Court recently reaffirmed, in determining whether the law was clearly established, courts must limit their inquiry to "the facts that were knowable to the defendant officers at the time they engaged in the conduct in question." *Hernandez*, 137 S. Ct. at 2007 (quoting *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam)).

In *Hernandez v. Mesa*, the Court reversed an order granting qualified immunity to a Border Patrol agent who shot and killed a Mexican teenager standing on the Mexican side of the border. *Hernandez*, 137 S. Ct. at 2004, 2007. The Fifth Circuit had reasoned that no precedent clearly established that the Fifth

Amendment's prohibition against excessive force applied to a border agent's interactions with a noncitizen in Mexico who lacked connections with the United States. *Id.* at 2006. But the Supreme Court faulted the Fifth Circuit for relying on these facts because it was "undisputed . . . that Hernandez's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting." *Id.* at 2007. The Court held that consideration of those facts was improper because "[t]he 'dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*.'" *Id.* (emphasis added) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). And therefore, "[f]acts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." *Hernandez*, 137 S. Ct. at 2007.

Similarly here, the officers did not, indeed could not, know whether Torres would escape after their bullets struck her (or even whether the bullets would strike her). Whether the officers had "fair warning" about the law that applied to their decision to shoot Torres cannot depend on the fact that things did not go according to plan *after* they pulled the trigger. *Hope*, 536 U.S. at 741.

That conclusion reflects the core rationale for qualified immunity. The purpose of limiting liability to violations of "clearly established" rights "of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, is to ensure that

"any reasonable official *in the defendant's shoes* would have understood" that his conduct was not permissible, *Kisela*, 138 S. Ct. at 1153 (emphasis added) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014)). Uncertainties in the law are relevant to that question only where they would deprive the official of "fair warning that his conduct deprived his victim of a constitutional right." *Hope*, 536 U.S. at 740 (quotation marks omitted).

The Supreme Court's admonition that qualified immunity analysis is "limited to the facts that were knowable to the defendant officers at the time," *Hernandez*, 137 S. Ct. at 2007 (quotation marks omitted), is doubly appropriate in the context of a Fourth Amendment violation, in which the key inquiry is whether the officer acted reasonably based on "the facts known to the arresting officer at the time," *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). In determining whether an officer used excessive force in violation of the Fourth Amendment, courts employ an "objective reasonableness standard," "judged from the perspective of a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 388, 396 (1989) (emphasis added). The district court's reasoning is therefore irrelevant to both the qualified immunity analysis and the underlying excessive force claim.

In sum, the district court's reasoning relies exclusively on facts that arose after the officers shot Torres multiple times, making that analysis irrelevant to the key

qualified immunity inquiry: whether the officers had "fair warning" that their conduct was unlawful when pulling the trigger. *Hope*, 536 U.S. at 741. And as the next Section discusses, it was clearly established at the time of the shooting that officers may not use deadly force against a suspect who poses no immediate threat of harm to the officers or to others, whether that suspect is on foot or driving a vehicle.

B. It Was Clearly Established When the Officers Shot Torres that They Could Not Use Deadly Force to Subdue a Fleeing Suspect Who Posed No Threat of Serious Physical Harm.

While the district court spent the majority of its analysis on the irrelevant issue of whether the Fourth Amendment seizure question was settled in 2014, it also granted qualified immunity to the officers on the grounds that it is "undisputed that Ms. Torres was armed with her vehicle," and therefore "any case that does not involve a plaintiff in a moving vehicle is simply inapplicable." App. Vol. II at 316. That one sentence is the entirety of the district court's assessment of this point. And it is wrong for at least two reasons: it ignores binding precedent addressing the use of deadly force against suspects fleeing in vehicles, and it distorts the qualified immunity analysis by focusing solely on one factual distinction.

It has been clearly established since at least 1985 that officers cannot use deadly force to subdue a suspect who poses no "significant threat of death or serious physical injury." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). In *Garner*, the

Supreme Court considered whether an officer who shot and killed a fleeing burglary suspect, whom the officer had no reason to believe was armed, used excessive force in violation of the Fourth Amendment. *Id.* at 3-4. Rejecting the argument that probable cause to arrest a suspect is enough, the Court held that because the use of deadly force is the most extreme means of carrying out an arrest, such force can be used only when the suspect "poses a threat of serious physical harm." *Id.* at 11.

By the time the officers shot at Torres, it was also clearly established in this Circuit that *Garner* applies in scenarios involving moving vehicles. Indeed, that has been clear since at least 2009. In *Cordova v. Aragon*, this Court emphasized that Supreme Court precedent did not declare "open season on suspects fleeing in motor vehicles." 569 F.3d at 1190 (quoting *Lytle v. Bexar County*, 560 F.3d 404, 414 (5th Cir. 2009)). This Court then held that while a threat to officers, "if actual and imminent," can "shift the calculus in the direction of reasonableness" under the Fourth Amendment, thereby permitting the use of deadly force, qualified immunity is not appropriate where "the threat to the officers is a disputed fact." *Id.*

Moreover, this Court has already held that, since *Cordova*, "it would be clear to every officer that the use of deadly force to stop a fleeing vehicle is unreasonable unless there is an immediate threat of harm to himself or others." *Reavis*, 967 F.3d at 995. In *Reavis*, this Court affirmed the denial of qualified immunity to an officer who shot and killed a driver the officer thought was fleeing the scene of a stabbing.

Id. at 982-84. The shooting ended a dramatic car chase, during which the suspect, after fleeing the police in his truck, accelerated at and passed "within inches" of an officer. *Id.* at 983. The officer shot at the suspect "five to seven times" as he sped away, killing him with a shot to the back of the head. *Id.* Despite this fast-moving and dangerous series of events, this Court concluded that, taking the facts in the light most favorable to the plaintiff, the officer's conduct violated a clearly established right. *Id.* at 993-95.

This Court first looked to *Garner*, which "clearly established that an officer cannot use deadly force once a threat has abated." *Id.* at 993. It then explained that the Tenth Circuit applied *Garner* to the moving-vehicle scenario in the "factually similar" *Cordova* case. *Id.* Therefore it would have been "clear to every reasonable officer" that once "any threat posed by [the victim's] truck had abated," then "the use of deadly force to stop [the] truck was unreasonable." *Id.* at 995. The same reasoning applies here.

Even setting aside *Cordova*, the Supreme Court has long been clear that exact factual analogues are not required to provide government officials with "notice that their conduct violates established law." *Hope*, 536 U.S. at 741. It is not necessary to show that "the very action in question has previously been held unlawful," only that "in the light of pre-existing law the unlawfulness [is] apparent." *Id.* at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[G]eneral statements"

are capable of giving "fair and clear warning," and a "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Indeed, the Court recently reversed a lower court decision that placed too much emphasis on close factual analogues, *see Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam), admonishing the lower court for requiring identical facts instead of focusing on whether the defendants "reasonably misapprehend[ed] the law governing the circumstances [they] confronted." *Id.* at 53 (quotation marks omitted). The district court's analysis in this case, with no discussion of any decisional law and only a passing reference to a single factual distinction, makes a similar error.

Significantly, numerous circuits have denied qualified immunity in cases involving moving vehicles based on the clearly-established rule set out in *Garner*. In *Vaughan v. Cox*, the Eleventh Circuit, "[a]pplying *Garner* in a common-sense way," denied qualified immunity to an officer who shot at a suspect three times as he accelerated away from police after ramming into the back of a police car. *Vaughan v. Cox*, 343 F.3d 1323, 1333, 1326 (11th Cir. 2003). In a case where police shot a suspect fleeing in an automobile during a fast-moving, "15-45 second[]" encounter, the Sixth Circuit affirmed the denial of qualified immunity, holding that *Garner* clearly established that "police officers may not fire at non-dangerous

fleeing felons." *Kirby v. Duva*, 530 F.3d 475, 478, 483 (6th Cir. 2008). *Kirby* rejected the officer's attempt to distinguish *Garner* on the basis that it did not "involve the roadside execution of a search warrant," observing that *Garner* "made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone." *Id.* at 483. The Fifth Circuit, in a case where an officer shot and killed a passenger in a speeding, stolen, moving vehicle, found it unnecessary to "dwell" on the qualified immunity inquiry because, pointing to *Garner*, it held that "[i]t has long been clearly established" that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle*, 560 F.3d at 417.

As these cases recognize, the fact that a case involves a moving vehicle is not—without more—enough of a distinction to escape the well-established rule of *Garner*. In each of these cases, the plaintiff was driving a vehicle, but that that did not give the defendants license to use deadly force if the officers did not reasonably perceive an imminent danger to themselves or others.

As these cases also recognize, whatever authority officers may have to use deadly force against a fleeing suspect who "poses a significant threat of death or serious physical injury to the officer or others" lasts only as long as the threat does. *Garner*, 471 U.S. at 3. The fact that a car chase began in a dangerous manner or even that a driver accelerated toward an officer at some point does not mean that any

shot fired during the incident is justified. As the Third Circuit observed, in a decision denying summary judgment to an officer who fatally shot a suspect who allegedly accelerated toward the officer at some point during their encounter, "[a] passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect." *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999). And as this Court has put it, *Garner* "clearly established that an officer cannot use deadly force *once a threat has abated*." *Reavis*, 967 F.3d at 993 (emphasis added).

Because binding precedent makes it "clear to every officer that the use of deadly force to stop a fleeing vehicle is unreasonable unless there is an immediate threat of harm," the officers here were on notice that they could not shoot at Torres once she drove past them. *Reavis*, 967 F. 3d at 995. Accordingly, they are not entitled to qualified immunity.

III. *Heck v. Humphrey* Does Not Bar Torres's Claim.

In addition to granting the officers qualified immunity, the district court also concluded that Torres's excessive force claim is barred by *Heck v. Humphrey*. *Heck* precludes Section 1983 claims when "the plaintiff's action," if successful, would "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Heck*, 512 U.S. at 487. The district court recognized that "[a]n excessive force claim" in this case "is not necessarily inconsistent with Ms. Torres's convictions," if "the officers used too much force to respond or the officers used

force after the need for force disappeared." App. Vol. II at 317. That should have ended the analysis. Instead, the district court applied the *Heck* bar because some of Torres's factual allegations are not consistent with her convictions for fleeing from a law enforcement officer and assault upon a police officer. *See id.* at 317-23. But *Heck* is not so broad. It does not ask courts to consider whether every factual allegation in a complaint, if true, would cast doubt on the validity of the plaintiff's conviction, only whether a *judgment* in favor of the plaintiff would "*necessarily require* the plaintiff to prove the unlawfulness of his conviction or confinement." *Heck*, 512 U.S. at 486 (emphasis added). As the Supreme Court has emphasized, it was "careful in *Heck* to stress the importance of the term 'necessarily.'" *Nelson v. Campbell*, 541 U.S. 637, 647 (2004). Because the district court's reasoning departs from this important limitation, this Court should reverse.

In *Heck*, the Court addressed the intersection of Section 1983 and the federal habeas statute, both of which "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck*, 512 U.S. at 480. While both statutes, on their face, offer an avenue for relief to criminal defendants whose convictions violate the Constitution, they differ in that the habeas statute requires that petitioners first exhaust state remedies. *Id.* at 480-81. Thus, if criminal defendants could challenge their convictions through Section 1983 suits, they could circumvent the habeas statute's exhaustion requirement. *Preiser v. Rodriguez*, 411

U.S. 475, 490-91 (1973).

While the Court had previously held that state prisoners therefore could not use Section 1983 to receive "equitable relief," *id.* at 494, in *Heck* the Court extended that reasoning to damages actions, *Heck* 512 U.S. at 481. The Court explained that where "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction," a claimant similarly can "be said to be attacking the fact or length of confinement." *Id.* at 482 (quotation marks omitted and alterations adopted). The Court also sought to alleviate concerns about "parallel litigation over the issues of probable cause and guilt" and about the possibility of "two conflicting resolutions arising out of the same or identical transaction." *Id.* at 484 (quotation marks omitted). But those concerns are simply not implicated when a Section 1983 plaintiff can make out their claim without having to demonstrate the "invalidity of [their] conviction or sentence." *Id.* at 487.

None of the factual allegations that the district court seized on are necessary to Torres's claim for excessive force. *Heck* may bar a theory of liability according to which Madrid and Williamson were never in danger. But Torres's complaint supports a theory of liability for excessive force in which the officers continued to fire at her after any threat to them had abated, or in which the officers shot at her *only* after they were no longer in danger. No one disputes that Torres was shot *in the back*, *see* App. Vol. II at 309, which suggests that one or both officers may have

fired at least some, if not all, of the shots at her as she drove away from them. Even the district court described the officers as firing their weapons "upon Ms. Torres driving away." *Id.* at 320. By fixating on Torres's allegation that she did nothing wrong to provoke the shooting, *id.* at 320-22, the district court failed to consider whether Torres can succeed on her excessive force claim without proving that allegation. She can, and for that reason a judgment in her favor will not "necessarily" imply the invalidity of her convictions. *Heck*, 512 U.S. at 487.[2]

To the extent that any of Torres's factual allegations are inconsistent with her convictions, the district court should have struck those allegations from the complaint, precluded the introduction of evidence that is inconsistent with Torres's convictions, and provided any appropriate jury instructions. *See Martinez v. City of Albuquerque*, 184 F.3d 1123, 1127 (10th Cir. 1999). The district court declined to do so based on its understanding that factual allegations can be set aside only where the plaintiff alleges "distinct uses of force," some of which may be allowed to proceed while others are barred. App. Vol. II at 320. But that ignores this Court's precedent. In *Martinez*, this Court considered whether *Heck* barred a plaintiff's Section 1983 claim for excessive force. *Martinez*, 184 F.3d at 1124-26. Martinez

[2] The district court also made much of the fact that Torres claims she was unarmed, which the district court found inconsistent with her convictions because they were premised on her use of her vehicle as a "weapon." App. Vol. II at 318-319. But Torres clearly meant that she did not have a firearm or other similar weapon. *See* App. Vol. I at 19.

alleged only one incident of excessive force, being struck in the face when he refused to exit his vehicle, *id.* at 1124, but also alleged facts that were inconsistent with his conviction for resisting arrest: that the officers had no probable cause to arrest him and that he did not actively resist, *id.* at 1127. This Court allowed Martinez's claim to go forward, because whether he resisted arrest by fleeing the scene was a separate question "from whether the police officers exercised excessive or unreasonable force in effectuating his arrest." *Id.* It then instructed the district court to strike those allegations from Martinez's complaint that were incompatible with his conviction. *Id.* Similarly here, the district court should have set aside those allegations inconsistent with Torres's convictions but allowed her excessive force claim to proceed.

* * *

Section 1983 was passed to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess. 376 (1871) (Rep. Lowe). Qualified immunity and the *Heck* bar undermine the effectiveness of that law even when properly applied, and here the district court improperly expanded them. Because the district court failed to apply important limits on these doctrines that are required by Supreme Court precedent, this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Charlotte Schwartz
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

Dated: May 9, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,382 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times New Roman font.

Executed this 9 day of May, 2022.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on May 9, 2022.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 9 day of May, 2022.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amicus Curiae