No. 15-1158

In the Supreme Court of the United States

THOMAS R. RODELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, a former county sheriff, was convicted of violating 18 U.S.C. 242 by willfully depriving an individual of his Fourth Amendment right to be free from unreasonable seizures. The conviction rested on two independent theories, reflected in the jury's special verdict finding that petitioner lacked probable cause for an arrest and used unreasonable force in making the arrest. The questions presented are:

1. Whether the court of appeals correctly held that the government was not required to prove that petitioner's victim suffered any particular quantum of injury in order to establish that petitioner's unreasonable use of force violated the Fourth Amendment.

2. Whether the court of appeals correctly upheld the jury's finding that petitioner lacked probable cause for the arrest.

3. Whether the court of appeals held that petitioner's violation of a state statute prohibiting out-of-uniform officers from making arrests for traffic offenses gave rise to a violation of the Fourth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-44) is reported at 804 F.3d 1317.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2015. A petition for rehearing was denied on December 14, 2015 (Pet. App. 152). The petition for a writ of certiorari was filed on March 14, 2016 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of willfully depriving an individual of his Fourth Amendment right to be free of unreasonable seizures, in violation of 18 U.S.C. 242, and brandishing a firearm in connection with that offense, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Petitioner was sentenced

to 121 months of imprisonment. The court of appeals affirmed. Pet. App. 1-44.

1. On March 11, 2014, while Michael Tafoya was driving in rural Rio Arriba County, New Mexico, an unmarked green Jeep approached his car from behind at high speed and began tailgating him. Tafoya flashed his brake lights, but the Jeep continued to tailgate. Frustrated, Tafoya made an obscene gesture at the Jeep's driver. Tafoya eventually pulled over to allow the Jeep to pass, and he made another obscene gesture as it went by. The Jeep responded by stopping abruptly and rapidly backing up to Tafoya's car. Two men got out of the Jeep: petitioner, who was then the sheriff of Rio Arriba County, and petitioner's son, who had been driving. Petitioner was not in uniform, and he neither showed a badge nor otherwise identified himself as a law enforcement officer. Instead, petitioner and his son walked toward Tafoya's car in an aggressive fashion, telling Tafoya to "come on." Pet. App. 3 (citation omitted); see *id.* at 2-3.

Tafoya believed that petitioner and his son wanted to fight, and he drove away to avoid a confrontation. Pet. App. 3-4. But petitioner and his son returned to their Jeep and chased Tafoya for several miles. *Id.* at 4. Tafoya feared for his safety, and in his attempt to escape he drove at speeds of up to 65 miles per hour—well in excess of the posted limit. *Ibid.* At one point during the pursuit, Tafoya rolled down his window and yelled to a jogger to "[c]all the police" because "[s]omeone [wa]s after [him]." *Ibid.* (citation omitted).

The chase ended when Tafoya's car became stuck on a metal pole as he tried to turn around in a driveway. Pet. App. 4. Petitioner then jumped into the front seat of Tafoya's car brandishing a gun, and he

and Tafoya began to struggle. *Id.* at 4-5. Tafoya pleaded "[p]lease don't kill me," but petitioner said "[i]t's too late" and attempted to point his gun at Tafoya. *Id.* at 5 (citation omitted). The struggle ended when petitioner's son pulled Tafoya out of the car and threw him to the ground. *Ibid.* When Tafoya continued to resist, petitioner's son told him to stop struggling and asked: "Don't you realize he's the sheriff?" *Ibid.* (citation omitted).

Tafoya, still lying on the ground, asked to see petitioner's badge. Petitioner responded by grabbing Tafoya's hair, slapping Tafoya across the face with his badge, pressing the badge into Tafoya's eye, and slamming Tafoya's head into the ground. Tafoya remained on the ground until deputies from the Rio Arriba County Sherriff's Office arrived and formally placed him under arrest. Tafoya was held in jail for several days, but all charges against him were eventually dismissed. Pet. App. 5-6.

2. A grand jury returned a superseding indictment charging petitioner with willfully depriving Tafoya of his Fourth Amendment right to be free from unreasonable seizures, in violation of 18 U.S.C. 242, and with brandishing a firearm in connection with that offense, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. 7. At trial, the government presented evidence that petitioner violated the Fourth Amendment by arresting Tafoya without probable cause and by using unreasonable force in making the arrest. *Id.* at 9. The district court instructed the jury that the government could establish a Fourth Amendment violation by proving either of those theories. *Id.* at 141.

The jury convicted on both counts. Pet. App. 7. With respect to the Section 242 charge, it returned a

special verdict finding that the government had proved both theories of a Fourth Amendment violation. *Id.* at 9; see *id.* at 149-150 (verdict form). The jury further found that petitioner used or threatened to use a dangerous weapon during the offense, but it did not find that he caused Tafoya to suffer "bodily injury." *Id.* at 9-10 (citation omitted).[1]

3. The court of appeals affirmed. Pet. App. 1-44.

a. As relevant here, the court of appeals first held that sufficient evidence supported the jury's finding that petitioner lacked probable cause to arrest Tafoya. Pet. App. 10-14. At petitioner's request, the district court had instructed the jury that it should determine whether the facts known to petitioner established probable cause to believe that Tafoya had committed any of four New Mexico offenses: "(1) resisting, evading or obstructing a peace officer, (2) aggravated assault on a peace officer by use of a deadly weapon (i.e., Tafoya's car), (3) careless driving, and (4) reckless driving." *Id.* at 11; see *id.* at 136-139 (jury instructions). The court of appeals held that a reasonable jury could have found a lack of probable cause as to all four crimes. *Id.* at 11-14.

The district court had instructed the jury that an individual commits the first two offenses—resisting or assaulting a peace officer—only if he knows the person he is resisting or assaulting is a law enforcement officer. Pet. App. 137-138. In this case, the court of appeals held that a reasonable jury could have found that a person in Tafoya's position "would not have

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[1] Section 242 provides a higher maximum sentence for offenses that involve the "use, attempted use, or threatened use of a dangerous weapon" or that result in "bodily injury." 18 U.S.C. 242.

known that [petitioner] was a law enforcement officer." *Id.* at 12-13.[2]

With respect to the careless driving and reckless driving offenses, the court of appeals held that "the jury reasonably could have found that * * * any careless or reckless driving that [Tafoya] engaged in was provoked by [petitioner]." Pet. App. 13. The court acknowledged that "the law regarding provocation 'is far from developed,'" but it noted that other circuits have concluded that law enforcement officers may not provoke a suspect into fleeing through fraud or threats and then rely on the flight to establish reasonable suspicion justifying a seizure. *Id.* at 13-14 (quoting *United States* v. *Jeter*, 721 F.3d 746, 753 (6th Cir.), cert. denied, 134 S. Ct. 655 (2013)). In this case, the court held that the jury could have found "that the actions of [petitioner] and his son placed Tafoya in reasonable fear of physical harm and in turn provoked Tafoya into panicking and fleeing for his safety" and, therefore, any driving offenses that Tafoya committed during his flight could not be used to establish probable cause. *Id.* at 14.

b. The court of appeals next rejected petitioner's contention that the government's excessive-force theory required proof that Tafoya suffered more than a de minimis injury. Pet. App. 14-22. The court relied on this Court's decision in *Wilkins* v. *Gaddy*, 559 U.S. 34 (2010) (per curiam), which rejected a similar argu-

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[2] The court of appeals also noted that, for the same reason, a reasonable jury could have found that petitioner "was not in 'uniform,' as defined by New Mexico law, and thus could not have legally detained or arrested Tafoya" under a state statute prohibiting out-of-uniform officers from detaining or arresting a person for a traffic offense. Pet. App. 13 (citation omitted); see *id.* at 134-135.

ment in the context of a claim that the use of force by prison guards violated the Eighth Amendment. Pet. App. 17-18. In *Wilkins*, this Court held that the Eighth Amendment requires courts to "decide excessive force claims based on the nature of the force rather than the extent of the injury." 559 U.S. at 34. This Court therefore rejected a rule that would have required proof of a "'non-*de minimis*'" injury, explaining that dismissing an Eighth Amendment excessive-force claim based on "the absence of 'some arbitrary quantity of injury' * * * improperly bypasses this core inquiry." *Id.* at 39 (citation omitted).

The court of appeals concluded that the same logic applies in this case because the Fourth Amendment, like the Eighth Amendment, focuses on the nature of the force used rather than the nature of the injury that results. Pet. App. 18-20. The court observed that its holding was consistent with decisions by the Eighth and Eleventh Circuits, which have relied on *Wilkins* in concluding that Fourth Amendment excessive-force claims generally do not require proof that the victim suffered any particular quantum of injury. *Ibid.* (citing *Saunders* v. *Duke*, 766 F.3d 1262, 1270 (11th Cir. 2014); *Chambers* v. *Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011)).[3]

[3] The court of appeals noted that courts have required proof of something more than a de minimis injury in the special context of excessive-force claims based on handcuffing. Pet. App. 17, 19-20 (citing *Chambers*, 641 F.3d at 907; *Cortez* v. *McCauley*, 478 F.3d 1108, 1128-1129 (10th Cir. 2007) (en banc)). The court agreed with the Eighth Circuit that handcuffing claims require a greater showing because "[h]andcuffing inevitably involves some use of force, and it almost inevitably will result in some irritation, minor injury, or discomfort where the handcuffs are applied." *Id.* at 19

Because the court of appeals held that the Fourth Amendment does not require proof of any particular quantum of injury, it rejected petitioner's claim that the evidence at trial was insufficient to establish that Tafoya suffered something more than a de minimis injury. Pet. App. 20-21. For the same reason, the court rejected petitioner's challenge to the district court's refusal to instruct the jury that the government had to prove that Tafoya suffered "more than de minimis physical or emotional injury." *Id.* at 21. The court of appeals also noted that, in any event, the government had introduced "more than sufficient" evidence to satisfy petitioner's proposed injury requirement because Tafoya "suffered significant emotional trauma as a result of [petitioner's] conduct in arresting him." *Id.* at 20 n.5.

ARGUMENT

Petitioner principally contends (Pet. 11-14) that a law enforcement officer's use of unreasonable force violates the Fourth Amendment only if it causes something more than a de minimis injury. The court of appeals correctly rejected that argument, and its decision neither conflicts with any decision of this Court nor implicates any circuit conflict warranting this Court's review. Petitioner also contends (Pet. 14-17) that the court of appeals erred in relying on petitioner's provocation of Tafoya's flight and on the New Mexico statute governing arrests by out-of-uniform officers in holding that petitioner lacked probable cause for an arrest. But petitioner does not contend that those aspects of the decision below conflict with

(quoting *Chambers*, 641 F.3d at 907) (citation and internal quotation marks omitted).

any decision by another court of appeals, and his arguments rest in part on a misunderstanding of the court of appeals' opinion. This case would, moreover, be a poor vehicle in which to consider all of the questions petitioner seeks to raise. Further review is therefore unwarranted.

1. Petitioner's primary argument (Pet. 11-14) is that the government's excessive-force theory required proof that Tafoya suffered a non-de minimis injury. The court of appeals correctly rejected that contention, and its decision is consistent with the decisions of every other court of appeals to consider the issue in light of this Court's resolution of an analogous question in *Wilkins* v. *Gaddy*, 559 U.S. 34 (2010) (per curiam). The Fifth Circuit has applied a different rule, but that disagreement does not warrant this Court's intervention because the Fifth Circuit has not considered the issue with the benefit of *Wilkins*. And this case would in any event be a poor vehicle in which to consider the question presented because petitioner would not be entitled to relief even if this Court resolved that question in his favor.

a. The court of appeals correctly held that a Fourth Amendment excessive-force claim does not require proof that the victim suffered any particular degree of injury. The Fourth Amendment's guarantee against unreasonable seizures includes the right to be free of the use of unreasonable force during an arrest. See, *e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989). The standard for determining whether a law enforcement officer's use of force was reasonable is "whether the officer['s] actions [we]re 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying in-

tent or motivation." *Id.* at 397. That standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer[] or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

As those factors make clear, the Fourth Amendment inquiry focuses on "whether *the force* used to effect a particular seizure is 'reasonable,'" *Graham*, 490 U.S. at 396 (emphasis added)—not on the extent of any *injury* suffered as a result. "The degree of injury is certainly relevant insofar as it tends to show the amount and type of force used." *Chambers* v. *Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011).[4] "But it is logically possible to prove an excessive use of *force* that caused only a minor *injury*, and a rule that forecloses a constitutional claim in that circumstance focuses on the wrong question." *Ibid.* Like the decision below, several other courts of appeals have thus held that—at least outside the special context of handcuffing, see note 3, *supra*—"an excessive force claim [under the Fourth Amendment] does not require any particular degree of injury." *Chelios* v. *Heavener*, 520 F.3d 678, 690 (7th Cir. 2008); see, *e.g.*, *Saunders* v. *Duke*, 766 F.3d 1262, 1270 (11th Cir. 2014) (holding

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[4] This Court has explained that under the Eighth Amendment, the extent of a prisoner's injury may be "one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation." *Wilkins*, 559 U.S. at 37 (citations and internal quotation marks omitted). "The extent of injury may also provide some indication of the amount of force applied." *Ibid.* For similar reasons, the extent of the resulting injury may be relevant in determining whether a use of force was reasonable under the Fourth Amendment.

that an excessive-force claim does not require proof of "some arbitrary quantity of injury") (citation omitted); *Chambers*, 641 F.3d at 906 (rejecting a contention that "evidence of only *de minimis* injury necessarily forecloses a claim of excessive force"); *Morrison* v. *Board of Trs. of Green Twp.*, 583 F.3d 394, 406-407 (6th Cir. 2009) (rejecting "a blanket *de minimis* injury requirement for excessive force claims").

The court of appeals' rejection of an injury requirement under the Fourth Amendment is reinforced by this Court's resolution of a parallel issue in the context of Eighth Amendment excessive-force claims. The Eighth Amendment permits force used "in a good-faith effort to maintain or restore discipline" but bars force applied "maliciously and sadistically to cause harm." *Hudson* v. *McMillian*, 503 U.S. 1, 7 (1992). In *Hudson*, this Court overruled a Fifth Circuit decision holding that a prisoner asserting an Eighth Amendment claim must demonstrate a "significant injury." *Id.* at 8. The Court explained that "[w]hen prison officials maliciously and sadistically use force to cause harm," they violate the Eighth Amendment "whether or not significant injury is evident." *Id.* at 9.

In *Wilkins*, this Court relied on *Hudson* to summarily reverse a Fourth Circuit decision holding that a prisoner bringing an Eighth Amendment claim cannot prevail "if his injury is *de minimis*." 559 U.S. at 39 (quoting *Norman* v. *Taylor*, 25 F.3d 1259, 1263 (4th Cir. 1994) (en banc), cert. denied, 513 U.S. 1114 (1995)). This Court emphasized that "[t]he 'core judicial inquiry'" is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore

discipline, or maliciously and sadistically to cause harm.'" *Id.* at 37 (quoting *Hudson*, 503 U.S. at 7). The Court therefore explained that while the extent of the injury may be a relevant consideration, "[i]njury and force * * * are only imperfectly correlated, and it is the latter that ultimately counts." *Id.* at 38. Thus, for example, "[a]n inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." *Ibid.*

b. Petitioner contends (Pet. 12-13) that the court of appeals erred in relying on *Wilkins* because the Fourth and Eighth Amendments use different language and establish different standards for excessive-force claims. The applicable standards do differ in some respects. For example, the Fourth Amendment calls for an objective inquiry, whereas the Eighth Amendment inquiry has a subjective component. Compare *Graham*, 490 U.S. at 396, with *Hudson*, 503 U.S. at 7. But the relevant point for present purposes is that both constitutional standards focus on "the nature of the force rather than the extent of the injury." *Wilkins*, 559 U.S. at 34. Accordingly, as every court of appeals that has considered the issue has concluded, this Court's rejection of an injury requirement under the Eighth Amendment counsels against imposing such a requirement under the Fourth Amendment.[5]

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[5] Pet. App. 17-18; see *Saunders*, 766 F.3d at 1270 ("We see no reason why [*Wilkins*'s] rationale should not apply in a Fourth Amendment excessive force case."); *Chambers*, 641 F.3d at 906 n.3 (explaining that although *Wilkins* "is not controlling," it "reinforce[s]" the conclusion that an injury requirement is inappropriate).

Petitioner also contends (Pet. 13-14) that an injury requirement should apply because police officers must make split-second judgments about the use of force and "should not too readily be subject to civil suit or, as here, criminal prosecution" for their actions. But the governing standard already accounts for that concern by prohibiting only *unreasonable* uses of force. This Court has emphasized that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Accordingly, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Ibid.* (citation and internal quotation marks omitted). And as the Eighth Circuit has emphasized, rejecting an injury requirement like the one petitioner advocates does not "lighten[] the significant burden that a plaintiff must carry in a [42 U.S.C.] 1983 suit based on a Fourth Amendment excessive force claim." *Chambers*, 641 F.3d at 907.[6]

Petitioner's proposed injury requirement would, moreover, yield inconsistent and potentially arbitrary results. The term "non-*de minimis*" is "ill-defined," *Wilkins*, 559 U.S. at 39, and would provide little guidance to officers, fact-finders, or reviewing courts. "Some plaintiffs will be thicker-skinned than others, and the same application of force will have different effects on different people." *Chambers*, 641 F.3d at 906. Petitioner's injury requirement would mean "that the same quantum of force, in the same circum-

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[6] Officers have even greater protection from criminal prosecution because Section 242 covers only "willful[]" violations of constitutional rights. 18 U.S.C. 242.

stances, could be unconstitutional when applied to a citizen with a latent weakness and constitutional when applied to a hardier person." *Ibid.* As the Eighth Circuit concluded, "[t]he governing rule should not turn on such unpredictable and fortuitous consequences of an officer's use of force." *Ibid.*

c. Petitioner notes (Pet. 11-12) that the decision below conflicts with a line of Fifth Circuit decisions holding that "a plaintiff asserting an excessive force claim" under the Fourth Amendment must have "'suffered at least some form of injury'" that was "more than de minimis." *Williams* v. *Bramer*, 180 F.3d 699, 703-704 (1999) (citation omitted); see, *e.g.*, *Tarver* v. *City of Edna*, 410 F.3d 745, 751-752 (2005). But the Fifth Circuit's outlier position does not warrant this Court's review. The Fifth Circuit based its injury requirement on an interpretation of this Court's decision in *Hudson* that this Court itself later rejected in *Wilkins*, and the Fifth Circuit has not considered the issue in light of *Wilkins*.[7]

Before *Hudson*, the Fifth Circuit applied a rule requiring a plaintiff asserting a Fourth Amendment excessive-force claim to "show that he suffered a 'significant injury.'" *Williams*, 180 F.3d at 703 (quoting *Johnson* v. *Morel*, 876 F.2d 477, 480 (5th Cir. 1989)). After *Hudson* "overruled the significant injury prong in the context of a claim of excessive force under the Eighth Amendment," the Fifth Circuit "appl[ied]

[7] The Fifth Circuit originally adopted the injury requirement long before *Wilkins* was decided in 2010. See, *e.g.*, *Williams*, 180 F.3d at 703-704. Petitioner also cites (Pet. 11-12) some nonprecedential decisions that post-date *Wilkins*. But none of those decisions acknowledged *Wilkins*, and it appears that no party to those cases challenged the continued vitality of the injury requirement.

Hudson" and "concluded that the plaintiff is no longer required to show a significant injury in the Fourth Amendment context either." *Ibid.* But the Fifth Circuit continued to require both Fourth and Eighth Amendment plaintiffs to establish that they suffered something more than a "de minimis" injury because it viewed that lesser injury requirement as consistent with *Hudson*. *Ibid.* (citing *Jackson* v. *Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993)).

In *Wilkins*, this Court rejected that "strained reading of *Hudson*," explaining that *Hudson* "did not * * * merely serve to lower the injury threshold for excessive force claims from 'significant' to 'non-*de minimis*'—whatever those ill-defined terms might mean." 559 U.S. at 39. Instead, *Wilkins* explained, *Hudson* "aimed to shift the 'core judicial inquiry' from the extent of the injury to the nature of the force." *Ibid.* (quoting *Hudson*, 503 U.S. at 7).

Now that this Court has squarely rejected the Fifth Circuit's understanding of *Hudson*, that court might well abandon its injury requirement if it were to consider the issue in light of *Wilkins*. And because the Fifth Circuit has not yet had an opportunity to do so, its disagreement with the other courts of appeals does not warrant this Court's intervention.

d. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it for at least two reasons.

First, petitioner would not be entitled to relief on the excessive-force theory even if this Court resolved the question presented in his favor. As the court of appeals explained, "the evidence presented by the government at trial * * * was more than sufficient to

allow the jury to find that Tafoya suffered significant emotional trauma as a result of [petitioner's] conduct." Pet. App. 20 n.5; cf. *Tarver*, 410 F.3d at 752 (holding that "psychological injuries" can satisfy the Fifth Circuit's requirement of a non-de minimis injury). And given the unrebutted testimony from Tafoya and other witnesses establishing the traumatic effect of petitioner's actions, any error in failing to instruct the jury that it had to find something more than a de minimis injury was harmless beyond a reasonable doubt. See Gov't C.A. Br. 32-34.[8]

Second, even if this Court concluded that the jury's finding that petitioner used excessive force had to be set aside, petitioner's conviction for violating 18 U.S.C. 242 would still be supported by the jury's independent finding that he lacked probable cause to arrest Tafoya. Pet. App. 9; see *id.* at 141 (jury instructions); *id.* at 149-150 (verdict form). Accordingly, petitioner would not be entitled to have his conviction vacated unless this Court also granted relief on one of his challenges to the jury's finding that he lacked probable cause for the arrest. And, as explained below, neither of those challenges implicates any disagreement among the courts of appeals or otherwise warrants this Court's review.

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[8] In addition, as the government argued below, petitioner's counsel waived any challenge to the omission of an injury requirement from the jury instructions by expressly agreeing with the district court's statement that "there is no injury requirement for the second element [*i.e.*, the Fourth Amendment violation]." C.A. Supp. App. 1472; see Gov't C.A. Br. 27-29; see also Pet. App. 21 (acknowledging that "[t]he parties dispute whether [petitioner] preserved" his claim of instructional error but declining to resolve the issue).

2. Petitioner separately contends (Pet. 15-17) that the court of appeals erred in holding that Tafoya's high-speed flight did not establish probable cause to arrest him for careless or reckless driving because petitioner provoked any traffic offenses that Tafoya committed by placing Tafoya in reasonable fear for his safety. The court relied on decisions from other circuits holding that officers may not rely on a person's flight to establish reasonable suspicion for a seizure when the officers provoked that flight by fraud or improper threatening behavior. Pet. App. 13-14 (citing *United States* v. *Jeter*, 721 F.3d 746, 754 (6th Cir.), cert. denied, 134 S. Ct. 655 (2013); *United States* v. *Franklin*, 323 F.3d 1298, 1302 (11th Cir.), cert. denied, 540 U.S. 860 (2003)). Petitioner contends (Pet. 16) that those decisions are distinguishable because they involved flight that was not itself a violation of the law, and he asserts that provocation is irrelevant where—as is allegedly the case here—the provoked flight itself involves the commission of an offense justifying an arrest. But petitioner does not suggest that the decision below conflicts with any decision of this Court or another court of appeals—indeed, he does not cite any other decision addressing comparable circumstances.

In the absence of a circuit conflict, petitioner asserts (Pet. 17) that this Court's review is warranted because the decision below will chill legitimate law enforcement activity. But petitioner errs in assuming (*ibid.*) that the court of appeals adopted a categorical rule "that an officer cannot arrest a person for an offense committed in the officer's presence" if the officer may be said to have "provoked" the offense in some sense. To the contrary, the court emphasized

that "the law regarding provocation 'is far from developed,'" Pet. App. 13 (citation omitted), and its decision must be viewed in light of the highly unusual circumstances of this case. Petitioner was not engaged in any law enforcement activity during the incident at issue here; instead, he was a passenger in a civilian car being driven by his son, who was not a law enforcement officer. *Id.* at 3. The evidence showed that petitioner and his son put Tafoya in reasonable fear for his safety by tailgating his car, by challenging him to a fight, and by chasing him when he drove away to avoid an altercation. *Id.* at 3-4, 13-14. The court held that petitioner could not establish probable cause based on alleged traffic offenses that he and his son provoked through their own threatening (and possibly criminal) behavior, but it did not adopt any categorical rule or address the relevance of provocation in the context of more typical law enforcement activity.

Even if the issue of provocation otherwise warranted this Court's review, moreover, the highly unusual circumstances of this case would make it a poor vehicle in which to consider the question presented. And this case is an unsuitable vehicle for the additional reason that a reasonable jury could have found a lack of probable cause even apart from any provocation. Petitioner's premise (Pet. 16) is that "it is undisputed that Tafoya violated New Mexico prohibitions on careless and reckless driving." But that premise is incorrect. As the jury was instructed, a person is guilty of careless driving—the lesser of the two offenses at issue—only if he operates a car "in a careless, inattentive, or imprudent manner without due regard of the width, grade, curves, corner, traffic, weather, road conditions *and all other attendant circumstances*."

Pet. App. 138-139 (emphasis added). And as the government argued below, a reasonable jury could have found that Tafoya's driving in excess of the posted speed limit was not "careless, inattentive, or imprudent" given his reasonable fear that petitioner and his son were trying to attack him. Gov't C.A. Br. 24-25 (citation omitted).[9]

3. Finally, petitioner contends (Pet. 14-15) that the court of appeals erred and departed from this Court's decision in *Virginia* v. *Moore*, 553 U.S. 164 (2008), by holding that his arrest of Tafoya violated the Fourth Amendment because it violated a New Mexico state statute prohibiting out-of-uniform officers from making arrests for traffic offenses. That argument rests on a misunderstanding of the decision below.

The courts below did not hold—and the government has never argued—that petitioner's violation of the New Mexico statute established a violation of the Fourth Amendment. The district court did instruct the jury that "[i]n New Mexico, a sheriff cannot arrest or detain an individual for a traffic violation unless he is wearing a uniform." Pet. App. 134. But the court then specifically emphasized that "[i]t is possible for a law enforcement officer to act contrary to state law without violating the United States Constitution." *Id.* at 135. Accordingly, the court instructed the jury that "if [it] determine[d] that [petitioner] acted contrary to state law, [it] should consider that evidence only in

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[9] For the same reason, a reasonable jury could have concluded that Tafoya did not commit the greater offense of reckless driving. See Pet. App. 139 (jury instruction specifying that a person is guilty of reckless driving only if, among other things, he "drove carelessly and heedlessly in a willful or wanton disregard of the rights or safety of others").

determining whether [petitioner] acted willfully" and should "*not consider this evidence in determining whether his actions violated the Constitution in the first instance*." *Ibid.* (emphasis added).

The court of appeals did observe that, because petitioner was not in uniform at the time of the arrest, New Mexico law prohibited him from detaining or arresting Tafoya for the alleged traffic offenses. Pet. App. 12-13. But the court did not suggest—and certainly did not hold—that petitioner's violation of that New Mexico statute was sufficient to establish a Fourth Amendment violation. Instead, the court made that observation in the course of holding that petitioner lacked probable cause to arrest Tafoya for resisting or assaulting a police officer because "a reasonable person in Tafoya's position would not have known that [petitioner] was a law enforcement officer" and therefore could not have committed those offenses. *Ibid.*; see *id.* at 137-138 (jury instructions specifying that a person is guilty of resisting or assaulting an officer only if he knows that the individual he is resisting or assaulting is a law enforcement officer). The court separately analyzed the existence of probable cause to arrest petitioner for careless or reckless driving, which were the only offenses potentially affected by the New Mexico statute governing arrests for "traffic violation[s]." *Id.* at 134; see *id.* at 13-14. And the court's holding that petitioner lacked probable cause to arrest Tafoya for the alleged traffic violations rested not on the fact that petitioner was out of uniform, but rather on petitioner's provocation of Tafoya's flight. *Id.* at 13-14. The court thus did not hold that petitioner's violation of the New Mexico statute gave rise to a Fourth Amendment violation,

and the question petitioner seeks to raise is not presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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