
Protest Policing and the Fourth Amendment

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Police crowd control techniques have come under increased scrutiny after viral videos of unprovoked violence against protesters dominated airwaves in 2020. Many demonstrators, and at least two state attorneys general, pursued civil rights claims claiming excessive use of force under the Fourth Amendment. While debate rages over the merits of those claims, surprisingly little scholarly literature exists to examine an important related threshold question: does the Fourth Amendment apply at all to police violence against protesters? This Article provides the first sustained treatment of the issue, highlighting how the United States Supreme Court's narrow definition of "seizure" and cramped notion of Fourth Amendment "standing" cast doubt on demonstrators' ability to sustain claims of excessive force under the Fourth Amendment. The Court has long defined a "seizure" as requiring an intent to submit a suspect to an officer's grasp, but crowd control techniques are designed to disperse rather than restrain protesters. Moreover, questions abound regarding whether actual submission or physical force are required to constitute a seizure, as well as what one means by "submission" or a physical touching in a crowd dispersed by chemical munitions. As to standing, while some individuals may assert personal claims, more recent attempts to aggregate protester claims through class actions or State-led parens patriae actions seem to contravene the Court's strict rejection of vicarious standing in Fourth Amendment cases. This Article critiques both the Court's seizure and

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standing jurisprudence as contrary to the original purpose of the amendment, articulates a novel “restraint on liberty” theory of seizures that incorporates the command to leave as equivalent to the command to stay, and charts a principled path forward for class action and state representative actions limited to the mass demonstration context.

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INTRODUCTION

Street protests against racism and police brutality became a defining feature of 2020 following George Floyd's murder by a Minneapolis police officer.¹ Ironically, many of these protests seeking redress for excessive police violence were met with coordinated excessive police violence. Tear gas canisters rained down on peaceful protesters in Raleigh, North Carolina.² Batons cracked the skulls of kneeling demonstrators in Washington, D.C.³ Police vehicles became battering rams used to disperse chanting crowds in New York City.⁴ Pepper spray

¹ See, e.g., Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/MKE7-9UQC] (suggesting that “about 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks”); *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM ET), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [https://perma.cc/S9PB-BDCD] (“From London to Pretoria to Sydney, people took to the streets to express the need for police reform and racial equality.”); see also Girardeau A. Spann, *Good Trouble*, U. CHI. L. REV. ONLINE 35, 35 (2020) (“[T]he distressingly cavalier murder of a Black man named George Floyd by a White Minneapolis police officer named Derek Chauvin prompted an unexpectedly prominent and sustained public outcry against the persistence of racism in the United States.”).

² See Anna Johnson & Ashad Hajela, *Raleigh Police Used Expired Tear Gas on George Floyd Protesters, New Report Says*, NEWS & OBSERVER (Sept. 15, 2020, 4:04 PM), <https://www.newsobserver.com/news/local/counties/wake-county/article245725665.html> [https://perma.cc/6ZPV-VC6V]; Amanda Lamb, *Consultant: Raleigh Police Need Better Policies on Using Force, Tear Gas on Crowds*, WRAL (Nov. 10, 2020, 5:37 AM EST), <https://www.wral.com/consultant-raleigh-police-need-better-policies-on-using-force-tear-gas-on-crowds/19378671/> [https://perma.cc/WV5K-Y39Z]; *Raleigh Police Used Tear Gas 252 Times, City Spent More Than \$1 Million on George Floyd Protests, Report Says*, ABC11 (Sept. 15, 2020), <https://abc11.com/raleigh-police-protests-george-floyd-in-may/6424640/> [https://perma.cc/XY93-RH8]?type=image].

³ See Andy Sullivan & Jonathan Landay, *On the Streets of Washington, Pleas for Change Met with Batons and Rubber Bullets*, REUTERS (June 2, 2020, 12:55 PM), <https://www.reuters.com/article/us-minneapolis-police-washingtondc/on-the-streets-of-washington-pleas-for-change-met-with-batons-and-rubber-bullets-idUSKBN2392VX> [https://perma.cc/7KUE-U935]; see also Oliver Holmes, Helen Sullivan, Maanvi Singh, Sam Levin, Joan E. Greve & Martin Pengelly, *US Police Forcefully Crack Down on Protesters as Curfews Fail to Stop Demonstrations – as it Happened*, GUARDIAN (June 2, 2020, 6:29 AM EDT), <https://www.theguardian.com/us-news/live/2020/jun/01/george-floyd-protests-donald-trump-white-house-washington-police-brutality-minneapolis-latest-news-updates> [https://perma.cc/C78S-FZEN] (noting that “protestors appeared to be acting peacefully before they were dispersed by force”).

⁴ See Scott Fallon, *Video Shows NYPD SUVs Ram into Crowd Protesting George Floyd Killing; Mayor's Comments Criticized*, USA TODAY (May 31, 2020, 12:42 PM ET), <https://www.usatoday.com/story/news/nation/2020/05/31/new-york-city-george-floyd->

burned the retinas of peaceful activists after police pulled down protective face masks.⁵ Secretive federal police roamed the streets of Portland in unmarked cars, “disappearing” journalists and protesters into undisclosed holding cells for hours, only to release them later without charge or a record of the encounter.⁶

These types of state-sponsored violence appear ripe for adjudication as civil rights violations of demonstrators’ Fourth Amendment guarantee against police excessive use of force.⁷ These “Section 1983” claims, so named because of the Civil Rights Act’s place in the United States Code,⁸ have become notorious for their inability to grant meaningful relief to victims of egregious acts of police violence.⁹ Facing

protests-nypd-subs-brooklyn-crowd/5299746002/ [https://perma.cc/7SRT-2FJ4] (“Two New York Police Department vehicles plowed into demonstrators . . . as the crowd pushed a barricade against one of them and pelted it with objects.”); Tara Law, *Footage of NYPD Vehicles Surging into Crowd of Protesters Sparks Further Outrage*, TIME (May 31, 2020, 11:36 AM EDT), <https://time.com/5845631/nypd-protests-vehicles-protesters/> [https://perma.cc/7QRD-UN8R].

⁵ See Lauren Cook, *Watch: Cop Pulls Mask Off Man, Pepper Sprays Him in the Face*, PIX11 (May 31, 2020, 9:15 AM EDT), <https://www.pix11.com/news/local-news/watch-cop-pulls-mask-off-man-pepper-sprays-him-in-the-face> [https://perma.cc/3NM7-TVG2] (“An officer . . . walks up to [a] man, pulls his mask down and sprays him directly in the face while the man’s hands are in the air, the video shows.”).

⁶ See Jonathan Levinson, Conrad Wilson, James Doubek & Suzanne Nuyen, *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020, 1:04 PM ET), <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland> [https://perma.cc/9VQK-CS2E] (noting that “[f]ederal law enforcement officers have been using unmarked vehicles to drive . . . up to people, detaining individuals with no explanation about why they are being arrested, and driving off,” and discussing how protestors were “put into a cell” before being released without receiving “any paperwork, citation, or record of [their] arrest”); see also Igor Derysh, “*They’re Kidnapping People*”: “*Trump’s Secret Police*” Snatch Portland Protesters into Unmarked Vans, SALON (July 17, 2020, 12:05 PM EDT), <https://www.salon.com/2020/07/17/theyre-kidnapping-people-trumps-secret-police-s snatch-portland-protesters-into-unmarked-vans/> [https://perma.cc/VY34-25HJ] (noting that “camouflaged federal officers” arrived over the objections of Oregon Governor Kate Brown “as part of President Donald Trump’s executive order to protect American memorials, monuments, and statues”).

⁷ See *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (discussing Fourth Amendment “excessive force claims brought under § 1983” and explaining that “§ 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred’” (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979))).

⁸ 42 U.S.C. § 1983 (2018); see Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 599 (2020).

⁹ One of the most damning recent indictments of the impotence of § 1983 claims comes from a United States District Judge, Carlton W. Reeves, who considered whether a Black man “pulled over and subjected to one hundred and ten minutes of an armed

the dual hurdles of a lenient reasonable force jurisprudence and a near-absolute qualified immunity defense, excessive force plaintiffs increasingly find themselves shut out of court without being able to present, or even discover, relevant evidence.¹⁰ A growing chorus of scholars,¹¹ politicians,¹² and protesters themselves¹³ are calling to

police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs” had his Fourth Amendment right to be free from unreasonable searches and seizures violated under § 1983. *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020). Judge Reeves cites two dozen examples of police brutality before excoriating the United States Supreme Court’s expansion of qualified immunity as “dispens[ing] with any pretense of competing values” and “protect[ing] all officers, no matter how egregious their conduct.” *Id.* at 390-91, 403-04. At the end of the 72-page opinion, Judge Reeves “reluctantly” follows precedent, grants qualified immunity, and dismisses the case. *Id.* at 423-24.

¹⁰ See Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 982 (2019) (describing how “this multilayered system of protection for police abuse [has rendered] qualified immunity . . . closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power”).

¹¹ See, e.g., Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 908-11 (2016) (noting qualified immunity serves as a barrier to excessive force claims and calling for the Court’s remedial jurisprudence to be reevaluated); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 80-82 (2018) (discussing the doctrine of qualified immunity and calling for the doctrine to be narrowed); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (calling for the Justices to “end qualified immunity in a single decision” and to “end it now”). For an example of a scholar whose work in this subject led to almost immediate legislative change, see Tatyana Hopkins, *DC Adopts GW Law Professor’s Model Legislation on Police Use of Force*, GW TODAY (June 12, 2020), <https://gwtoday.gwu.edu/dc-adopts-gw-law-professor%E2%80%99s-model-legislation-police-use-force> [<https://perma.cc/C8KJ-9DVC>], describing D.C. Council’s unanimous adoption of Professor Cynthia Lee’s model legislation redefining reasonable use of force articulated in *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 664-65 (2018).

¹² See Jackie DeFusco, *Virginia House Kills Bill to End Qualified Immunity for Police Officers, Scaled-Back Senate Proposal Lives On*, ABC8 (Jan. 29, 2021, 7:23 PM EST), <https://www.wric.com/news/virginia-house-kills-bill-to-end-qualified-immunity-for-police-officers-scaled-back-senate-proposal-lives-on/> [<https://perma.cc/KZ89-6BTU>]; Christianna Silva, *Cory Booker Wants to End Qualified Immunity for Police Officers*, NPR (June 7, 2020, 8:29 PM EST), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/07/871713872/cory-booker-wants-to-end-qualified-immunity-for-police-officers> [<https://perma.cc/L3NL-CCPS>].

¹³ Ben Cohen, *Better Policing Begins with Accountability and an End to Qualified Immunity*, USA TODAY (Jan. 27, 2021, 7:43 PM ET), <https://www.usatoday.com/story/opinion/policing/2021/01/27/better-policing-begins-accountability-end-qualified-immunity-column/4251822001/> [<https://perma.cc/U6P4-ZLVJ>] (describing grass roots movements aimed at ending qualified immunity).

redefine what the law considers objectively reasonable use of force and to narrow or even eliminate qualified immunity.

This Article does not wade into that urgent discussion. Rather, it asks an important and undertheorized related question: does the Fourth Amendment apply at all to protest policing cases? In other words, before the merits of a demonstrator's claim of police abuse can be assessed, can the demonstrator even cross the "Fourth Amendment threshold" to trigger constitutional scrutiny?¹⁴ At first blush, the answer appears obviously to be, "yes." After all, a protester pelted with pepper balls, tear gas, or other chemical munitions has been subjected to force by an officer, giving rise to at least a claim that such force was constitutionally unreasonable.

That may not be the case. Excessive force claims are adjudicated as "unreasonable seizures" under the Fourth Amendment,¹⁵ and the United States Supreme Court's narrow and multilayered definition of "seizure" casts serious doubts on the claims of protesters subjected to crowd control techniques. The Court has long referred to seizures as requiring intentional conduct by a police officer to submit a suspect to the officer's grasp, thus restricting the individual's "free[dom] to leave."¹⁶ But protest policing has the opposite motivation. Officers lobbing flash bang grenades into crowds do not want to make the crowd stay; they want the crowd to go away. While little case law addresses the issue directly, a handful of courts have rejected claims that the Fourth Amendment applies at all in protest-policing cases under this dispersal versus submission distinction.¹⁷

¹⁴ See Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 520 (2015) (observing that when the Court "remov[es] encounters from the definition of 'seizure,'" it renders that police activity as "beneath the Fourth Amendment threshold" and thus leaves "no role for the judiciary under the Fourth Amendment to scrutinize the reasonableness of the encounter at all"); Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 829-35 (2016) (describing the ever-moving Fourth Amendment threshold in search law cases).

¹⁵ See *Scott v. Harris*, 550 U.S. 372, 376 (2007) (considering a § 1983 claim "alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment"); see also *Anderson v. Creighton*, 483 U.S. 635, 643-44 (1987) (explaining that excessive force cases are governed by the unreasonable seizure clause of the Fourth Amendment).

¹⁶ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

¹⁷ See, e.g., *Edrei v. City of New York*, 254 F. Supp. 3d 565, 574 (S.D.N.Y. 2017) (finding that police use of acoustic device to disperse crowd did not constitute a seizure).

An additional aspect of the Court's seizure jurisprudence further complicates the analysis. For nearly thirty years, the Court has required a seizure to be effectuated by either "physical force" or a "show of authority . . . coupled with actual submission."¹⁸ In other words, absent a physical touching, no seizure occurs unless the target of police conduct actually submits.¹⁹ But what constitutes "actual submission" in the protest policing context, if not submission to arrest or detention, remains an open question. The boundaries of "physical force" are more vague in a world where crowd control tactics involve not only the dissemination of diffuse gaseous particles "wafting" over demonstrators but long-range acoustic devices designed to blare away the crowd.²⁰ Even the distinction between physical force and shows of authority appears to be crumbling, as the Supreme Court recently was forced to resolve on narrow grounds a circuit split over whether intentionally shooting a fleeing suspect (clearly physical force) constitutes a seizure if the suspect temporarily evades capture.²¹

After exploring these issues and critiquing the Court's artificially narrow approach to seizure cases, this Article articulates a "restraint on liberty" theory of Fourth Amendment seizure that accords with the underlying purpose of the Fourth Amendment and better reflects the practical reality of modern-day policing, including protest policing.

because the officers never "intentionally" meant to "restrain" any demonstrator); *Dundon v. Kirchmeier*, No. 1:16-cv-406, 2017 U.S. Dist. LEXIS 222696, at *57-62 (D.N.D. Feb. 7, 2017), *affd. mem.*, 701 F. App'x. 538 (8th Cir. 2017) (per curiam) (finding that the Fourth Amendment did not apply to claims of police abuse brought by protesters pelted with water cannons and tear gas canisters because they were never "seized").

¹⁸ *California v. Hodari D.*, 499 U.S. 621, 637-38 (1991).

¹⁹ *Id.*

²⁰ See *Edrei*, 254 F. Supp. 3d at 574 (denying Fourth Amendment protection to protesters subjected to noise violence by police); *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1265 (C.D. Ill. 1996) (distinguishing between non-arrested demonstrators directly in line of pepper spray and demonstrators further removed from police action); Renée Paradis, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 338 (2003) (describing a court's division of two "separate plaintiff classes" and directing a verdict against the "waft class").

²¹ See *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021) ("We hold that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."); see also *Petition for Writ of Certiorari at 1*, *Torres v. Madrid*, 769 Fed. App'x 654 (10th Cir. 2019) (No. 19-292) (seeking Supreme Court review in case where "police officers shot Petitioner, but she drove away and temporarily eluded capture," when such physical force alone constitutes a seizure in the Eighth, Ninth, and Eleventh Circuit Courts of Appeal but not in the Tenth or D.C. Circuit Courts of Appeal).

This theory posits that any intentional restriction on an individual's freedom of movement constitutes a seizure, whether the restriction infringes the freedom to go or the freedom to stay. Both situations involve a formal, armed government command to stop moving freely, which at root is the state action sought to be restricted by the Fourth Amendment's seizure provision.²² Moreover, this theory does away with the physical force and show of authority distinction, in recognition both of the increasingly unworkable nature of the distinction and the significant violence a nonphysical show of authority can bear on a citizen in a comparatively powerless encounter with law enforcement. This approach admittedly would broaden the range of police conduct subject to Fourth Amendment scrutiny, but not necessarily the range of police conduct deemed unconstitutional. The calculus simply would shift from threshold questions of whether a seizure occurred to substantive questions of whether the seizure was reasonable. Such a shift is long overdue in the Court's tortured search law jurisprudence and would bring principled clarity in its seizure cases as well.²³

But even if these seizure questions can be resolved satisfactorily, a second Fourth Amendment threshold issue arises in the protest policing context: standing. Little question exists that an individual personally seized by an officer has standing to pursue an excessive force claim, subject to Article III's injury, causation, and redressability requirements.²⁴ But in the wake of police violence against mass groups of demonstrators during 2020's "Summer of Racial Reckoning,"²⁵ a

²² See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1281 (2016) (observing that the Fourth Amendment's inclusion in the Constitution was a paramount priority for those "concern[ed] . . . as to whether the structural protections [of the Constitution] would be sufficient to restrain a stronger national government"); *id.* at 1286 (quoting founding concern that police "may, unless the general government be restrained by a bill of rights, . . . go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, and wear").

²³ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974) (decrying the Court's tortured definition of "search," which leaves us with "a [F]ourth [A]mendment with all of the character and consistency of a Rorschach blot"); Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 238-40 (2019) (advocating a return to the plain, dictionary meaning of the word "search," which would shift the focus of search analysis to reasonableness of the police action and eschew the "vacuous word play" defining the last half century of search law jurisprudence).

²⁴ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998) ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement . . .").

²⁵ Ailsa Chang, Rachel Martin & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM EST), <https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit>. [<https://perma.cc/PP6Z-Q23C>].

number of representative actions have been filed on behalf of large groups of protesters seeking redress. The ACLU filed a class action lawsuit on behalf of protesters and journalists in Portland,²⁶ and the Attorneys General of Oregon and New York filed actions on behalf of their respective states' citizens in their *parens patriae* capacity.²⁷ Such aggregate litigation makes practical sense given the large numbers of affected individuals. But it is unclear if Fourth Amendment allows it.

Fourth Amendment scholars may intuitively think not. For nearly forty years, the Supreme Court has defined substantive Fourth Amendment "standing" (while not referring to it as such) narrowly, reaffirming time and again that Fourth Amendment rights are personal and may never be asserted vicariously.²⁸ In so doing, the Court has denied standing to injured "targets" of clear police abuses unless those targets also possessed a reasonable expectation of privacy in the place or thing searched by police.²⁹ This cramped approach to Fourth Amendment standing has drawn ire and ridicule from numerous

²⁶ Second Amended Complaint at 16, *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI (D. Or. July 17, 2020) (asserting class claims arising from "[t]he police's use of excessive force against neutral observers [that] extends to all Plaintiff class members and other neutrals").

²⁷ Complaint for Declaratory and Injunctive Relief at 1, *State of New York v. City of New York*, No. 1:21-cv-00322 (S.D.N.Y. Jan. 14, 2021) ("The People of the State of New York, by their Attorney General, Letitia James, bring this action to end the pervasive use of excessive force and false arrests by the New York City Police Department (NYPD) against New Yorkers in suppressing overwhelmingly peaceful protests."); Complaint at 1, 3, *Rosenblum v. Does 1-10*, No. 3:20-cv-01161-MO (D. Or. July 17, 2020) (asserting *parens patriae* standing to challenge actions of "federal law enforcement officers [who] . . . have been using unmarked vehicles to drive around downtown Portland, detain protesters, and place them into the officers' unmarked vehicles, removing them from public without either arresting them or stating the basis for an arrest, since at least Tuesday, July 14").

²⁸ *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (denying the "target" of an unlawful search standing to assert a Fourth Amendment claim unless that target had a reasonable expectation of privacy protected by the Fourth Amendment and re-affirming that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted" (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Class actions are not "vicarious" in the prudential standing sense, but nonetheless rarely succeed for reasons tied to the Court's narrow Fourth Amendment standing framework. *See infra* Part II.

²⁹ Donald L. Doernberg, "The Right of the People": *Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 264-65 (1983) (retracing pre-*Rakas* precedent suggesting "that being the target of a search might itself suffice to confer standing Under such a target theory, standing would be extended to 'anyone legitimately on the premises when a search occurs . . . [if] its fruits are proposed to be used against him.'" (quoting *Jones v. United States*, 362 U.S. 257, 267 (1960))).

scholars.³⁰ But both the case law and the commentary on Fourth Amendment standing involves only search law issues; virtually no major cases have considered Fourth Amendment “standing” requirements in unreasonable seizure cases.³¹ This Article provides the first systematic treatment of standing issues in the context of Fourth Amendment seizures.³²

Much of that treatment centers on the relationship between Fourth Amendment standing principles and representative actions, as well as the inherent problems of aggregation of Fourth Amendment claims. In the class action context, virtually all Fourth Amendment class claims fail at certification because of the inherently fact- and context-specific analyses required to adjudicate whether “reasonable suspicion” or “probable cause” existed, or whether “reasonable force” was used.³³ These fact-intensive inquiries, guided by various totality-of-the-circumstances tests,³⁴ render it virtually impossible for putative classes

³⁰ See, e.g., *id.* at 290-91, 294 (asserting that *Rakas* and its progeny ignore the “deterrence rationale” adopted elsewhere in Fourth Amendment jurisprudence, which requires “a return to the question of how that interest is to be vindicated” collectively rather than just individually); David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 96-97 (2018) (“The collective damage done to the security of the people against unreasonable searches and seizures by . . . rules governing Fourth Amendment standing is profound” and ignores the original text whereby “any member of ‘the people’ should have standing to pursue prospective constitutional remedies sufficient to guarantee their security.”).

³¹ JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, UNDERSTANDING CRIMINAL PROCEDURE 334 (7th ed. 2020) (“Nearly everything the Supreme Court has said about standing . . . has concerned challenges to police searches, rather than seizures.”).

³² A number of scholars have addressed problems with existing Fourth Amendment standing doctrine, but almost exclusively in the context of search law. See, e.g., Gregory Brazeal, *Mass Seizure and Mass Search*, 22 U. PA. J. CONST. L. 1001, 1013-14 (2020) (analyzing how mass surveillance interacts with Fourth Amendment search jurisprudence); Doernberg, *supra* note 29, at 270-71 (analyzing the doctrine of standing for Fourth Amendment rights in the context of searches); Gray, *supra* note 30, at 86-103 (analyzing Fourth Amendment standing and its “idiosyncratic definition of ‘search’”). This scholarly gap makes some intuitive sense, as discussed herein. See *infra* Part II.A.

³³ See *Graham v. Connor*, 490 U.S. 386, 397-99 (1989) (defining and explaining “objectively reasonable use of force” in seizure analyses); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (articulating reasonable suspicion standard for temporary involuntary detentions); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (defining “probable cause” as existing when facts and circumstances are “sufficient in themselves to warrant a person of reasonable caution in the belief that” an offense has been committed or evidence will be found).

³⁴ See, e.g., *Graham*, 490 U.S. at 396 (reasonable force); *Illinois v. Gates*, 462 U.S. 213, 233 (1983) (probable cause); *Terry*, 392 U.S. at 27 (reasonable suspicion); see also Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593,

to demonstrate the commonality and typicality of claims needed for aggregate treatment.³⁵ But protest policing may provide one exception to this general rule, at least where a protester class can point to a single command decision or use of force that led to substantially similar injuries to the crowd.

Alternatively, the Oregon and New York litigations test a nearly unprecedented use of a state's *parens patriae* power to assert standing in a Fourth Amendment action on behalf of the well-being of its citizens. Few such cases exist, and early returns on their success is not promising, as states fail to demonstrate that private Fourth Amendment injuries are both sufficiently widespread to threaten the entire population and incapable of being asserted by those private parties.³⁶ Here again, the protest policing context may provide an exception. The sheer size of protest groups affected by aggressive police crowd control techniques, the likelihood of continued clashes in the future, and the primacy of a citizenry's collective First Amendment right to peaceably assemble may provide the necessary size and magnitude to confer this "special solicitude" standing.³⁷ As to the ability of private citizens to bring actions in their own right, the Court's narrow Fourth Amendment standing doctrine ironically may help demonstrate the broad incapacity of individuals to litigate these claims on their behalf. States may also succeed in presenting damning evidence of the disparate impacts of protest policing methods on communities of color — particularly Black communities — to press forward with state-wide harm claims.³⁸ Given

621 (2012) (exploring problems of the Fourth Amendment's "totality-of-the-circumstances" tests with class action treatment).

³⁵ See Garrett, *supra* note 34, at 621-24; see also *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 (D.C. Cir. 1984) (rejecting certification of Fourth Amendment false arrest claims that "turn upon highly individualized proof, [where] probable cause may have existed for . . . some putative class members").

³⁶ See *infra* Part II.C.

³⁷ *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (recognizing "Massachusetts' stake in protecting its quasi-sovereign interests" and thus granting "special solicitude in our standing analysis").

³⁸ See REBECCA C. HETEVY, BENOÎT MONIN, AMRITA MAITREYI & JENNIFER L. EBERHARDT, DATA FOR CHANGE: A STATISTICAL ANALYSIS OF POLICE STOPS, SEARCHES, HANDCUFFINGS, AND ARRESTS IN OAKLAND, CALIF., 2013-2014, at 91 tbl.5.2 (2016), <https://stanford.app.box.com/v/Data-for-Change> [<https://perma.cc/9NQZ-N7GC>] (finding that during a thirteen-month period in Oakland, California, 2,890 African Americans were handcuffed but not arrested, while only 193 whites were cuffed); CODY T. ROSS, A MULTI-LEVEL BAYESIAN ANALYSIS OF RACIAL BIAS IN POLICE SHOOTINGS AT THE COUNTY-LEVEL IN THE UNITED STATES, 2011-2014, at 6 (2015), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0141854&type=printable> [<https://perma.cc/C3L8-ZF84>] ("The median probability of being {black, unarmed, and shot by police} is about 3.49 times the probability of being {white, unarmed, and shot by police} on

the Supreme Court's unwillingness to consider discrimination claims based on disparate impact alone,³⁹ this approach may further highlight the incapacity of private citizens to seek broad relief from police abuse.

This urgent issue is ripe for scholarly consideration. The current movement, aimed directly at curbing police excessive force, provides a moment of reflection for how the law fails these activists when they themselves become the target of the injustice they seek to remedy. Moreover, scant scholarly literature exists addressing the unique threshold seizure issues presented by protest policing, the impact of the Court's narrow Fourth Amendment "standing" analysis on seizure cases, or the viability of or theoretical justifications for representative actions in protest policing cases. This Article provides the first comprehensive treatment of protest policing and these critical Fourth Amendment threshold issues.

I. PROTESTS AND FOURTH AMENDMENT SEIZURES

On June 1, 2020, a large group of protesters gathered for a seventh straight day in Lafayette Square Park in Washington, D.C. to protest the death of George Floyd and racial injustice in policing.⁴⁰ The park, less than one mile from the White House, had seen violent protests and looting in recent days, but on that afternoon the assembled protesters stood largely motionless while chanting, many on their knees in prayer or meditation.⁴¹ Then, in a scene National Guard commander Adam DeMarco later called "deeply disturbing,"⁴² a mixed group unit of Park Police, federal law enforcement officers, and federal military personnel dispersed the crowd with a series of pepper spray bullets, "flash bang" grenades, tear gas, and other smoke bombs.⁴³ This dispersal was

average."); Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1013-15 (2007) (finding that officers in use of force simulations shot darker skinned suspects both more quickly and with more accuracy than white suspects).

³⁹ *Washington v. Davis*, 426 U.S. 229, 245 (1976).

⁴⁰ See Caroline Linton, *Lafayette Square Protesters Were Subjected to "Excessive Use of Force," National Guard Commander Will Testify*, CBS NEWS (July 27, 2020, 4:58 PM), <https://www.cbsnews.com/news/lafayette-square-protesters-were-subject-to-excessive-use-of-force-national-guard-commander-will-testify/> [<https://perma.cc/D4Z6-3V8K>].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (noting that DeMarco's comments "refut[ed] the attorney general's earlier assertions that force was justified": "Having served in a combat zone, and understanding how to assess threat environments, at no time did I feel threatened by the protesters or assess them to be violent."); Katie Rogers, *Protesters Dispersed with Tear Gas so Trump*

commanded by Attorney General Bill Barr, not as a necessary safety measure, but to clear a path for he and President Trump to walk from the White House to nearby St. John's Episcopal Church for a photo opportunity.⁴⁴ Trump stood in front of the church, upside down Bible in hand, and briefly posed for photographs flanked by military officials and aides.⁴⁵

DeMarco later testified before Congress that "excessive use of force" was used on that day.⁴⁶ Park Police formally acknowledged the mistake.⁴⁷ The chairman of the joint chiefs of staff, General Mark Milley, admitted the military's participation in the disproportionate response, as well as his participation in the photo op, was a mistake.⁴⁸ But despite these apologies and public acknowledgements of police brutality against peaceful protesters, it is unclear if this conduct violated or even implicated the Fourth Amendment at all. The answer to that question turns on the Supreme Court's narrow definition of a Fourth Amendment "seizure."

The Fourth Amendment prohibits "unreasonable searches and seizures."⁴⁹ An unreasonable seizure acts as the constitutional hook giving rise to civil rights police brutality claims, though less frequently the seizure itself may yield evidence subject to Fourth Amendment exclusion.⁵⁰ But as with searches, "the issue of whether police conduct constitutes a seizure is a matter of threshold significance."⁵¹ Unless the police action in question is a "seizure," the Fourth Amendment simply does not apply at all.⁵² In other words, if this Fourth Amendment

Could Pose at Church, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/us/politics/trump-st-johns-church-bible.html> [https://perma.cc/J6V6-ZPKC].

⁴⁴ See Phillip Bump, *Timeline: The Clearing of Lafayette Square*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/politics/2020/06/02/timeline-clearing-lafayette-square/> [https://perma.cc/89E4-VJCY].

⁴⁵ *Id.*; Linton, *supra* note 40.

⁴⁶ Linton, *supra* note 40.

⁴⁷ Alex Ward, *US Park Police Said Using "Tear Gas" in a Statement was a "Mistake." It Just Used the Term Again.*, VOX (June 5, 2020, 4:21 PM EDT), <https://www.vox.com/2020/6/5/21281604/lafayette-square-white-house-tear-gas-protest> [https://perma.cc/S9KG-UVFX].

⁴⁸ Helene Cooper, *Milley Apologizes for Trump Photo Op Role: 'I Should Not Have Been There.'* N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/us/politics/trump-milley-military-protests-lafayette-square.html> [https://perma.cc/W7UB-RQR5].

⁴⁹ U.S. CONST. amend. IV.

⁵⁰ See *Graham v. Connor*, 490 U.S. 386, 394 (1989).

⁵¹ DRESSLER, *supra* note 31, at 109.

⁵² *Id.*; see also *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) ("The Fourth Amendment covers only 'searches and seizures' . . .").

threshold is not passed, officers can act as arbitrarily and violently as they want and not trigger scrutiny.⁵³ Thus, the question of what constitutes a “seizure” is of paramount importance.

Paradigmatically, an arrest of a suspect constitutes a seizure of that person.⁵⁴ The Supreme Court has also held that circumstances short of an arrest may constitute a seizure. In *United States v. Mendenhall*,⁵⁵ the Court held that a person has been “seized . . . if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.”⁵⁶ In recent years, however, the Court has backed away from this totality-of-the-circumstances test in favor of bright-line rules predicated on whether the officer attempted the seizure through physical force or a “show of authority.”⁵⁷ These bright-line rules, articulated most recently in *Brendlin v. California*,⁵⁸ require that “[a] person is seized by the police . . . when the officer, by means of physical force or show of authority, terminates or restrains [the person’s] freedom of movement through means intentionally applied.”⁵⁹ Moreover, while a “police officer may make a seizure by a show of authority and without the use of physical force . . . there is no seizure without actual submission.”⁶⁰

This multilayered definition presents two unique issues in the protest policing context. First, while the typical seizure case involves an officer attempting to “terminate . . . freedom of movement”⁶¹ and submit a suspect to the officer’s grasp, a protest police officer’s intent often is not to make the protester succumb to the officer’s grasp, but to disperse a crowd and make the protester go away. Does this matter? In other words, has a seizure occurred when the intention of the officer is to make the target of physical force flee rather than submit? Precedent

⁵³ Litigants who fail to assert Fourth Amendment excessive force claims may still proceed with Due Process claims under the Fifth or Fourteenth Amendment. However, those claims will be assessed under an incredibly deferential “conscience shocking” standard. See *Tierney v. Davidson*, 133 F.3d 189, 199 (2d Cir. 1998) (explaining that excessive force claims where “[p]laintiffs do not assert they were arrested or seized . . . are governed instead by the Due Process Clause”); see also *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2d Cir. 2001) (holding that excessive force claims must show “conscience-shocking” action by a government actor”).

⁵⁴ See *Henry v. United States*, 361 U.S. 98, 101 (1959).

⁵⁵ 446 U.S. 544 (1980).

⁵⁶ *Id.* at 545.

⁵⁷ *California v. Hodari D.*, 499 U.S. 621, 626 (1991); DRESSLER, *supra* note 31, at 118.

⁵⁸ 551 U.S. 249 (2007).

⁵⁹ *Id.* at 254-55.

⁶⁰ *Id.* at 254.

⁶¹ *Id.*

suggests the answer is no, a result at odds with the purpose of the Fourth Amendment and anathema to a society that reveres peaceful assembly.

Second, even if an intention to disperse can constitute a seizure in some circumstances, it remains unclear whether a seizure occurred when the officer's attempts are unsuccessful and the protester does not submit to the show of authority, either by leaving the area or otherwise acquiescing to the officer's commands. Moreover, what constitutes "actual submission" in the protest policing context? Precedent suggests the answers to these questions turn on whether the officer applies physical force or a nonphysical show of authority — in the protest policing context, a tear gas canister or a bullhorn.⁶² This artificial distinction between physical force and shows of authority leads to absurd results, ignores the power imbalance inherent in police-civilian interactions, and becomes practically impossible to enforce in the protest policing context.

After exploring these unresolved questions, this section articulates a "restraint on liberty" theory of Fourth Amendment seizure that recognizes the need to place constitutional limits on police violence regardless of its purpose and closes any legal loopholes current precedent affords protest policing. For the wary, it bears reminding that whether an action constitutes a "seizure" is merely a threshold question allowing entrance into the Fourth Amendment labyrinth, where the reasonableness of the police action may still prove fatal to any claims of unlawful violence. In other words, this approach would not necessarily radically alter the landscape of permissible police conduct, but only subject a larger swath of that conduct to constitutional scrutiny.

A. *Protest Policing Intent*

The Supreme Court has defined "seizures" as those actions whereby an officer intentionally "terminates or restrains [one's] freedom of movement."⁶³ On its own, this language could apply equally to restraint by means of submission or restraint by means of repelling someone from an area. In both cases is the person's freedom of movement is restrained. But the Court's language in describing seizures clearly implies a focus only on the former. Thus, it appears by implication that a restraint on movement only constitutes a Fourth Amendment seizure if that restraint renders someone not "free to leave" as opposed to being not "free to stay." If true, that distinction is critical in the protest

⁶² See *infra* Part I.B.

⁶³ *Brendlin*, 551 U.S. at 254.

policing context, where officers deploy chemical agents and nonlethal munitions to communicate to assembled crowds that they are, in fact, free to leave but not free to stay.

Indeed, this appears to be the case: “[w]here suspects are free to leave but not free to go about their business,” courts are reluctant to find a seizure.⁶⁴ This result “is not surprising: every time a police officer demands that a pedestrian cross the street to avoid entering a crime scene, for instance, that pedestrian is no longer free to go about her business (of walking down the street).”⁶⁵ Courts have declined to find a seizure on this principle in an array of scenarios, including where a traffic cop ordered a driver to pull into a parking lot to clear an intersection,⁶⁶ where a ranger pointed a gun at someone and demanded he step away from the ranger’s dog,⁶⁷ and where officers pointed guns to repel a distraught dog owner who charged them after the officers killed his dog.⁶⁸

While seemingly unrelated to mass protests, these cases rely on the same basic principle: that an officer’s use of force or show of authority to make someone go away does not constitute a seizure. In “large-scale public street demonstrations . . . police intent in using force is to clear the streets quickly by making demonstrators leave, rather than to detain and arrest them.”⁶⁹ The “seizure” moniker appears perhaps even less

⁶⁴ Paradis, *supra* note 20, at 333.

⁶⁵ *Id.* (suggesting that a “most precise reading” of Court precedent might dictate such a result, but “lower courts may be reluctant to raise every such police-citizen encounter to the level of a Fourth Amendment seizure”).

⁶⁶ See *United States v. Pedroza*, 269 F.3d 821, 826-27 (7th Cir. 2001) (acknowledging factual question over whether encounter was consensual but nonetheless concluding being forced to go somewhere else away from the officer did not constitute a seizure).

⁶⁷ See *Brooks v. United States*, C-94-0714-DLJ, 1995 U.S. Dist. LEXIS 22021, at *13-14 (N.D. Cal. May 16, 1995) (holding that the pointing of the gun only prevented the plaintiff from attacking the ranger or his dog, but did not require him to submit for detention).

⁶⁸ See *Fuller v. Vines*, 36 F.3d 65, 69 (9th Cir. 1994) (holding that the only thing plaintiff was restrained from doing was attacking the officers, but that he was free otherwise to leave).

⁶⁹ Paradis, *supra* note 20, at 334; see also JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 67-80 (1993) (exploring purposes and problems of crowd control policing); SEATTLE POLICE DEPT., SEATTLE POLICE DEPT. DIRECTIVE NUMBER 21-000XX, MANUAL SECTION 14.090 – CROWD MANAGEMENT (DRAFT) 2 (2020), https://www.seattle.gov/Documents/Departments/Police/Policy_Review/14.090_Crowd_Control_Draft.pdf [<https://perma.cc/S7AR-6V8L>] (identifying “crowd control and dispersal strategies” in response to “unlawful assembly,” including “issue an order to disperse; identify dispersal routes; . . . use force that is reasonable,

suitable in this crowd control scenario, where officers confront hundreds or thousands of demonstrators, making the “individualized determinations of the sort upon which seizure cases . . . insist” impossible.⁷⁰

This narrow conception of “seizure,” limited to restraints on movement designed to result in submission to an officer’s grasp, has led multiple courts to conclude that the Fourth Amendment simply does not apply at all in the protest policing context. In *Dundon v. Kirchmeier*,⁷¹ for example, the District of North Dakota considered claims of police brutality brought by demonstrators peacefully protesting the construction of the Dakota Access Pipeline through Native American tribal lands.⁷² These protesters, claiming the project threatened tribal water sources and sacred burial grounds, were blasted with fire hoses, subjected to tear gas and concussion grenades, and hit with rubber bullets, bean bag projectiles, and other special impact munitions.⁷³ The assault, much of it taking place overnight while protesters slept, injured over 200 people.⁷⁴ Chief Judge Daniel Hovland “questioned whether the Fourth Amendment even protected activists since police sought to disperse them, instead of arrest them.”⁷⁵ In dismissing the claim, Judge Hovland concluded that since there were no attempts to arrest or otherwise detain any individuals, “the Fourth Amendment did not apply at all to any of the police conduct.”⁷⁶ Leaving

necessary, and proportional to disperse or move a crowd; [and] continue to assess and modulate response as behavior changes,” but not arrest or otherwise detain).

⁷⁰ Paradis, *supra* note 20, at 334.

⁷¹ No. 1:16-cv-406, 2017 U.S. Dist. LEXIS 222696 (D.N.D. Feb. 7, 2017), *aff’d. mem.*, 701 F. App’x. 538 (8th Cir. 2017) (per curiam).

⁷² *See id.* at *4.

⁷³ *See id.* at *21-22; *see also* Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 831-32 (2020) (highlighting the “militarized police response” to the peaceful demonstrators, including the “use of military vehicles, water cannons, fire hoses, and special impact munitions against indigenous water protectors”).

⁷⁴ Pita Loor, *supra* note 73, at 817.

⁷⁵ *See id.* at 838; *see also Dundon*, 2017 U.S. Dist. LEXIS 222696, at *58 (“The Plaintiffs have neither alleged they were arrested or detained by law enforcement officials . . . nor alleged they were informed by law enforcement officers they were not free to leave and walk away.”).

⁷⁶ Pita Loor, *supra* note 73, at 839; *Dundon*, 2017 U.S. Dist. LEXIS 222696, at *58-59 (finding no seizure occurred, but then “[a]ssuming for the sake of argument the Plaintiffs have alleged viable excessive force claims . . . the indiscriminate use of water and other forms of *non-lethal* force that were used that evening in the midst of the darkened chaos” was so objectively reasonable that “no reasonable juror could conclude the level of non-lethal force used . . . was objectively unreasonable”).

no doubt as to the importance of police intent in the analysis, Judge Hovland reasoned that no seizure occurred, because the demonstrators “could have just complied with the police orders to disperse,” ignoring entirely the restraint on freedom of movement necessarily entailed in being forcibly relocated.⁷⁷

Likewise, in *Edrei v. City of New York*,⁷⁸ a case involving the violent dispersal of demonstrators protesting the death of Eric Garner, the court concluded that the use of long-range acoustic devices against activists did not implicate the Fourth Amendment.⁷⁹ The court reasoned that, “an officer’s request to leave an area, even with use of force is not a seizure unless ‘accompanied by the use of sufficient force to *intentionally* restrain a person and gain control of his movements.’”⁸⁰ By recognizing the violent impact of these novel acoustic weapons on protesters’ movements and still denying the application of the Fourth Amendment, the court confirmed the legal impunity within which protest police officers can operate free from constitutional excessive force claims.⁸¹

These cases reflect the legal black hole the Court’s seizure jurisprudence has created for protest police. By narrowly defining seizures as requiring an intent to detain, the Court has implicitly excepted from any Fourth Amendment scrutiny all crowd control techniques no matter how unnecessary, including chemical munitions, projectiles, water cannons, attack dogs, and acoustic devices. If the impunity created by these cases does not sufficiently worry readers, consider that federal agencies charged with controlling Lafayette Square protesters sought approval to use a military device known as a “heat

⁷⁷ Pita Loor, *supra* note 73, at 839; *Dundon*, 2017 U.S. Dist. LEXIS 222696, at *58 (“The Plaintiffs and other pipeline protesters could have easily removed themselves from the Backwater Bridge and the presence of law enforcement by simply complying with lawful commands, and dispersing . . .”).

⁷⁸ 254 F. Supp. 3d 565 (S.D.N.Y. 2017).

⁷⁹ *See id.* at 574.

⁸⁰ *Id.* (“While exposed to the X100, none of the Plaintiffs have plausibly alleged that their movements were restrained. Rather, Plaintiffs state that while the X100 was used . . . each Plaintiff . . . left the vicinity of the X100 as each desired, generally to escape the noise.”).

⁸¹ Similar cases involving violent crowd control tactics offer little practical guidance. Some, like *Marbet v. City of Portland*, assume that a Fourth Amendment seizure occurs when any chemical agents or other force are used without considering the intent of the officer. *Marbet v. City of Portland*, No. CV 02-1448-HA, 2003 WL 23540358, at *12 (D. Or. Sept. 8, 2003). Others, like *Ellsworth v. City of Lansing and County of Sacramento v. Lewis*, conclude without discussion that “where no seizure occurs” the Fourth Amendment does not apply, assuming that dispersal tactics cannot constitute seizures. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-48 (1986); *Ellsworth v. City of Lansing*, 34 F. Supp. 2d 571, 580 (W.D. Mich. 1998).

ray,” an “Active Denial System . . . developed by the military . . . which emits a directed beam of energy that causes a burning heat sensation” and reportedly causes severe burns.⁸²

There exists some limited contrary precedent. In at least one case, the officer’s intent to disperse an assembled crowd rather than submit an individual to detention did not prove fatal to the petitioner’s claim. In *Nelson v. City of Davis*,⁸³ campus police fired pepper balls (rounds containing pepper spray launched from a paint ball gun) to disperse a student gathering, hitting the plaintiff in the eye.⁸⁴ The Ninth Circuit seemed unconcerned that the officer firing the round had no desire to submit any particular student to his authority, concluding that the plaintiff was seized because he submitted to the officers’ show of authority when he dropped to the ground, remained there for fifteen minutes, and then was driven to the hospital.⁸⁵ Notably, the court held in the alternative that:

Even in the absence of [plaintiff’s] submission, the government’s intentional application of force to [plaintiff] was sufficient to constitute a seizure. As the Supreme Court has made clear, the mere assertion of police authority, without the application of force, does not constitute a seizure unless the individual submits to that authority. Conversely, when that show of authority includes the *application of physical force*, a seizure has occurred even if the object of that force does not submit.⁸⁶

This case provides some measure of hope for the protester who suffers a tangible, physical injury from crowd control tactics, even one who was not specifically targeted.⁸⁷ But it does little for those subjected only to nonphysical shows of authority or for those who refuse to yield in the

⁸² *Feds Sought “Heat Ray” to Clear D.C. Protesters for Trump Photo Opp: Whistleblower*, HUFFPOST (Sept. 17, 2020, 11:20 AM ET), https://www.huffpost.com/entry/heat-ray-protesters-lafayette-square_n_5f637aa8c5b6ba9eb6eadf15 [<https://perma.cc/5C2V-KTTH>].

⁸³ 685 F.3d 867 (9th Cir. 2012).

⁸⁴ *See id.* at 873-74.

⁸⁵ *See id.* at 875 (rejecting officers’ claim that no seizure occurred because “the U.C. Davis police officers took aim and intentionally fired in the direction of a group of which Nelson was a member. Nelson was hit in the eye . . . [and] was rendered immobile. Nelson was both an object of intentional governmental force and his freedom of movement was limited as a result”).

⁸⁶ *Id.* at 876 n.4.

⁸⁷ *Cf. Vaughan v. Cox*, 343 F.3d 1323, 1329 n.5 (11th Cir. 2003) (holding that “because [the plaintiff] was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure”).

face of protest police tactics. The *Nelson* court's focus on the methods employed — physical force or show of authority — also reflect the obsessive distinction between seizure tactics courts apply post-*California v. Hodari D.* It is to these methods we now turn.

B. Protest Policing Methods

Even assuming that an intent to disperse could provide the basis for a Fourth Amendment seizure, there remains the question of whether the attempted seizure must be successful to trigger constitutional scrutiny. In other words, the Fourth Amendment may not protect against attempted but unsuccessful seizures, but only those acts of force that result in actual submission. The answer to that question appears to turn on whether the force is “physical” or merely a “show of authority,” a purported bright-line distinction that becomes fuzzier in the gaseous haze of protest policing.

When the Court defined a seized person in *Mendenhall* as simply “a reasonable person [who] would have believed he was not free to leave,” it neither required that the person actually submit nor cared what type of conduct the officer employed to create this belief.⁸⁸ But the Court retreated from this reasonable person test in *California v. Hodari D.*,⁸⁹ and in so doing injected *per se* categories of police conduct that would by itself create a seizure and other categories requiring actual submission.

In *Hodari D.*, two police officers patrolled a “high-crime area” in Oakland in an unmarked car but while wearing jackets clearly emblazoned on front and back with “Police.”⁹⁰ When the officers rounded a corner, five youths huddled around a red car “apparently panicked and took flight.”⁹¹ One of the two officers pursued one of the youths on foot — Hodari — and repeatedly called out for him to stop.⁹² Just before the officer caught Hodari, the youth “tossed away what appeared to be a small rock,” which the officer later collected and determined was crack cocaine.⁹³ In his motion to suppress the drugs, Hodari argued that he had been unlawfully “seized” at the time he discarded the rock.⁹⁴ California admitted the officer had no reasonable

⁸⁸ *United States v. Mendenhall*, 446 U.S. 544, 545 (1980).

⁸⁹ 499 U.S. 621 (1991).

⁹⁰ *Id.* at 622.

⁹¹ *Id.* at 623.

⁹² *See id.* at 626.

⁹³ *Id.* at 623.

⁹⁴ *Id.*

suspicion to pursue the fleeing Hodari but claimed instead that the mere pursuit of a suspect, absent actual apprehension, does not constitute a seizure.⁹⁵

The Supreme Court agreed with California. Writing for the majority, Justice Scalia acknowledged that an officer's pursuit of a fleeing suspect amounts to a "show of authority," but he rejected Hodari's claim that a "*show of authority* [alone] has restrained the liberty of a citizen . . . even though the subject does not yield" sufficient to trigger Fourth Amendment seizure analysis.⁹⁶ Justice Scalia explained that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to retrain movement, even when it is ultimately unsuccessful . . . But it does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure."⁹⁷ Thus, Justice Scalia eliminated entirely *Mendenhall's* totality-of-the-circumstances approach and replaced it with two bright-line rules: 1) any physical contact by a police officer, no matter how small, constitutes a seizure even if the seizure attempt is unsuccessful; and 2) a nonphysical "show of authority" cannot constitute a seizure — no matter how violent, threatening, or aggressive — unless the seizure attempt is successful.

The implication of this ruling — that officers can engage in suspicionless shows of authority, including shouting at, harassing, chasing, and firing warning shots above individuals without triggering Fourth Amendment scrutiny — was not lost on the dissent. Calling the ruling "profoundly unwise," Justice Stevens discussed the potentially "significant time interval between the initiation of the officer's show of authority and the complete submission by the citizen."⁹⁸ In applying the majority's approach, some commentators have argued "the police may now lawfully chase a person — even if the pursuit includes a command to 'freeze,' the use of police sirens, or other coercive actions — without reasonable suspicion of wrongdoing (indeed, on no basis at all, or on a malicious basis), in the hope that during the pursuit the citizen's response . . . will give the police a legitimate basis to seize the individual."⁹⁹

⁹⁵ *See id.*

⁹⁶ *Id.* at 626 ("The narrow question before us is whether, with respect to a show of authority . . . a seizure occurs even though the subject does not yield. We hold that it does not.").

⁹⁷ *Id.*

⁹⁸ *Id.* at 643 (Stevens, J., dissenting).

⁹⁹ DRESSLER, *supra* note 31, at 119. This concern has led several state courts to reject *Hodari D.* in interpreting their own state constitutions. *See, e.g.,* *Hall v. State*, 145 P.3d

Such a broad legal loophole, through which all manner of arbitrary and discriminatory police power may be deployed with impunity, contravenes the Fourth Amendment's primary original purpose: to limit random, suspicionless police abuses of power against innocent citizens.¹⁰⁰ Armed government law enforcement agents are entrusted with enormous power and control over society, a control that creates inherent, oppressive power imbalances between officer and civilian.¹⁰¹ Indeed, the Court's sensible recognition that a police officer's non-physical "show of authority" is sufficient to effectuate a seizure is itself an implicit acknowledgement that the command "Stop!" coming from someone with a badge and a gun means something very different from the same command made by anyone else. To suggest that an officer's "show of authority" via threatening words, menacing dogs, or warning shots is any less violent and less deserving of the "seizure" label than even the most minor physical contact belies the limiting purpose of the Fourth Amendment, betrays the reality of policing in America, and leads to absurd results.¹⁰²

Hodari D.'s high-stakes distinction between physical force and shows of authority leaves two questions unresolved in the protest policing

605 (Alaska Ct. App. 2006) (defining "seizure" exclusively by means of the *Mendenhall* test); *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992) (same); *In re Welfare of E.D.J.*, 502 N.W.2d 779 (Minn. 1993) (same); *State v. Clayton*, 45 P.3d 30 (Mont. 2002) (same); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (same).

¹⁰⁰ See Donahue, *supra* note 22, at 1281; Ariel Marshae Harris, *The Backdoor that Leads to the Trap Door: The Unusual Effects of 18 U.S.C. § 2703(D) and Stingrays*, 45 S.U. L. REV. 134, 145 ("The Fourth Amendment's original purpose is 'to prevent, not repair the damage of unreasonable government intrusions.'" (quoting *Ekins v. U.S.*, 364 U.S. 206, 217 (1960))); Reinart, *supra* note 32, at 1485-86 (observing that while "[t]he Fourth Amendment was adopted in large part because of colonial resentment of the general warrant[] . . . [it] was not based solely on a penchant for protecting individual privacy . . . colonists recognized that general warrants could be used to target political and religious dissenters.").

¹⁰¹ The danger of ignoring this imbalance threatens to disrupt the balance struck by the Fourth Amendment itself. See Thomas P. Crocker, *Order, Technology, and the Constitutional Meanings of Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 685, 719 (2013) ("Courts and scholars alike view[] the power imbalance that exists between the citizen and the police officer as informing constitutional meaning."); see also Orit Gan, *Third-Party Consent to Search: Analyzing Triangular Relations*, 19 DUKE J. GENDER L. & POL'Y 303, 330 (2012) ("[D]isregarding the power imbalance between the police officer and the citizen gives the former more power.").

¹⁰² Professor Wayne LaFave has suggested that the message of *Hodari D.* is that when they chase a person on a wild and unsupported hunch, a "fat cop" is preferable to one who is "slim, trim, and of athletic build," because the latter officer is too likely to catch up to the suspect and grab him "by the scruff of the neck before the [contraband is] ditched." Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 730-31.

context. First, what constitutes “physical force” when the tactics involved include deployment of noxious gases and audio disturbances? Second, what constitutes “actual submission” to a show of authority commanding persons not to submit but to go away?

To the first question, courts have repeatedly (and correctly) held that individuals directly targeted and hit with chemical agents like mace and pepper spray have been seized under *Hodari D.*’s physical touching rule, because the direct deployment of these chemical munitions is no less an intended use of physical force than the firing of a bullet into a body.¹⁰³ But it is unclear what the result would be in large crowds where a bystander next to an intended pepper spray target also is hit. Similarly uncertain are situations where pepper balls, tear gas canisters, and flash bang grenades are fired indiscriminately into crowds without any particular intended target. The Court’s current formulation of “seizure” requires “means intentionally applied,”¹⁰⁴ but does that also require an intentionally selected target? In the case of the bystander accidentally struck, she likely is out of luck. The Court has routinely held that persons collaterally injured by officers during the pursuit of a suspect have not been seized because there was no intentional touching.¹⁰⁵ But for the assembled group subjected to gaseous agents, clearly the officers intend to hit *someone*, even if the target is no one demonstrator in particular. After all, tear gas only works to disperse a crowd if the gas actually touches and irritates the crowd. Does this desire to physically touch a group of people give the entire group of tear gas-affected persons a Fourth Amendment claim under *Hodari D.*?

Adjudicating that difficult question turns on the even more vexing issue of when someone has been “touched” by crowd control tactics. Rubber bullets and other projectiles present relatively easy cases; the bullets hit you or they do not. But in the case of gases, at least one court distinguished between a group of protesters on the front lines of a demonstration and who were directly sprayed with tear gas canisters from a group farther back in the crowd over whom the noxious agent merely “wafted.”¹⁰⁶ While both groups were affected by the gas (albeit to varying degrees), the court found that the “waft class” had not been

¹⁰³ See, e.g., *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) (holding that a seizure occurred where officers maced a suspect and hit him with a squad car).

¹⁰⁴ *Brendlin v. California*, 551 U.S. 249, 249 (2007).

¹⁰⁵ See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 865 (1986) (holding that a driver of a motorcycle was not seized when an officer accidentally struck her during a high-speed pursuit).

¹⁰⁶ See *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1264 (C.D. Ill. 1996); see also *Paradis*, *supra* note 20, at 334.

seized under the Fourth Amendment.¹⁰⁷ And if determining how many molecules of a chemical gas must physically touch a protester to constitute a seizure seems difficult, try assessing what amount of soundwaves from a police acoustic device must “touch” the ears of a protester to trigger Fourth Amendment scrutiny.¹⁰⁸

In one sense, the absurdity of these distinctions, driven as much by ever-innovating police weaponry labs as by *Hodari D.*'s artificial physical touch rule, is the stuff of creative law school exam hypotheticals. In another sense, the meaning of “physical touch” could not be more crucial to protester Fourth Amendment claims, because the “anomaly” of *Hodari D.* suggests that any touching — even wafting — should trigger constitutional review.¹⁰⁹ As one commentator observed, “*Hodari D.* drastically limited seizure by a show of authority, but it may also have had the effect of expanding the definition of seizure by physical force.”¹¹⁰ Thus, “[a]lthough *Hodari D.* is clearly not on its face concerned with expanding either the category of physical force or the protection that attaches to that category, its express language opens a door to that expansion.”¹¹¹

It appeared increasingly possible, however, that even this door to an expanded seizure definition may have been closing. At least two circuit courts of appeal, the Tenth Circuit¹¹² and the D.C. Circuit,¹¹³ held that the use of physical force to detain a suspect does not constitute a seizure unless that seizure is actually successful. In *Torres v. Madrid*,¹¹⁴ the Tenth Circuit determined that “an officer’s intentional shooting of a suspect [did] not effect a seizure” because the suspect “managed to elude police for at least a full day after being shot.”¹¹⁵ The Tenth Circuit

¹⁰⁷ *Lamb*, 947 F. Supp. at 1265.

¹⁰⁸ See, e.g., *Edrei v. City of New York*, 254 F. Supp. 3d 565, 574 (S.D.N.Y. 2017) (assessing whether the use of a loud, amplified acoustic device to disperse by police to disperse protesters constitutes force).

¹⁰⁹ See DRESSLER, *supra* note 31, at 119 (“[I]f an officer barely touches the subject in an effort to detain her, and she immediately escapes, such ‘laying on of hands’ is a seizure . . .”).

¹¹⁰ Paradis, *supra* note 20, at 318 (italics added); see also Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 Ky. L.J. 145, 161-62 (1994).

¹¹¹ Paradis, *supra* note 20, at 318 (italics added).

¹¹² *Torres v. Madrid*, 769 Fed. App’x 654, 657 (10th Cir. 2019), *vacated*, 141 S. Ct. 989 (2021).

¹¹³ *Henson v. United States*, 55 A.3d 859, 862 (D.C. Cir. 2012).

¹¹⁴ 769 Fed. App’x 654 (10th Cir. 2019).

¹¹⁵ *Id.* at 657. The Author contributed to an amicus brief on behalf of Petitioner Roxanne Torres arguing that the Tenth Circuit’s ruling contradicts the clear holding of *Hodari D.* that physical touch alone constitutes a seizure under the Fourth Amendment.

acknowledged the clear language in *Hodari D.* suggesting otherwise but dismissed it as common law dicta.¹¹⁶ Similarly, in *Henson v. United States*,¹¹⁷ the D.C. Circuit found that an officer who physically grabbed but “did not succeed in stopping the suspect” had not effectuated a seizure, dismissing as constitutionally irrelevant *Hodari D.*’s “historical, common law definition of seizure.”¹¹⁸ The Eighth,¹¹⁹ Ninth,¹²⁰ and Eleventh¹²¹ Circuits and the New Mexico Supreme Court¹²² held otherwise, and the United States Supreme Court resolved the split in early 2021, finding by a 5-3 vote in *Torres* that “[t]he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.”¹²³ Yet the narrowness of the Court’s opinion in *Torres*, coupled with the fact that even one circuit could reject Fourth Amendment application to someone intentionally shot by police in hot pursuit does not bode well for demonstrators indiscriminately hit with tear gas.

In the absence of physical force alone, then, it is unclear what must a protester do to demonstrate “actual submission” sufficient to trigger the Fourth Amendment. No case has directly addressed when the requisite “submission to authority” occurs.¹²⁴ However, *Brendlin* provides dictum on the subject in the context of a traffic stop, finding that the passenger of a car “was seized from the moment . . . [the] car came to a halt on

¹¹⁶ See *id.*

¹¹⁷ 55 A.3d 859 (D.C. Cir. 2012).

¹¹⁸ *Id.* at 864.

¹¹⁹ Ludwig v. Anderson, 54 F.3d 465, 471 (8th Cir. 1995) (noting that a seizure is “effected by the slightest application of physical force’ despite later escape”).

¹²⁰ Nelson v. City of Davis, 685 F.3d 867, 876 n.4 (9th Cir. 2012) (“Even in the absence of . . . submission, the government’s intentional application of force . . . was sufficient constitute a seizure.”).

¹²¹ Carr v. Tatangelo, 338 F.3d 1259, 1268 (11th Cir. 2003) (“Although [Defendant] was not immediately stopped by the bullet from Officer Fortson’s gun, he nevertheless was seized within the meaning of the Fourth Amendment when the bullet struck or contacted him.”).

¹²² State v. Garcia, 217 P.3d 1032, 1038 (N.M. 2009) (“Defendant demonstrated that he was seized by showing that he was pepper sprayed, regardless of his subjective reaction.”).

¹²³ *Torres*, 141 S. Ct. at 1003 (“The rule we announce today is narrow. In addition to the requirement of intent to restrain, a seizure by force — absent submission — lasts only as long as the application of force.”).

¹²⁴ See DRESSLER, *supra* note 31, at 119 (“Has a fleeing suspect, for example, submitted to authority . . . as soon as she stops running, or only when she indicates by words or action . . . that she has submitted? Or, when does the driver of a car, ordered to pull over on the highway, submit to authority? Is it as soon as the driver sees the officer’s red lights flashing in the rear view mirror, slows down, and begins to change lanes to pull over, or only when the vehicle comes to a complete stop?”).

the side of the road.”¹²⁵ The analogy to protest policing is not exact, because police in crowd control mode often neither want to nor can detain protesters, unlike detained vehicle passengers. But if the moment of seizure becomes not when the red lights flash in the rearview mirror or when the car begins to slow down, but when it comes to a complete halt as desired by the highway patrol officer, one can fairly extrapolate for the retreating protester.¹²⁶ In the absence of detention, retreating in response to a bullhorn command to fall back behind a certain line would appear to demonstrate a sufficient submission when, and only when, the protester is behind the desired line. In other words, a retreating demonstrator from Lafayette Square Park may fairly be said to have successfully submitted to the “show of authority” assault on their peaceful demonstration only after having left the area, and not before. But this conclusion yet again rests on the notion that a “not free to stay” fact pattern can constitute a seizure in the same way as a “not free to leave” fact pattern, a doubtful proposition under the Court’s current narrow seizure formulation.

C. *A Restraint on Liberty Theory of Seizure*

The foregoing discussion highlights the Supreme Court’s artificially narrow, bifurcated, and increasingly impractical definition of “seizure.” The Court’s refusal to recognize broad categories of egregious, excessive uses of force as triggering Fourth Amendment scrutiny creates a dangerous zone of impunity for officers. This concern applies with particular salience in the context of protest policing, where vicious crowd control techniques escape constitutional scrutiny. The events of the past year confirmed Justice Stevens’ fears in his *Hodari D.* dissent, when he warned that, although “[i]t is too early to know the consequences of . . . [this] holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever . . . rights they may still have.”¹²⁷

It is time for a reimagined seizure definition, one that not only promotes “the goal of deterring police misconduct,”¹²⁸ but which more

¹²⁵ *Brendlin v. California*, 551 U.S. 249, 263 (2007).

¹²⁶ See, e.g., *Davila v. N. Reg’l Joint Police Bd.*, No. 2:13-cv-070, 2016 U.S. Dist. LEXIS 43702, at *6 (W.D. Pa. Mar. 31, 2016) (“[P]eople are ‘seized’ when pulled over for traffic stops.”).

¹²⁷ *California v. Hodari D.*, 499 U.S. 621, 646-47 (1991) (Stevens, J., dissenting).

¹²⁸ Karen J. Pita Loo, *supra* note 73, at 839 (describing the *Hodari D.* dissent as criticizing the majority’s narrowing of the definition of seizure as “inconsistent with the goal of deterring police misconduct because it determined whether the Fourth

importantly accords with the fundamental liberty rationale underlying the Fourth Amendment. The historical purpose of the Amendment was not only to protect the privacy of individuals from the oppressive intrusion of general warrants, but also to protect citizens' from unwarranted government coercion and force.¹²⁹ Where protection from unreasonable searches was premised on the fundamental precept of privacy from a snooping government, protection from unreasonable seizures was premised on the equally fundamental precept of liberty from a violent government.¹³⁰

By refocusing seizures as restraints on liberty rather than technical touching or total submission, a few practical things occur. First, any police-directed restraint on physical movement becomes a seizure, whether that restraint takes the form of a criminal suspect unable to leave or an assembled mass of demonstrators unable to proceed. This approach readily accords with the historical, constitutional understanding of a seizure separate and apart from any common law definition more akin to an arrest. It also, admittedly, opens the door to constitutional scrutiny of potentially large swaths of routine police conduct. But that is a good thing. The Supreme Court's much-maligned Fourth Amendment search law jurisprudence suffers from a series of tortured legal fictions that label conduct that is factually a "search"

Amendment applied to the interaction based on how the civilian responded, not on how the police behaved"); *see also* *Hodari D.*, 499 U.S. at 646 (Stevens, J., dissenting) ("The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers and on discouraging improper behavior on their part, and not on the reaction of the citizen to the show of force.").

¹²⁹ The most frequently articulated historical purposes of the Fourth Amendment involve freedom from unreasonable searches. *See* *Olmstead v. United States*, 277 U.S. 438, 463 (1928) (stating the "well-known historical purpose" of the Fourth Amendment "was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will."); *cf.* Brandon R. Teachout, *On Originalism's Originality: The Supreme Court's Historical Analysis of the Fourth Amendment from Boyd to Carpenter*, 55 *TULSA L. REV.* 63, 86 (2019) (noting that this declaration was made "without citation to any historical sources"). But this historical purpose "also supports [a] reading of the Fourth Amendment's purpose as reflecting a protection against 'personal security.'" Jonathan Ostrowsky, *#MeToo's Unseen Frontier: Law Enforcement's Sexual Misconduct and the Fourth Amendment Response*, 67 *UCLA L. REV.* 258, 290 (2020) ("The Fourth Amendment imposes limits . . . to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976))).

¹³⁰ *See* Transcript of Oral Argument at 5-7, *United States v. Lanier*, 520 U.S. 259 (1997) (No. 95-1717) ("[W]hy is not any offensive touching a violation of the act? . . . [T]he idea of the Fourth Amendment does go way, way back . . . of any invasion of a person's personal security.").

legally inadequate in an inconsistent effort to narrow the search threshold.¹³¹ A much simpler and more principled way to proceed would be to call a search a search and then assess its reasonableness.

So, too, should the Court proceed with its seizure jurisprudence. Defining a larger scope of police conduct a “seizure” does not declare it unlawful; it merely subjects it to a constitutional reasonableness calculus, one which recent Court history suggests will tilt heavily in favor of the officer.¹³² Thus, declaring it a seizure when an officer commands a pedestrian to cross the street to avoid a crime scene does not unnecessarily open the floodgates of litigation. Instead, it merely provides an opportunity to confirm the eminent reasonableness of that officer’s conduct in the rare case where the pedestrian sees fit to waste their time with such a suit. More importantly, additional constitutional scrutiny of police use of force is sorely needed, especially for a Court that has “abdicated” its responsibilities on that front.¹³³

Second, a restraint on liberty theory of seizure does away with the artificial and increasingly unworkable physical touch and show of authority distinctions. This has several benefits. This artificial distinction, if taken to its logical conclusion, arguably compels a finding of seizure if an officer attempts a stop by placing a gentle hand on a target’s back but not if the officer shouts profanity-laced commands at and threatens violence towards an unrelenting target. Eliminating the distinction eliminates these nonsensical contrary results. It also

¹³¹ See, e.g., Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 121 (2002) (“In some recent decisions that recognize and leave open the possibility of broader Fourth Amendment protection, the Court displays ambivalence about the moves it has repeatedly employed and thereby calls into question the logical moves and doctrinal conclusions embraced by the earlier precedents.”); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011) (“Scholars complain that the law is ‘a mess,’ ‘an embarrassment,’ and ‘a mass of contradictions.’”); Scott E. Sundby, “Everyman”’s Fourth Amendment: *Privacy or Mutual Distrust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1753 (1994) (“Consequently, most arguments have coalesced along the lines that the Court has not properly measured the individual’s expectations of privacy, that it has underemphasized the Warrant Clause’s requirements of a warrant based on probable cause, or that it has struck the wrong balance of individual and government interests in deciding that a particular intrusion was ‘reasonable.’”).

¹³² See Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 UC DAVIS L. REV. 2033, 2036 (2018) (“The Supreme Court has largely abdicated any role in regulating police stops that do not produce evidence of criminality . . .”).

¹³³ *Id.* (“Despite doubling its criminal procedure caseload, the United States Supreme Court has failed to address the most significant issues that have accompanied the rise of the modern criminal justice system.”).

removes quantum physics from the Court's list of responsibilities, as it no longer must adjudicate whether a diffuse chemical gas or soundwave "physically touched" a demonstrator. Perhaps most importantly, removing the distinction in a restraint on liberty theory recognizes the practical power imbalance between officer and citizen and the attendant ability of nonphysical, assertive shows of authority to chasten and restrain targets of that conduct, including protesters.

II. PROTESTS AND FOURTH AMENDMENT STANDING

In July 2020, Acting Homeland Security Secretary Chad Wolf authorized the deployment of thousands of secretive federal police to Portland, Oregon, ostensibly to protect federal property from vandalism by increasingly violent crowds of protesters.¹³⁴ Dressed in combat fatigues, armed with tear gas and flash bang grenades, and lacking any identifying insignia other than the word "POLICE" emblazoned across their backs, shadowy federal agents from at least six different agencies began confronting protesters in downtown Portland on July 12, 2020.¹³⁵ Pursuant to Wolf's public statements, the police's stated mission was to protect the Mark O. Hatfield United States Courthouse, which had become the focal point of protesters and the site of widespread property damage.¹³⁶

¹³⁴ Kristine Phillips, *Acting DHS Secretary Chad Wolf: Federal Officers in Portland 'Are Not the Gestapo, Storm Troopers, or Thugs'*, USA TODAY (Aug. 6, 2020, 8:42 AM ET), <https://www.usatoday.com/story/news/politics/2020/08/06/dhs-secretary-chad-wolf-testifies-federal-agents-portland/5580507002/> [<https://perma.cc/2DE4-X3GL>].

¹³⁵ Kyron J. Huigens, *Trump's Legal Justification for the Abduction of Portland Protesters Is Absurd*, SLATE (July 20, 2020, 4:48 PM), <https://slate.com/news-and-politics/2020/07/trump-legal-justification-portland-secret-police.html> [<https://perma.cc/2393-H5XZ>] ("Last week, people wearing combat fatigues were seen pulling apparently peaceful protesters off the streets . . . and hustling them into unmarked vehicles. Their uniforms carried no identifying insignia, but they were clearly military uniforms."); Kristofer Rios, Marjorie McAfee, Neil Giardino, Zoe Lake, John Kapetaneas & Anthony Rivas, *Legality of Federal Agents in Portland Scrutinized as Protests Become More Violent*, ABC NEWS (July 22, 2020, 1:18 PM), <https://abcnews.go.com/US/legality-federal-agents-portland-scrutinized-protests-violent/story?id=71908246> [<https://perma.cc/VT3Z-8JTV>].

¹³⁶ Dave Goldiner, *Homeland Security Chief Boasts of 'Proactively' Rounding Up Protesters as Crackdown Widens*, N.Y. DAILY NEWS (July 22, 2020), <https://www.nydailynews.com/news/politics/ny-chad-wolf-proactive-homeland-security-20200722-66sn2apavnc2tfbzi3anwctzee-story.html> [<https://perma.cc/E97T-66G7>] (quoting Wolf's description of his agency's blatantly unconstitutional tactics during a Fox News interview: "We are having to go out and proactively arrest individuals").

It soon became clear that the federal agents' primary purpose was to suppress peaceful protests by any means necessary.¹³⁷ Viral video footage showed federal police lobbing tear gas, grenades, and other chemical munitions at peaceful protesters, including a line of "Portland Moms" that included visibly pregnant women.¹³⁸ Officers pepper sprayed and repeatedly beat a 53 year-old Navy veteran when he approached with his hands up to ask a question.¹³⁹ They sprayed rubber bullets into a crowd, hitting multiple protesters and causing skull fractures in at least two cases.¹⁴⁰ At one point, video footage appeared to show officers targeting and detaining journalists with visible press credentials.¹⁴¹ Perhaps most troubling, dozens of individuals reported being forcibly removed from the street, placed into unmarked rental cars, placed under arrest and put in a holding cell inside the Hatfield Federal Courthouse. These individuals were later released without notification of their charges or the identity of their captors by name or agency, and without any record of their arrest.¹⁴²

¹³⁷ Hamed Aleaziz, "Disturbing and Demoralizing": DHS Employees Are Worried the Portland Protest Response Is Destroying Their Agency's Reputation, BUZZFEED (July 21, 2020, 7:02 PM ET), <https://www.buzzfeednews.com/article/hamedaleaziz/dhs-employee-anger-over-portland-protest-response> [<https://perma.cc/3XHN-EFB3>] (quoting DHS employee: "This administration's utterly transparent fearmongering of sending federal officers out against peaceful protesters in Portland and Chicago has no purpose other than to support Trump's reelection bid. It is blatantly unconstitutional and an embarrassment to the agency and the career civil servants who work here").

¹³⁸ Huigens, *supra* note 135 ("Over the weekend, a group of Portland, Oregon moms confronted federal officers who had fired tear gas at them and other peaceful protesters on Saturday outside a federal courthouse."); Ryan Mac, *A Group of Moms Formed a Human Wall to Protect Portland Protesters from Federal Officers*, BUZZFEED (July 19, 2020, 7:43 PM ET), <https://www.buzzfeednews.com/article/ryanmac/moms-human-wall-portland-protest-federal-officers> [<https://perma.cc/ZS5D-AUKL>].

¹³⁹ *Navy Veteran Beaten by Federal Agents in Portland: 'They Came Out to Fight'*, L.A. TIMES (July 20, 2020, 7:43 PM PT), <https://www.latimes.com/world-nation/story/2020-07-20/navy-vet-beaten-by-federal-agents-they-came-out-to-fight> [<https://perma.cc/46HV-ZDZ7>].

¹⁴⁰ Ryan Nguyen, *Police Shoot Portland Protester in Head with Impact Weapon, Causing Severe Injuries*, OREGONIAN (July 12, 2020), <https://www.oregonlive.com/news/2020/07/pollce-shoot-portland-protester-in-head-with-impact-weapon-causing-severe-injuries.html> [<https://perma.cc/J3LY-4T4B>].

¹⁴¹ Tucker Higgins, *Judge Blocks Federal Officers from Targeting Journalists in Portland Anti-racism Protests*, CNBC (July 24, 2020, 9:14 AM EDT), <https://www.cnbc.com/2020/07/24/judge-blocks-federal-officers-from-targeting-journalists-in-portland.html> [<https://perma.cc/5ZG9-B7Z7>].

¹⁴² Katie Shepherd & Mark Berman, *'It Was Like Being Preyed Upon': Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/> [<https://perma.cc/665V-GKW8>].

These “disappearances” by unidentified government troops shocked observers, who remarked on their reminiscence to authoritarian regimes quelling dissent.¹⁴³ One of these observers, Oregon Attorney General Ellen Rosenblum, responded by suing numerous federal agencies, including Department of Homeland Security (“DHS”), the U.S. Marshals Service, U.S. Customs and Border Protection, and the Federal Protection Service.¹⁴⁴ In requesting injunctive relief to “stop the federal police from secretly stopping and forcibly grabbing Oregonians off the street,” Attorney General Rosenblum personally asserted standing to appear for Oregon “citizens under the doctrine of *parens patriae*,” as the protector of her state’s citizens.¹⁴⁵ On the same day, the ACLU filed a class action lawsuit on behalf of journalists and legal observers seeking an injunction to prevent DHS and the U.S. Marshals service “from assaulting news reporters” and using “unconstitutionally excessive force,” including “riot batons, semi-lethal projectiles, and chemical weapons.”¹⁴⁶ Both complaints brought Fourth Amendment excessive force claims, among other causes of action.

Are either of these representative actions a proper exercise of standing? While those Oregonians personally detained or forcibly dispersed may have personal standing to seek redress, these lawsuits — as well as a third *parens patriae* suit filed against the NYPD on January 14, 2021, by New York Attorney General Letitia James for their protest policing practices last summer¹⁴⁷ — raise the interesting and increasingly important question of whether such representative actions

¹⁴³ Mike Baker, Thomas Fuller & Sergio Olmos, *Federal Agents Push into Portland Streets, Stretching Limits of Their Authority*, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/us/portland-federal-legal-jurisdiction-courts.html> [<https://perma.cc/J9FX-HNW5>] (quoting an attorney and member of the Portland “Wall of Moms” as saying, “This is not creeping authoritarianism. The authoritarianism is here”).

¹⁴⁴ See *Rosenblum v. Does 1-10*, 474 F. Supp. 3d 1128, 1130 (D. Or. 2020); see also Complaint, *supra* note 27, at 2-3.

¹⁴⁵ *Attorney General Rosenblum Files Lawsuit Against U.S. Homeland Security; Announces Criminal Investigation*, OR. DEP’T OF JUST. (July 17, 2020) <https://www.doj.state.or.us/media-home/news-media-releases/attorney-general-rosenblum-files-lawsuit-against-u-s-homeland-security-announces-criminal-investigation/> [<https://perma.cc/H9FY-8N3L>]; Complaint, *supra* note 27, at 3.

¹⁴⁶ *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 U.S. Dist. LEXIS 127214, at *2-3 (D. Or. July 17, 2020); see also Second Amended Complaint, *supra* note 26, at 1, 24.

¹⁴⁷ *State of New York v. City of New York*, No. 1:21-cv-0322, 2021 U.S. Dist. LEXIS 81329, at *7 (S.D.N.Y. Apr. 28, 2021); see also Complaint for Declaratory and Injunctive Relief, *supra* note 27, at 3.

are appropriate in the protest policing context, or permissible at all under the Fourth Amendment.

Fourth Amendment scholars may intuitively answer “no.” The Supreme Court has repeatedly reaffirmed the principle that Fourth Amendment rights are personal and may not be asserted vicariously, applying an exceedingly narrow construction of Fourth Amendment “standing” to reject claims even when the petitioners clearly suffered substantial personal injury from illegal police conduct.¹⁴⁸ It would seem particularly strange, then, to recognize vicarious state standing to bring such claims. Moreover, the Fourth Amendment’s text and precedent relies on individualized fact-specific inquiries of what constitutes “reasonable suspicion,” “probable cause,” or “objectively reasonable use of force,” each adjudged by a totality-of-the-circumstances standard.¹⁴⁹ As a result, common facts and issues rarely predominate, meaning Fourth Amendment class actions rarely survive Rule 23 class certification.¹⁵⁰

These intuitions are reasonable, but they may not be correct in the protest policing context. Singular, unified command decisions to violently disperse a large crowd of demonstrators may provide the one excessive force context where a single judgment about the reasonableness of a single seizure could be made on a class wide basis. Moreover, states acting in their quasi-sovereign *parens patriae* capacity may be able to survive standing challenges if they can show a sufficiently widespread pattern or practice of constitutional violations against their citizens, though the very limited case law considering that question is mixed.¹⁵¹ The “Operation Legend” mission also presents the

¹⁴⁸ *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014) (denying that presence of an innocent passenger in a car is relevant to an argument that “too many shots were fired” by officers to detain suspect driver, because “the question before us is whether petitioner’s violated Rickard’s Fourth Amendment rights, not [the passenger’s]”); *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” (quoting *Brown v. United States*, 411 U.S. 223, 230 (1973), questioning whether a separate Fourth Amendment “standing” doctrine exists at all)).

¹⁴⁹ See Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 432 (2017) (describing difficulties in aggregating typical Fourth Amendment claims).

¹⁵⁰ See Fed. R. Civ. P. 23(a)(2) (authorizing class actions only if “there are questions of law or fact common to the class”); Garrett, *supra* note 34, at 620.

¹⁵¹ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 517-21 (2007) (discussing Massachusetts’s ability to sue in a quasi-sovereign capacity to compel a reduction in greenhouse gases); cf. *Washington v. Trump*, 858 F.3d 1168, 1186 (9th Cir. 2017) (“The States may not sue the federal government as *parens patriae* to protect their

complicating factor that states generally may not sue the federal government in its *parens patriae* capacity, though a narrow exception to this rule may in fact authorize claims challenging specific protest policing conduct.¹⁵²

This Section explores these questions, beginning with a brief overview of the vagaries of Fourth Amendment “standing” doctrine before turning to aggregate standing and state standing.

A. Seizures and Standing

Article III, Section 2 of the Constitution requires that all claims heard in federal court present a “case” or “controversy.”¹⁵³ To establish the existence of a case or controversy, litigants must demonstrate that they have “standing.”¹⁵⁴ Under the now-familiar tests of Article III standing, plaintiffs must establish that they have suffered an “injury in fact[,]” that is “an invasion of a legally protected interest” which is concrete, particularized, and actual or imminent.¹⁵⁵ The injury must be “fairly traceable to the challenged action of the defendant” and it must be “likely, as opposed to merely speculative” that a favorable decision will redress the harm.¹⁵⁶ These standing requirements are jurisdictional. Courts do not have authority to adjudicate claims brought by litigants who cannot show standing.¹⁵⁷

These rules also broadly mean that, normally, litigants can only assert their own legal rights and interests. They cannot seek remedies based on violations of the rights or interests of absent third parties.¹⁵⁸ Thus, standing doctrine “requires [courts] to separate injured from ideological plaintiffs.”¹⁵⁹ Courts and scholars have articulated a number

citizens from constitutional violations alleged to have been committed by the federal government.”).

¹⁵² See *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); see also *infra* Part III.C.

¹⁵³ U.S. CONST. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

¹⁵⁴ *Lujan*, 504 U.S. at 560.

¹⁵⁵ *Id.*; see also *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 632 (3d Cir. 2017).

¹⁵⁶ *Payton v. Cnty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002).

¹⁵⁷ *Id.*

¹⁵⁸ *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (explaining general rule that federal courts will not allow a plaintiff to assert the rights and interests of absent third parties).

¹⁵⁹ Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1238-39 (2019) (“Ideological plaintiffs, who allege nothing more than a ‘special interest’ in the subject of their suit, lack standing. . . . By contrast, individuals and private entities may sue to

of justifications for these stringent, personalized standing requirements. They assure concrete, adversarial litigation, guard against constitutionally impermissible advisory opinions, avoid *stare decisis* issues if absent third parties do not regard themselves as bound by the results, and more broadly, they further an appropriate separation of powers.¹⁶⁰

In addition to establishing standing under Article III, litigants raising Fourth Amendment claims must articulate a personally held substantive right under the Fourth Amendment. Before *Rakas v. Illinois*,¹⁶¹ this requirement was commonly referred to as Fourth Amendment “standing.”¹⁶² In *Rakas*, the Court rejected the notion that the Fourth Amendment imposed separate standing requirements but reaffirmed that only individuals whose personal “reasonable expectation of privacy” was violated had Fourth Amendment claims to assert.¹⁶³ In denying an automobile passenger standing to challenge an unlawful search of the glove box of the car, the *Rakas* Court held that, to press a Fourth Amendment claim, a litigant must demonstrate that the government has intruded upon her personal reasonable expectations of privacy.¹⁶⁴ Because “Fourth Amendment rights are personal rights,” the Court held that they “may not be vicariously asserted.”¹⁶⁵

In reaching this holding, the *Rakas* Court rejected the proposition that being the “target” of investigative searches or seizures automatically confers standing to challenge the constitutionality of those searches or seizures.¹⁶⁶ Targets of investigations may suffer intrusions upon their expectations of privacy, and those who suffer intrusions upon their expectations of privacy may be targets.¹⁶⁷

vindicate financial injuries, which have been called the ‘paradigmatic’ type of injury [T]he loss of even of a ‘few pennies’ is enough to give a litigant standing in an Article III court”).

¹⁶⁰ See Gray, *supra* note 30, at 87.

¹⁶¹ *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁶² Gray, *supra* note 30, at 88.

¹⁶³ *Rakas*, 439 U.S. at 134.

¹⁶⁴ *Id.* at 140.

¹⁶⁵ *Id.* at 133-34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)) (“A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.”).

¹⁶⁶ *Id.* at 132-33 (“Adoption of the so-called ‘target’ theory advanced by petitioners would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial.”).

¹⁶⁷ See *id.* at 134; see also Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 570, 598 (2008) (criticizing the differential treatment of these two sets of injured persons).

However, being a target is neither necessary nor sufficient to establish eligibility to raise a Fourth Amendment claim.¹⁶⁸ It therefore made no sense, in the Court's view, to confer automatic standing to targets. Instead, the Court advised that the question of standing is determined solely by whether the litigant's reasonable expectations of privacy were violated.¹⁶⁹ In other words, police can unlawfully seize evidence to use against a suspect (the target), but if the suspect had no protectable privacy interest in the place searched or the thing seized (e.g., the police ransack the neighbor's house), then the suspect's injury is insufficient to confer standing.

Unlike limited exceptions to Article III standing requirements authorizing vicarious standing claims *jus tertii*, post-*Rakas* precedent confirms that no such exception exists allowing litigants to raise Fourth Amendment claims on behalf of absent third parties.¹⁷⁰ This exceedingly strict application of *Rakas* has led to manifestly unjust results. For example, in *United States v. Payner*,¹⁷¹ Internal Revenue Service ("IRS") agents investigated American citizens suspected of hiding income in offshore banks.¹⁷² Frustrated by a lack of progress in their investigation, agents conspired to steal banking records from an employee of one of the suspect banks.¹⁷³ When the banker was in the United States on business, the agents arranged a date for him.¹⁷⁴ While he was out on the town, an investigator, working for the agents, stole the banker's briefcase.¹⁷⁵ IRS agents copied the contents of the stolen briefcase, which included documents showing Payner's efforts to hide income.¹⁷⁶ Importantly, the entire scheme was approved by IRS supervisors and in-house counsel because they knew that Payner would not have "standing" to raise any Fourth Amendment objections because the

¹⁶⁸ See *Rakas*, 429 U.S. at 138-39.

¹⁶⁹ See *id.* at 148; see also Julian A. Cook III, *Policing in the Era of Permissiveness: Mitigating Misconduct Through Third-Party Standing*, 81 BROOK. L. REV. 1121, 1144-45 (2016) (criticizing *Rakas* as part of a pattern of creating unreviewable categories of police misconduct).

¹⁷⁰ See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-13 (2013) (denying standing to American journalists and activists whose private communications were discovered by agents through surveillance of non-U.S. persons located abroad).

¹⁷¹ 447 U.S. 727 (1980).

¹⁷² *Id.* at 729.

¹⁷³ *Id.* at 730.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

stolen briefcase did not belong to him.¹⁷⁷ At trial, Payner moved to suppress evidence gathered during the search.¹⁷⁸ The trial court was “appalled by the agents’ behavior and the institutional approval of their activities provided by supervisors and attorneys,” and granted Payner standing.¹⁷⁹

The Supreme Court reversed, holding that the bank employee was the only person with standing to raise a Fourth Amendment claim because only his — and not the defendant’s — reasonable expectation of privacy had been violated.¹⁸⁰ Thus, Payner could not assert the banker’s claim vicariously, nor could the nonparty banker enter the case to seek suppression of the evidence on Payner’s behalf.¹⁸¹ That holding “not only allowed the government to exploit a premeditated violation of the Fourth Amendment, it also issued an effective license for government agents to adopt similar strategies in the future.”¹⁸²

However, this cramped and dangerous doctrine of Fourth Amendment “standing” has developed almost exclusively in cases challenging police searches like in *Rakas* and *Payner*. Virtually no major cases have considered Fourth Amendment “standing” requirements in unreasonable seizure cases.¹⁸³ In one respect, this precedential gap makes sense. Unlike searches, which often happen to places and things and lead to queries about who has a privacy interest in those places and things, seizures happen to people. A person who is unreasonably seized — either via prolonged detention, warrantless arrest, or excessive force — likely has no trouble establishing a personal, as opposed to vicarious, injury.

In another sense, however, an identical “standing” conundrum exists in these seizure cases. Unless the individual unreasonably seized is a party to the action (i.e., the criminal defendant), they have no standing

¹⁷⁷ See *id.*; see also *id.* at 738 (Marshall, J., dissenting) (“Th[is] holding effectively turns the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person’s Fourth Amendment rights in order to obtain evidence against another person.”).

¹⁷⁸ *Id.* at 729 (majority opinion).

¹⁷⁹ Gray, *supra* note 30, at 91 (citing *United States v. Payner*, 434 F. Supp. 113, 131 (N.D. Ohio 1977)).

¹⁸⁰ See *Payner*, 447 U.S. at 735.

¹⁸¹ See *id.*

¹⁸² Gray, *supra* note 30, at 91; see also *Payner*, 447 U.S. at 739 (Marshall, J., dissenting); George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith Exception to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 35 (1993) (describing the “bad-faith searches” at issue in *Payner*).

¹⁸³ See DRESSLER, *supra* note 31, at 319-35.

to pursue their Fourth Amendment claim, at least absent a separate civil rights action. In other words, had federal agents in *Payner* tied up and beaten the bank employee *en route* to stealing his briefcase, the employee would have lacked the ability to assert his rights in an action to which he was not a party. Likewise, the criminal defendant likewise would have lacked the ability to assert vicarious standing. Alternatively, the banker may have elected to protect his Fourth Amendment interests via a civil rights lawsuit, which may be worth the time and expense depending on the severity of the injuries. But in other cases, including those with mass seizures and relatively minor injuries, individual lawsuits may neither be possible nor preferable. Thus, to the extent a post-*Rakas* Fourth Amendment allows, other litigation vehicles may need to be pursued. It is to these representative vehicles we now turn.

B. Aggregate Standing

An individual whose person is seized by an officer automatically crosses the Fourth Amendment threshold and has standing to challenge that action.¹⁸⁴ Unlike the “target versus zone of privacy holder” thicket search cases present, in seizure cases there almost always exists a synchronicity between the seized party and the injured party. The trickier standing question for seizure cases is what happens when groups are seized *en masse*, as in the case of assembled crowds of protesters. Each individual seized protester has standing to proceed, but a few practical realities often preclude meritorious individual seizure litigation from moving forward. First, unlike search cases, which inevitably arise in the context of a motion to suppress in a criminal proceeding, “[p]olice use of excessive force rarely gives rise to evidence . . . as a result, few excessive force claims are litigated in the context of the exclusionary rule.”¹⁸⁵ Lacking an existing legal proceeding, government-appointed counsel, and a constitutional remedy, most victims of police brutality must proceed with complex, costly, and risky civil rights litigation under 42 U.S.C. § 1983.¹⁸⁶ Second, most victims of police violence “lack the resources to navigate the federal court system, and if the case gets to trial,”¹⁸⁷ — a doubtful proposition given the near

¹⁸⁴ *United States v. Sanford*, 806 F.3d 954, 958-59 (7th Cir. 2015) (“[E]ven if [a car passenger] lacks standing to challenge the search on the basis of having a quasi-property right of some sort in the car, he has standing to challenge the seizure of his person . . .”).

¹⁸⁵ *Paradis*, *supra* note 20, at 328.

¹⁸⁶ See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *GEO. WASH. L. REV.* 453, 472 (2004) (noting that “the sheer volume of factual evidence that is necessary to make out such a [claim] makes cases very expensive to litigate”).

¹⁸⁷ *Paradis*, *supra* note 20, at 328.

absolute immunity provided by modern qualified immunity jurisprudence¹⁸⁸ — “it will be the word of the uniformed officer against that of the plaintiff, often poor, badly educated, and [possibly] a criminal himself.”¹⁸⁹

These practical barriers to relief do not affect the legal standing inquiry. But they do beg for an alternative legal vehicle, which may exist in the case of mass protest seizures. Aggregate class action treatment of such claims could provide access to protest plaintiffs with little resources and comparatively smaller claims, and more importantly, may provide the only realistic opportunity to deter and sanction indiscriminate violent crowd control techniques.

However, the structure of the Fourth Amendment makes such aggregate treatment difficult. Fourth Amendment standing inquiries are so individualized in part because the constitutional text itself calls for fact-specific, individualized inquiries regarding the scope of protection.¹⁹⁰ The two touchstones of Fourth Amendment inquiry — reasonableness and probability — inherently call for contextualized analysis rather than the adoption of bright-line rules. “For example, the concept of ‘probable cause’ implies an individualized question whether a particular search or seizure was reasonable under the circumstances.”¹⁹¹ The Supreme Court’s totality-of-the-circumstances approach to probable cause determinations reflects this individualized inquiry.¹⁹² Likewise, *Terry* stops analyzed under the Fourth Amendment’s Reasonableness Clause¹⁹³ require a determination of

¹⁸⁸ See *Fields*, *supra* note 10, at 982; see also Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 235 (2006) (noting that “absolute immunity and qualified immunity are supposed to operate in very different ways,” even if they often do not in the police context, because “qualified immunity turns on the objective reasonableness of the official’s conduct in light of existing constitutional doctrine”).

¹⁸⁹ *Paradis*, *supra* note 20, at 328.

¹⁹⁰ See *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (“[T]he Fourth Amendment imposes no irreducible requirement of individualized suspicion.” (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976))); see also *Nat’l Fed’n of Fed. Employees-IAM v. Vilsack*, 681 F.3d 483, 499 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (“By establishing reasonableness as the legal test, the text of the Fourth Amendment requires judges to engage in a common-law-like balancing of public and private interests to determine the constitutionality of particular kinds of searches and seizures.”); *Vore v. U.S. Dep’t of Just.*, 281 F. Supp. 2d 1129, 1132 (D. Ariz. 2003) (“Whether or not a search or seizure is reasonable is a fact-specific determination.” (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985))).

¹⁹¹ *Garrett*, *supra* note 34, at 620.

¹⁹² See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (discussing the magistrate’s need to consider all of the particular circumstances of a case under the approach).

¹⁹³ See *Terry v. Ohio*, 368 U.S. 1, 30 (1968).

“reasonable suspicion,” as articulated through an assessment of all the facts, circumstances, and rational inferences available to the officer at the time.¹⁹⁴

These unique factual determinations for each officer-citizen makes the class action vehicle an uneasy fit, as only class claims predominated by common facts that are amenable to a single legal determination are appropriate for aggregation.¹⁹⁵ To be sure, fact-specific questions cut short any number of class claims in all areas of law, particularly where common issues do not predominate. For example, in the employment context, class action requirements that all members share some degree of commonality and typicality in their claims are relatively easy to satisfy when a uniformly enforced blanket policy is at issue, such as an employer’s across-the-board policy of denying meal breaks or providing miscalculated wage statements.¹⁹⁶ But employment discrimination claims can be more difficult to maintain on a class basis when their common core claims involve patterns or practices of discrimination that vary from member to member.¹⁹⁷

This variability is almost always present in the Fourth Amendment context. Not only are there problems of inconsistent practices across a large group of affected purported class members, but of legal standards governing the claims that are inherently vague and probabilistic, requiring nuanced individualized assessment of particular actions at particular split-second intervals. This fact-specific nature of Fourth Amendment inquiries “tend[s] to frustrate aggregate treatment.”¹⁹⁸ This functions less as a textual requirement that the Court’s interpretation that such a result is required, at least under some theories of liability. In the *Terry* stop context, the Court has held that stops and frisks must be supported by individualized reasonable suspicion, based on the

¹⁹⁴ *Id.* (“Each case of this sort will, of course, have to be decided on its own facts.”).

¹⁹⁵ See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 658-59 (2012).

¹⁹⁶ *Compare* Espinoza v. Domino’s Pizza, LLC, No. EDCV 07-1601-VAP (OPx), 2009 U.S. Dist. LEXIS 31093, at *1, *39 (C.D. Cal. Feb. 18, 2009) (certifying class where claims alleged employer denied meal breaks and provided intentionally miscalculated wage statements as a matter of policy), *with* Lampe v. Queen of the Valley Med. Ctr., 228 Cal. Rptr. 3d 279, 292 (2018) (denying certification where employer had policy of providing meal breaks and there was varying evidence among class members regarding waivers).

¹⁹⁷ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011) (“Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored.*”).

¹⁹⁸ Garrett, *supra* note 34, at 620.

circumstances of that individual stop.¹⁹⁹ Likewise, probable cause determinations require individualized assessments of split-second decisions to determine whether a suspect may be arrested.²⁰⁰ Because each factual circumstance will differ from the officer's perspective in that moment, courts regularly deny class certification for class claims based on false arrest alleging aggregated constitutional seizure violations.²⁰¹ Because both such cases are "seizure" cases, this alone casts serious doubt on the ability to successfully aggregate mass protest excessive force seizure claims.

Moreover, the Court has reaffirmed time and again that, in the context of police use of force, no one particular police practice is *per se* unconstitutional.²⁰² Instead, each use of force case must be examined on the totality of the "facts and circumstances under which each search and/or inspection took place."²⁰³ In other words, if the Court held that carotid chokeholds were *per se* unconstitutional, presumably a class of people subjected to such practice could successfully challenge the practice. Indeed, the rare successful Fourth Amendment class cases involve blanket governmental policies that are deemed *per se* unconstitutional, thus satisfying the commonality requirement of certification and authorizing class relief.²⁰⁴ For example, in *Gerstein v. Pugh*,²⁰⁵ former detainees brought a class action seeking to challenge a policy of pre-trial detention without a warrant and without an

¹⁹⁹ *Terry v. Ohio*, 368 U.S. 1, 27 (1968).

²⁰⁰ *See State v. Johnson*, 944 A.2d 297, 312 (Conn. 2008) (explaining that "it would make little sense to require police officers, who are often required to make split second decisions regarding probable cause, to adhere to the cumbersome" framework rejected by the Supreme Court in *Gates*); *State v. Schulz*, 55 A.3d 933, 939 (N.H. 2012) ("Officers executing warrants cannot be expected to make the same [probable cause] decision in a split second, under dangerous conditions, that a reviewing court makes after a comprehensive review.").

²⁰¹ *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 (D.C. Cir. 1984); *Garrett*, *supra* note 34, at 621.

²⁰² *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (limiting the analysis only to the circumstances as they existed in the split second before the particular force was used).

²⁰³ *Russo v. CVS Pharmacy, Inc.*, 201 F.R.D. 291, 300 (D. Conn. 2001) (citing *Ker v. California*, 374 U.S. 23, 33 (1963)); *cf. id.* ("Fourth Amendment violations may be susceptible to resolution by means of a class action where the allegations involve a uniform policy.").

²⁰⁴ *See Casale v. Kelly*, 257 F.R.D. 396, 410 (S.D.N.Y. 2009). Class treatment for such a *per se* prohibition is analogous to, for example, a *per se* prohibition against arresting people under statutes previously declared unconstitutional. *See id.* at 415 (certifying class of all persons who had been or would be arrested for violation of a law declared unconstitutional).

²⁰⁵ 420 U.S. 103 (1975).

opportunity for a probable cause determination by a judge.²⁰⁶ This “blanket policy” allowed for common claims to predominate.²⁰⁷ And unlike in excessive force cases, the Court found a categorical Fourth Amendment violation, holding that the Constitution requires that there be “a timely judicial determination of probable cause as a prerequisite to detention,” regardless of the probable cause determinations ultimately made in each individual class member’s case.²⁰⁸ These types of cases avoid the highly individualized, fact-specific treatment at odds with the class action vehicle. Instead of relying on allegations that every class member was unreasonably searched or seized without probable cause, the focus is on allegations that no probable cause determination took place at all.²⁰⁹ No such categorical prohibition exists in the Court’s excessive force jurisprudence, rendering such class claims almost always dead on arrival.

Yet despite the absence of categorical use of force prohibitions and the reluctance of courts to aggregate individualized seizure cases, one type of excessive force claim may still be suitable for class treatment: ones where a single use of force was directed at and affected in substantially similar ways a large group of people at once. In other words, in the protest policing context, “[c]lass actions may be easier to bring in the situation where a large group of people, say at a political demonstration, were subjected to . . . common ‘command decisions to disperse the crowd.’”²¹⁰ Of course, different protest scenarios would provide different levels of suitability for class treatment. The actions of federal forces in Portland during “Operation Legend” appeared largely

²⁰⁶ See *id.* at 106-07.

²⁰⁷ See *id.*; see also *Blihovde v. St. Croix Cnty.*, 219 F.R.D. 607, 622 (W.D. Wis. 2003) (finding that “a class action provides the most feasible and efficient method of determining liability” in a case where a blanket unconstitutional policy of suspicionless strip searches affected a “potentially large number of people”); *Garrett*, *supra* note 34, at 634.

²⁰⁸ *Gerstein*, 420 U.S. at 126; *cf. In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (certifying Fourth Amendment class action “[i]n light of the pervasive character of the common liability issues and the admitted *de minimis* nature of individualized liability issues”); *Casale v. Kelly*, 257 F.R.D. 396, 414 (S.D.N.Y. 2009) (discussing the court’s hesitation to decertify the class with common liability issues).

²⁰⁹ See *Garrett*, *supra* note 34, at 621 (“The type of class action brought commonly on behalf of arrestees relates not to whether the arrest itself was supported by probable cause, but the situation where law enforcement adopts a ‘blanket policy’ that does not make a reasonable suspicion judgment at all — such as a policy of strip-searching all detainees regardless of whether the officers possessed reasonable suspicion . . .”).

²¹⁰ *Id.* at 620; *cf. Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977) (questioning suitability of class action treatment in case where plaintiffs Vietnam War protesters were falsely arrested at the U.S. Capitol after being warned to disperse).

to involve a series of horrifying, yet individualized decisions to target and seize large numbers of people one at a time.²¹¹ Similarly, protest policing activities in New York City in the days after George Floyd's murder received widespread condemnation and has become the target of at least one suit by the New York Attorney General.²¹² However, the most egregious acts of unlawful violence — including pulling down protective face masks to pepper spray protesters, beating kneeling protesters with batons, and ramming a small crowd with a police SUV — all appear to be individual decisions.²¹³

In contrast, the protest at Lafayette Square Park involving premeditated command decisions to fire tear gas directly at a large peaceful crowd immediately prior to President Trump's stroll appear more suitable for class treatment, at least from video footage and witness statements of the event.²¹⁴ The court would not need to make hundreds of individualized determinations whether the mass seizure was reasonable, but only assess whether the single command decision to tear gas the crowd was objectively reasonable.²¹⁵ Of course, other factual intricacies make it far from certain that even this type of singular act leading to mass injury could survive class certification. Must all demonstrators have been affected substantially similarly, or is a "direct impact" and "waft class" designation necessary? Is the court limited to a single type of seizure conduct — only tear gas or pepper balls, but not both? Or more narrowly, a single tear gas canister? And even if these issues could be rendered sufficiently justiciable in the aggregate, what level of individualized inquiry is still required to resolve the question of whether an officer was objectively justified to lob a particular canister

²¹¹ One possible exception might be the "Wall of Moms," a group of hundreds of women all intentionally tear gassed during a single command decision outside the Hatfield Courthouse. *See* Huigens, *supra* note 135.

²¹² *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *supra* note 27, at 2 (suing the City of New York based on unlawful police practices during the protests in the summer of 2020).

²¹³ *See, e.g.*, Cook, *supra* note 5 (discussing one NYPD officer who pepper sprayed a protester in the face); Fallon, *supra* note 4 ("Two New York Police Department vehicles plowed into demonstrators . . .").

²¹⁴ *See supra* notes 40–48 and accompanying text.

²¹⁵ *See* Dan Friedell, *Some Clarity a Day After Reports of Tear Gas in Lafayette Square, but Questions Remain*, WTOP (June 2, 2020, 9:30 PM), <http://wtop.com/dc/2020/06/some-clarity-a-day-after-reports-of-tear-gas-in-lafayette-square-but-questions-remain/> [<http://perma.cc/9R9R-W5UF>] (reporting that the decision to forcibly remove protesters from the park was made by U.S. Attorney General William Barr who stated, "This needs to be done. Get it done").

at that exact moment?²¹⁶ Must every demonstrator's conduct in that moment be examined? What if all of the thousand protesters were kneeling, save for one agitator far in the back threatening to throw a rock? While these latter questions speak more to the sufficiency of the evidence at trial (or given qualified immunity, more likely summary judgment) than class certification, they further illustrate the difficulties of using aggregation to afford any real relief in the context of mass protest policing abuses.

C. State Standing

In the absence of a viable class claim for mass protest policing improprieties, the remaining vehicle may be the most powerful of all: the state *parens patriae* lawsuit. When a state sues, its interest in the suit is usually classified as sovereign, quasi-sovereign, or proprietary.²¹⁷ Sovereign interests include the structural rights of governments to create and enforce a legal code.²¹⁸ Proprietary interests include those that a state shares with any other litigant — they derive from its role as a landowner or a party to a contract.²¹⁹ When states sue to protect their own interests, whether proprietary or sovereign, they must show standing under conventional Article III doctrine or a state analog.²²⁰ When states sue as *parens patriae*, on the other hand, they seek to protect their quasi-sovereign interests, defined as “a set of interests the State has in the well-being of its populace.”²²¹

²¹⁶ See Fields, *supra* note 10, at 979 (noting the “split-second syndrome” infecting the Court’s reasonable use of force doctrine); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 120 (2009).

²¹⁷ See Seth Davis, *State Standing for Equality*, 79 LA. L. REV. 147, 153 (2018); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2077-78 (2011).

²¹⁸ Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982) (recognizing a state’s “sovereign interest[]” in “the power to create and enforce a legal code”); see also Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1915 (2019).

²¹⁹ See Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (recognizing a state’s proprietary interest as a landowner); Young, *supra* note 218, at 1897-98 (“The distinction between proprietary and governmental interests and actions is notoriously indeterminate, and . . . proprietary interests in property or contractual rights are hardly the only interests that states share in common with private entities.”).

²²⁰ See Davis, *supra* note 217, at 154.

²²¹ Snapp, 458 U.S. at 602 (explaining that the quasi-sovereign interest giving rise to *parens patriae* standing, is a “judicial construct that does not lend itself to a simple or exact definition” but which implicates the state’s interest in the well-being of its residents and in maintaining its proper place in the federal system).

These interests have their roots in the common law, which attributed to the sovereign the right to bring suit for those citizens who could not protect themselves.²²² Generally, those interests exist in two categories: the State's interest in the well-being of its residents,²²³ and the State's interest in ensuring it and its citizens are not discriminatorily denied their rightful status within the federal system.²²⁴ When a state invokes *parens patriae* standing, it "litigates as a representative for its citizens."²²⁵ Consequently, *parens patriae* standing is more likely to be recognized when, for whatever reason, no more appropriate party is available.²²⁶ Importantly, states asserting standing as *parens patriae* still must meet the other constitutional requirements of standing. The injury alleged "must be sufficiently concrete to create an actual controversy" and sufficiently generalized to represent an injury to the state as a whole.²²⁷

However, to gain *parens patriae* standing, the state must be able to articulate a sovereign interest that is more than, or different from, a simple aggregation of the injuries to individual citizens.²²⁸ Courts have recognized this quasi-sovereign interest as sufficient to confer standing

²²² FRANCIS C. AMENDOLA, JOSEPH BASSANO, JAMES BUCHWALTER, PAUL M. COLTOFF, STEPHEN LEASE, ERIC MAYER & JEANNE M. REISER, 91 C.J.S. UNITED STATES § 311 (2021).

²²³ "Well-being" is interpreted broadly to include physical and economic well-being as well as protection from "the political, social, and moral damage of discrimination." *Snapp*, 458 U.S. at 609. Thus, an assertion of quasi-sovereign standing is, according to some scholars, an assertion of the State's police power and has a similar reach. See Crocker, *supra* note 217, at 2082-83.

²²⁴ *Snapp*, 458 U.S. at 607.

²²⁵ Crocker, *supra* note 217, at 2072 (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.7 (5th ed. 2007)). In this sense, *parens patriae* suits are in some ways analogous to class action suits, with the State serving as the class representative, but courts have resisted treating them as class actions. See, e.g., Addison Automatics, Inc. v. Hartford Cas. Ins. Co., 731 F.3d 740, 744 (7th Cir. 2013) (noting there are "important procedural differences between class actions and *paren patriae* actions" and "[s]uch suits . . . should not be considered representative actions subject to Rule 23.").

²²⁶ See *Pennsylvania v. Kleppe*, 533 F.2d 668, 675 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976) (providing an overview of the historical development and application of the *parens patriae* doctrine and denying standing because "the suit [was] a direct attempt by a state to insert itself between the national government and the legitimate objects of its administrative authority").

²²⁷ *Snapp*, 458 U.S. at 602; see *Kleppe*, 533 F.2d at 675.

²²⁸ See *Table Bluff Rsr. v. Philip Morris, Inc.*, 256 F.3d 879, 885-86 (9th Cir. 2001). Further, *parens patriae* standing is available only to U.S. States. *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 336 (1st Cir. 2000) ("[P]arens patriae standing should not be recognized in a foreign nation unless there is a clear indication of intent to grant such standing expressed by the Supreme Court or by the two coordinate branches of government.").

most prominently in environmental cases that pit one state against another, where the environmental injuries are both sufficiently widespread and where the state as an entity has also suffered damage.²²⁹ States have also sued other states, and private parties, to protect the economic well-being of their citizens²³⁰ and to seek redress for discrimination.²³¹

These last two interests most directly affect the Fourth Amendment analysis. Police brutality can have devastating, long-term economic impacts on victims, particularly if injuries sustained cause long-term disability or otherwise interfere with the ability to work. The significant dignitary harm caused by excessive violence at the hands of powerful state actors also exacts an economic toll.²³² That dignitary harm is compounded when unlawful violence is exacted for discriminatory motives, either express or structural. The history of unlawful violence to Black bodies at the hands of police officers, both individually and in aggregate, illustrates how structural, pervasive discrimination exacted against a state's citizens implicates Fourth Amendment concerns, and thus, the propriety of *parens patriae* state standing to redress this harmful and widespread discrimination.²³³

And yet, the quasi-sovereign interest sufficient to confer *parens patriae* standing has rarely, if ever, been recognized in the Fourth Amendment context. Two primary reasons appear to exist for this limit. First, "*parens patriae* standing is inappropriate where an aggrieved party

²²⁹ See *Snapp*, 458 U.S. at 603. See generally *Missouri v. Illinois*, 180 U.S. 208, 220 (1901) (the first case to apply *parens patriae* standing, involving attempt by Missouri to enjoin Illinois from dumping sewage into the Mississippi River). The early *parens patriae* cases nearly all concerned environmental issues. See, e.g., *North Dakota v. Minnesota*, 263 U.S. 365, 371 (1923) (describing changes to the course of the Mustinka River in Minnesota that led to flooding of North Dakota farmland); *New York v. New Jersey*, 256 U.S. 296, 299 (1921) (describing New Jersey's discharge of sewage into the Passaic River, which drained into New York's Upper Bay); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (describing a copper mine's discharge of sulfur into the air, which then blew into Georgia).

²³⁰ See, e.g., *Snapp*, 458 U.S. at 594 (alleging discrimination against Puerto Rican migrant workers); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (alleging discriminatory state taxation on natural gas); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450 (1945) (litigating antitrust violations).

²³¹ E.g., *Snapp*, 458 U.S. at 594 (Puerto Rico suing Virginia over apple growers' systematic discrimination against Puerto Rican migrant workers).

²³² See Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 835-36, 865 (2008) (describing the corrosive long-term impact of illegitimate policing on communities of color).

²³³ See *id.* at 844-49.

could seek private relief.”²³⁴ In virtually all excessive force cases, private individuals or their estates could seek private redress via Section 1983. Second, *parens patriae* standing is typically only appropriate “if the health or well-being of an entire population is threatened, and individuals are incapable of pursuing their own interests.”²³⁵

This second limitation doomed *Rosenblum*, where Oregon attempted to “support a *parens* theory of standing . . . with no more than two identifiable unlawful seizures.”²³⁶ In granting the federal agencies’ joint motion to dismiss, the court presumed that Oregon’s “theory [of *parens patriae* standing] is that the State of Oregon is harmed when its citizens are subjected to widespread unlawful seizures of their persons.”²³⁷ The court acknowledged that “this could be a quasi-sovereign interest to support a *parens* theory of standing” in cases alleging widespread harm, “this is not that case.”²³⁸ Absent proof of either sustained, widespread harm to a significant portion of its citizens or a singular command decision affecting a large group of demonstrators at once, the court reasoned that *parens patriae* did not apply.²³⁹

But to deny *parens patriae* standing in all protest policing contexts would unnecessarily restrict the doctrine. In many such cases, states arguably could satisfy the implicit numerosity and magnitude of harm requirements inherent in *parens patriae* cases, not only because of the size of assembled groups subjected to police violence, but because of the likelihood of future peacefully assembled protests in the future likely to affect a sizeable portion of the populace. Moreover, the fundamental constitutional nature of both the First Amendment right to peaceful assembly and the Fourth Amendment right to be free from unreasonable seizures counsels in favor of broader *parens patriae* standing. At least in cases where the state can identify “more than two” cases of violations, and especially in cases turning on centralized command decisions to employ violence against large groups of demonstrators, courts should recognize the state’s ability to protect

²³⁴ *Mo. ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017) (holding that “complete relief would be available to the [injured] egg farmers themselves, were they to file a complaint on their own behalf”).

²³⁵ *Navajo Nation v. Barr*, No. CV-18-08072-PCT-GMS, 2019 U.S. Dist. LEXIS 77513, at *12 (D. Ariz. May 8, 2019) (denying Navajo Nation *parens patriae* standing to bring a wrongful death claim against Winslow police officers on behalf of an individual decedent, because “the complaint does not articulate how the shooting of Loreal Tsingine . . . injured other members of the Navajo Nation living in Winslow”).

²³⁶ *Rosenblum v. Does 1-10*, 474 F. Supp. 3d 1128, 1134 (D. Or. 2020).

²³⁷ *Id.* at 1133-34.

²³⁸ *Id.* at 1130-34.

²³⁹ *Id.* at 1137.

both the health and well-being of the existing large, injured group and groups at risk of similar future command decisions.

The Lafayette Square Park experience, where officers followed a single, preordained command decision to use tear gas and pepper balls regardless of the threat posed by the crowd, serves as one example of an appropriate “health and well-being” *parens patriae* case.²⁴⁰ The 1,000 protesters’ experience in *Edrei* who were exposed to a single, long-range acoustic device blast, is another.²⁴¹ These actions could seek injunctive relief and prospective reforms through negotiated consent decrees to change policing practices, in addition to redress for past harms.

Somewhere between the *Rosenblum* and *Edrei* extremes lies *State of New York*, the pending *parens patriae* action brought by New York Attorney General Letitia James.²⁴² The lawsuit challenges several individual crowd control decisions, listing isolated incidents wherein “police officers unlawfully used pepper spray and battered protesters with fists and batons.”²⁴³ But it also alleges a series of command decisions affecting large groups of similarly situated citizens, including “detain[ing] observers and medics for curfew violations and corral[ing] large groups of demonstrators without giving them a chance to disperse.”²⁴⁴ Perhaps bolstering her own claim to *parens patriae* standing, James summarized the case in a press conference by claiming that “NYPD engaged in a pattern of excessive, brutal, and unlawful force against peaceful protesters.”²⁴⁵

But even if a state can demonstrate sufficient widespread impact on its citizens, there remains the question of citizens’ incapacity to otherwise litigate on their own behalf. Here, two novel theories of incapacity, both based on the Supreme Court’s narrow substantive rights jurisprudence, may justify *parens patriae* standing in the protest policing context. First, the undeniable disparate impact of police

²⁴⁰ See *supra* notes 40–48 and accompanying text.

²⁴¹ See *Edrei v. City of New York*, 254 F. Supp. 3d 565, 575 (S.D.N.Y. 2017).

²⁴² See generally Complaint for Declaratory and Injunctive Relief, *supra* note 27 (alleging the NYPD both used physical force against protesters at specific protests from May 28, 2020, to December 11, 2020, and consistently used “unlawful excessive force and false arrest practices while policing large-scale protests” generally).

²⁴³ Jacob Gershman & Ben Chapman, *New York State Attorney General Sues NYPD Over Protest Response*, WALL STREET J. (Jan. 14, 2021, 2:38 PM ET), <https://www.wsj.com/articles/new-york-attorney-general-sues-nypd-over-protest-response-11610650600> [<https://perma.cc/5BCV-FXA7>].

²⁴⁴ *Id.* The suit also alleges systematic failures, including “failing to train and supervise officers and for allowing or encouraging flagrant violations of constitutional protections against excessive police force and unlawful detention.” *Id.*

²⁴⁵ *Id.*

violence on communities of color highlights how large swaths of a state's citizenry suffer unjust and unlawful excessive force on the basis of race.²⁴⁶ But virtually none of these potential litigants can successfully maintain discrimination claims in their own right, because the Supreme Court only recognizes government discrimination claims evidenced by "discriminatory purpose" or "animus," not damning evidence of disparate impact and structural racial inequality.²⁴⁷

This narrowly constructed discrimination jurisprudence does not, in itself, mean individuals lack standing to bring disparate impact claims, only that such claims are doomed to fail pre-trial. Thus, a state's ability to assert *parens patriae* standing based on its citizens' "incapacity" depends on whether courts interpret "incapacity" to mean legal inability to assert standing or practical incapacity to seek meaningful relief. In the racial discrimination protest policing context, the difference should not matter. Moreover, allowing a state to proceed *parens patriae* on a disparate impact theory would accord with the primary purpose of the doctrine: to allow a state to seek redress for pervasive injuries to a populace that citizens themselves cannot obtain.

A state, in contrast, may satisfactorily maintain such a claim, arguing not that the state itself is subject to purposeful discrimination but that the evidentiary record belies any suggestion that a large percentage of its population does not suffer significant harm from excessive police violence. Claims of disparate racial treatment in the protest-policing context demand greater recognition and more adequate legal reform vehicles, particularly considering the utter lack of police resistance White supremacists faced when they mounted the nation's first attempted insurrection at the United States Capitol on January 6, 2021.²⁴⁸

²⁴⁶ See Ross, *supra* note 38, at 12; see also Ray Sanchez, *Harvard Study Finds Institutional Racism 'Permeates' the Massachusetts Justice System*, CNN (Sept. 12, 2020, 4:09 PM ET), <https://www.cnn.com/2020/09/12/us/harvard-racial-disparity-criminal-justice-trnd/index.html> [<https://perma.cc/5A5Y-YCUU>] (summarizing key findings, including that "Black people -- who represent 24% of the city's population -- accounted for 63% of people interrogated, stopped, frisked or searched. Latinos make up 12% of the population but were subjected to 18% of those encounters. . . . The disparity . . . was more consistent with racial bias than with differences in criminal conduct").

²⁴⁷ *Washington v. Davis*, 426 U.S. 229, 240 (1976); see also Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 989, 995 n.31 (2007) (challenging the trend towards "colorblindness" in judicial review post-*Davis*); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 728, 725-32 (2006) (noting changing nature of racial discrimination claims after *Davis*).

²⁴⁸ Nandita Bose & Makini Brice, *If Rioters Were Black, 'Hundreds' Would Have Been Killed: Washington Reflects on Capitol Rampage*, REUTERS (Jan. 8, 2021, 4:06 AM),

Second, the Supreme Court's artificially narrow Fourth Amendment standing doctrine ironically may help. The Court has been more than willing to recognize actual Article III injuries in fact to "targets" of police abuse but nevertheless deny Fourth Amendment "substantive" standing. One novel, as yet untested approach, may be for a state to assert its *parens patriae* interest in protecting real party in question citizens who are legally incapable of proceeding in their own right. The Utah Department of Commerce made just such an argument in *United States DOJ v. Utah DOC*.²⁴⁹ While the court recognized that, generally, "no party . . . may assert the substantive Fourth Amendment rights of any investigative target," it nevertheless acknowledged the state's ability to assert standing under a *parens patriae* theory.²⁵⁰ Without ruling on whether this standing theory might otherwise succeed, it denied standing to the state on the unrelated ground that "states may not invoke the *parens patriae* doctrine in order to assert the constitutional rights of their residents against the federal government."²⁵¹

This holding raises a further *parens patriae* wrinkle that arose in *Rosenblum*: whether, if at all, states can sue federal agencies like those secretively roaming Portland in July 2020 for violating their citizens' Fourth Amendment rights. In general, *parens patriae* standing is unavailable to States against the federal government. In *Massachusetts v. Mellon*,²⁵² the Supreme Court barred *parens patriae* standing for States suing the federal government.²⁵³ The Court erected what became

<https://www.reuters.com/article/us-usa-election-inequality/if-rioters-were-black-hundreds-would-have-been-killed-washington-reflects-on-capitol-rampage-idUSKBN29D1HM> [<https://perma.cc/QL2P-8KRRK>] (quoting President-elect Biden: "No one can tell me that if it had been a group of Black Lives Matter protesters . . . they wouldn't have been treated very, very differently from the mob of thugs that stormed the Capitol"); Jeremy Kohler, "Sense of Entitlement": Rioters Faced Few Consequences Invading State Capitols. No Wonder They Turned to the U.S. Capitol Next, PROPUBLICA (Jan. 19, 2021, 2:56 PM EST), <https://www.propublica.org/article/sense-of-entitlement-rioters-faced-no-consequences-invading-state-capitols-no-wonder-they-turned-to-the-u-s-capitol-next> [<https://perma.cc/3J6E-Y45D>].

²⁴⁹ No. 2:16-cv-611-DN-DBP, 2017 U.S. Dist. LEXIS 118470, at *13 (D. Utah July 27, 2017).

²⁵⁰ *Id.* at *12-13.

²⁵¹ *Id.* It is questionable whether such a theory would or should work, because, unlike search cases, there rarely exists individual "target versus standing" issues in the seizure context. *See supra* section II.A.

²⁵² 262 U.S. 447 (1923).

²⁵³ *Id.* at 485-86 (emphasizing that "[i]t cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect [its citizens who are also] citizens of the United States, from the operation of a statute [of the United States]" upon the ground that, as applied to them, it is unconstitutional); *see also* *Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing

known as the “*Mellon* bar,” reasoning that “[t]he individual’s dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as *parens patriae* within their separate spheres of activity.”²⁵⁴ Thus, the overlapping federalism spheres within which each sovereign operates should not be disturbed to protect the rights of a citizen of both sovereigns.

The *Mellon* bar suggests suits like *Rosenblum*, wherein states challenge excessive force by federal agents against their own citizens, are automatically barred. But maybe not. While most federal circuits appear to have read *Mellon* to provide an absolute bar against states naming the federal government as a defendant, thereby denying States *parens patriae* standing against any federal defendants, the doctrine may not be as absolute as it appears.²⁵⁵ In *Pennsylvania v. Kleppe*, the court noted that “it is debatable whether the Court in [*Mellon*] meant to bar all state *parens patriae* suits against the Federal Government.”²⁵⁶ The *Mellon* Court itself prefaces its holding with a qualifier: “We need not go so far as to say that a state may *never* intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts by Congress.”²⁵⁷ The contradiction between this qualification and the flat denial of *parens patriae* standing against federal defendants, just a few sentences later, creates an ambiguity, as the *Kleppe* court recognized.²⁵⁸

Seven decades after *Mellon*, the Supreme Court acknowledged this ambiguity and arguably opened the door to another set of exceptions. In a footnote to *Massachusetts v. EPA*, the Court commented that “there is a critical difference between allowing a State ‘to protect her citizens from the operation of federal statutes’ (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has

as *parens patriae* to bring an action against the Federal Government. . . . Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants.”).

²⁵⁴ *Pennsylvania v. Kleppe*, 533 F.2d 668, 676-77 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976) (italics added).

²⁵⁵ See, e.g., *Manitoba v. Bernhardt*, 923 F.3d 173, 183 (D.C. Cir. 2019) (finding that “[t]here is no reason to treat *parens patriae* actions alleging constitutional claims against the federal government differently We doubt the Supreme Court meant in footnote seventeen to create an exception to the *Mellon* bar based on such a distinction”); *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670, 675-76 (7th Cir. 2008) (“A state may not bring *parens patriae* suit against the federal government . . .”).

²⁵⁶ *Kleppe*, 533 F.2d at 677.

²⁵⁷ *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (emphasis added).

²⁵⁸ *Kleppe*, 533 F.2d at 678 n.52 (declining to engage with the ambiguity, choosing instead to base its reading on “the narrower reading” of *Mellon*).

standing to do).²⁵⁹ A number of courts have noted the impossibility of reconciling *Massachusetts v. E.P.A.* with a reading of *Mellon* as providing an absolute bar.²⁶⁰

Generally, this pair of propositions appears to mean that a state cannot sue to question, on its *people's* behalf, the constitutionality of a given federal statute.²⁶¹ However, it may be able to sue as *patria parens* either to compel implementation of federal law or to allege that an agency act is illegal under federal law.²⁶² On this interpretation, protest policing cases bringing federal Fourth Amendment challenges to particular agency *actions* would appear to fit squarely within the permissible exception. This allowance makes sense, both as a matter of *parens patriae* purpose and *Mellon* bar exception. The core purpose of state *parens patriae* standing is to protect citizens from oppressive conduct when they cannot effectively do so themselves.²⁶³ Arguably, there can be no more oppressive power imbalance than a widespread campaign to brutalize mass groups of citizens by armed federal agents, at least where they have the blessing of the President and the benefit of operating in the unaccountable shadows. Moreover, challenging a specific unlawful executive agency action is not at odds with the structural sovereignty purpose of the *Mellon* bar, which seeks to avoid inter-sovereign battles over broad legislative prerogatives.²⁶⁴

No precedent decisions exist to test this theory in the Fourth Amendment context. But the experience of States exploring the limits

²⁵⁹ *Massachusetts v. EPA*, 549 U.S. 497, 521 n.17 (2007) (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)); cf. *Bernhardt*, 923 F.3d at 182 (“*Massachusetts v. EPA* is not a *parens patriae* case.”).

²⁶⁰ See *Aziz v. Trump*, 231 F. Supp. 3d 23, 31 (E.D. Va. 2017).

²⁶¹ A state can always file suit on its own behalf, if it can allege an injury to its own proprietary or sovereign interests, for instance by arguing that a federal law infringes on its own sovereign prerogatives. See *infra* notes 264–270.

²⁶² Cf. *Bernhardt*, 923 F.3d at 182 (rejecting this reasoning in a section flatly titled “The *Mellon* Bar Has No Exception”).

²⁶³ Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1033 (2020) (“Historically, *parens patriae* standing has been a powerful basis on which state governments have brought lawsuits to remedy problems that could not otherwise be addressed by private litigants.”).

²⁶⁴ *Pennsylvania v. Kleppe*, 533 F.2d 668, 676-77 (D.C. Cir. 1976) (exploring the federalism and sovereignty sought to be protected by the *Mellon* bar, including maintaining “the proper allocation of authorities within the federal system”); cf. David M. Howard, *State Parens Patriae Standing to Challenge the Federal Government: Overruling the Mellon Bar*, 11 N.Y.U. J.L. & LIBERTY 1089, 1129 (2018) (asserting that states “must act as *parens patriae* in place of the federal government” in such cases, which “maintains the federalism principles of our nation, the principles that most correlate to the purpose of the *parens patriae* doctrine”).

of *Mellon* bar exceptions in other contexts suggests protest policing Fourth Amendment challenges might survive standing challenges. For example, in *Aziz v. Trump*,²⁶⁵ the court allowed *parens patriae* standing for Virginia to challenge the constitutionality of the first iteration of President Trump's so-called "Muslim Ban" Executive Order. There, the court held that "a state is not to be barred by the *Mellon* doctrine from a *parens patriae* challenge to executive action when the state has grounds to argue that the executive action is contrary to federal statutory or constitutional law."²⁶⁶ Yet in three other recent cases, where states challenged the constitutionality of federal acts themselves instead of federal actions, courts denied *parens patriae* standing as prohibited by the *Mellon* bar.²⁶⁷

A final, as yet untested, theory of state standing to bring protest policing claims against the federal government involves the state's sovereign interest to bring claims when it suffers a pecuniary loss. States increasingly take on the mantle of "ideological litigant" by claiming a broad public injury has caused the state damages.²⁶⁸ This "new public standing"²⁶⁹ has allowed states the "special solicitude"²⁷⁰ to represent its citizens as public litigants under the guise of a "paradigmatic"²⁷¹ pecuniary interest. States have brought several high-profile public law cases against the federal government for financial injuries, perhaps none more famous than the travel ban litigations pursued by the States of

²⁶⁵ 231 F. Supp. 3d 31 (E.D. Va. 2017).

²⁶⁶ *Id.* at 31-32 (emphasis added) (finding *parens patriae* on the grounds that the Executive Order affected the State's quasi-sovereign interests by discriminating against a portion of its citizens after the State alleged that the order violated the First, Fifth, and Fourteenth Amendments, as well as several statutes). In later proceedings, the court granted a temporary injunction. *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017).

²⁶⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (denying South Carolina standing to challenge provisions of the Voting Rights Act of 1965 as an unconstitutional Bill of Attainder); *Connecticut ex rel. Blumenthal v. United States*, 369 F. Supp. 2d 237, 245 (D. Conn. 2005) (denying Connecticut standing to challenge the constitutionality of the Magnuson-Stevens Act under the Fifth Amendment's Due Process Clause, because it presented no evidence that any individual's due process rights were violated); *People ex rel. Hartigan v. Cheney*, 726 F. Supp. 219, 227 (C.D. Ill. 1989) (denying Illinois standing to challenge the constitutionality of the Base Closure Act).

²⁶⁸ See Davis, *supra* note 159, at 1229, 1234.

²⁶⁹ *Id.* at 1229.

²⁷⁰ *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); see also Davis, *supra* note 159, at 1283-84 (cautioning against a broad interpretation of this "special solicitude" doctrine to allow state standing "in every case in which a state sues the federal government based upon a financial injury").

²⁷¹ *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005).

Washington and Hawaii.²⁷² The doctrinal difficulty with this new public standing “is that while some financial injuries to the state mirror those to private parties, others do not,” including “quintessential” Fourth Amendment injuries.²⁷³ These cases also present the normative challenge that “state attorneys general who sue based on upon financial injuries to their states are ideological litigants” and not parties litigating direct state financial injuries.²⁷⁴ These concerns, and the admittedly uneven fit between protesters’ personal injuries from crowd control techniques and any derivative state financial injury, renders the viability of state sovereign standing in protest policing cases doubtful. For the time being at least, and if recent litigations from the Summer of Racial Reckoning are any indication, states are content to assert quasi-sovereign interests on behalf of citizens with tangible, physical, financial injuries.

CONCLUSION

Police reform deserves all the scholarly and political attention it has received in recent years. The murders of George Floyd, Breonna Taylor, and countless others serve as catalysts to remind us of the “fierce urgency of now” to resolve an entrenched, centuries-old problem in this country.²⁷⁵ Ironically, police brutality against activists demanding these reforms further illustrates the need to redefine reasonable use of force and reframe the role of law enforcement in public life. But these conversations must be guided by a better understanding of fundamental, threshold issues about the applicability of constitutional guarantees against police abuse, and thus the availability of the legal mechanisms necessary to help drive change.

This Article has attempted to sketch the contours of these threshold questions in one specific Fourth Amendment context — protest-

²⁷² See *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017) (per curiam), *vacated as moot per curiam*, 138 S. Ct. 377 (2017) (finding State of Hawaii had standing to challenge travel ban based on its proprietary interest in its public universities, which were harmed by the denial of entry of faculty, staff, and students under the ban); *Washington v. Trump*, 847 F.3d 1151, 1158-59, 1161 (9th Cir. 2017) (per curiam) (same).

²⁷³ *Davis*, *supra* note 159, at 1229.

²⁷⁴ *Id.*

²⁷⁵ Dr. Martin Luther King, Jr., “I Have a Dream” Address at the March on Washington for Jobs and Freedom (Aug. 28, 1963), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 82 (Clayborne Carson & Kris Shephard eds., 2001) (“We have . . . come to this hallowed spot to remind America of the fierce urgency of now. This is no time . . . to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism.”).

policing methods against crowds of peaceful protesters — and provide a principled theoretical roadmap for the viability of excessive force claims where existing doctrine unjustly closes the courthouse door. The present moment portends an increase in classes of demonstrators bringing dispersal-driven excessive force claims and states pursuing structural remedies in their quasi-sovereign capacities on behalf of abused protesters. The original, textual, and doctrinal support exists to recognize and hear the merits of these claims. Courts need only be willing to cross the Fourth Amendment threshold do so.