IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARLON FLORES, Defendant and Appellant.	Case No. S267522 Court of Appeal No. B305359 Los Angeles Sup. Ct. Case No. BA477784

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT MARLON FLORES

GALIT LIPA
State Public Defender

MARNIE LOWE (SBN PENDING)
Barry P. Helft Fellow
Marnie.Lowe@ospd.ca.gov

JESSIE HAWK (SBN 278762)
Senior Deputy State Public Defender
Jessie.Hawk@ospd.ca.gov

1111 Broadway, Suite 1000
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Constitutional Provisions

Other Authorities

INTEREST OF AMICUS CURIAE

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases. The Legislature has directed OSPD to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) Further, OSPD is "authorized to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional rights of those who have been convicted of crimes. Further, OSPD frequently litigates issues related to the rights of its clients to be free from unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution. (See, e.g., *In re Lance W.* (1985) 37 Cal.3d 873, 878; *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 26; *In re Tony C.* (1978) 21 Cal.3d 888, 891.)

This case presents the question of whether the Los Angeles Police Department's detention of Marlon Flores was supported by reasonable suspicion that he was engaged in criminal activity. The Court of Appeals concluded it was, but the court's decision raised two central concerns. The first is whether the court may ignore relevant contextual circumstances—namely, the pervasive perception of police as sources of sudden, deadly violence—when assessing whether the police reasonably regarded a person's conduct as suspicious. The second is whether the court may avoid engaging fully in Fourth Amendment analysis by invoking the "truth-in-evidence" provision of Proposition 8, even in the absence of controlling United States Supreme Court precedents.

OSPD submits this brief to assist the Court in resolving these important questions. In so doing, OSPD seeks to encourage the Court to recognize that the totality of the circumstances encompasses contemporary social context, including the fear of police violence, and to clarify that Proposition 8 does not negate the courts' authority and obligation to assess Fourth Amendment claims on their specific facts, except in limited circumstances. Only by directing that the lower courts take a contextual, case-by-case approach to such claims can the Court ensure Californians retain the full protections guaranteed them by the Fourth Amendment.

INTRODUCTION

The Second District Court of Appeal incorrectly concluded that the police had reasonable suspicion to seize a solitary pedestrian when he stood on the sidewalk next to his car, bent over to tie his shoe, and did not immediately rise when police confronted him. This error requires reversal.

The facts in this case are essentially uncontested: one night in May 2019, a patrol car drove into a cul-de-sac, where officers observed Marlon Flores standing on the street side of a parked sedan. Mr. Flores did not flee. Instead, he looked toward the approaching car, then walked to the sidewalk on the rear passenger side of the sedan and bent down. Although temporarily out of view, Mr. Flores was not hiding: after the patrol car pulled up behind the sedan, Mr. Flores stood up in full view, stretched, looked in the direction of the patrol car, and then bent again. The police officers had not yet exited their vehicle. A few seconds later, Mr. Flores again stood up briefly and then again bent down. When police officers ultimately exited their vehicle, illuminated Mr. Flores with a flashlight, and ordered him to "post up," he remained in the bent-over position for a few seconds, appearing to tie his shoe, before rising. The entire encounter lasted just over one minute. (Appellant's Opening Brief ("AOB") at p. 14; Respondent's Brief on the Merits ("RB") at pp. 11-12; Def. Exh. A.)

The trial court concluded that it would expect "any normal human being" to stand up immediately and speak to the approaching officers once illuminated by a flashlight. (*People v. Flores* (2021) 60 Cal.App.5th 978, 987 (*Flores*).) Instead, the court

noted, Mr. Flores remained bent over for some seconds, "toying with his feet." (*Ibid.*) The court additionally found it suspicious that, as the officers commanded Mr. Flores to stand up (but see fn. 6, *post*), he remained bent over and did not immediately respond. (*Id.* at p. 988.)

The Court of Appeal affirmed. In doing so, the court failed to account for the impact of longstanding (and more recently, highly publicized) police violence on police-community relations. Accordingly, like the trial court, it excluded from "normal human" behavior reactions to police presence that demonstrate fear, caution, or simply a desire to avoid further engagement—in other words, common-sense reactions in heavily policed communities and many communities of color. Taken in context, Mr. Flores's decision to remain in place as police advanced on him was not only insufficient to create reasonable suspicion of criminal activity, but was perhaps the most prudent course of action available.

The Court of Appeal also improperly circumscribed its analysis by mischaracterizing *Illinois v. Wardlow* (2000) 528 U.S. 119 (*Wardlow*) and, invoking Proposition 8's "truth-in-evidence" provision, treating *Wardlow* as controlling precedent that tied the court's hands. But because neither the facts nor holding of *Wardlow* controls this case outright, Prop. 8 has no effect on the merits of Mr. Flores's claim. Prop. 8 also does not relieve the court of its independent duty to interpret and apply the U.S. Constitution—a duty the court neglected here.

ARGUMENT

A. The reality of highly publicized instances of police violence and their impact on the "reasonable person" must be considered in a totality-of-the-circumstances analysis of a *Terry* stop

The Court of Appeal erred in concluding the police had reasonable suspicion that Mr. Flores was engaged in criminal activity, justifying his seizure. At the core of this error, the court did not account for the totality of circumstances relevant to the seizure. Specifically, the majority below wholly ignored the reality of police violence and how that violence, and pervasive recognition of potential violence, predictably shape reactions to the presence of police. Properly factoring in this context, Mr. Flores's conduct did not give the police the basis for a lawful investigatory seizure.

1. The Supreme Court unequivocally requires that courts consider the totality of the circumstances to evaluate reasonable suspicion

Contrary to the Court of Appeal's reasoning, courts may not simply defer to a police officer's "judgments and inferences about human behavior" when assessing the legality of a detention. (See *Flores*, *supra*, 60 Cal.App.5th 978, 990.) Doing so results in mechanically ratifying stops based on nothing more than an officer's "inchoate and unparticularized . . . 'hunch'" that a person is up to no good. (See *Wardlow*, *supra*, 528 U.S. at pp. 123-124 [quoting *Terry v. Ohio* (1968) 392 U.S. 1, 27 (*Terry*)]; accord *In re Tony C.*, *supra*, 21 Cal.3d 888, 894.) Rather, the court must determine whether the police had "reasonable and articulable suspicion that the person

seized [was] engaged in criminal activity." (*Reid v. Georgia* (1980) 448 U.S. 438, 440.)

In making this reasonable-suspicion determination, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." (*United States v. Arvizu* (2002) 534 U.S. 266, 273 (*Arvizu*) [quoting *United States v. Cortez* (1981) 449 U.S. 411, 417-418].) This mandate is a clear throughline across decades of United States Supreme Court precedent. (See, e.g., *Navarette v. California* (2014) 572 U.S. 393, 396-397; *Georgia v. Randolph* (2006) 547 U.S. 103, 125 (conc. opn. of Breyer, J.) [collecting cases].) In every case, the Supreme Court has "deliberately avoided reducing [the concept of reasonable suspicion] to a neat set of legal rules," in favor of the totality-of-the-circumstances approach. (*Arvizu*, *supra*, 534 U.S. at p. 274 [internal quotation marks omitted].) This Court has remained similarly steadfast. (See, e.g., *People v. Tacardon* (2022) 14 Cal.5th 235, 241; *People v. Hernandez* (2008) 45 Cal.4th 295, 299; *People v. Souza* (1994) 9 Cal.4th 224, 227, 235.)

The Supreme Court's decision in *Illinois v. Wardlow* is no exception—despite the Court of Appeal's suggestion to the contrary (see *Flores*, *supra*, 60 Cal.App.5th at p. 981; see also Section B.2, *post*). In *Wardlow*, the defendant, holding an "opaque bag," fled upon seeing police in an area where police expected to find a crowd engaging in drug transactions. (*Wardlow*, *supra*, 528 U.S. 119, 121-122.) The Supreme Court held, based on the case's specific facts, that the police had reasonable suspicion of criminal activity to

support Mr. Wardlow's detention. (*Id.* at pp. 124-125.) Although the Court stated that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion" (*id.* at p. 124), it did not set out a rule that any "flight"—let alone any nervous or evasive action—in an area the police call "high-crime," at night, necessarily justifies a *Terry* stop. (See *id.* at p. 126 (conc. opn. of Stevens, J.) ["The Court today wisely endorses [no] *per se* rule."].) Rather, in accord with the unbroken string of precedents before and since, *Wardlow* represents a fact-driven approach that endorsed accounting for all the "relevant contextual considerations" affecting the reasonable-suspicion analysis. (See *id.* at p. 124 (maj. opn.).)

2. Visceral, highly salient incidents of police violence shape reasonable responses to law enforcement interactions and must be considered as a circumstance affecting any stop

One contextual consideration undeniably alters how people perceive police and therefore how police might reasonably expect people to react in street encounters: the widespread visual documentation of police killing unarmed people, often in escalations of "routine" law enforcement. To be sure, instances of police violence against members of marginalized communities are hardly new. (See Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.* (May 29, 2020) Smithsonian Magazine <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> (as of Jan. 4, 2024) [documenting racially disproportionate levels of police killings as early as the 1920s].) Indeed, even at the time of *Wardlow*, Justice Stevens voiced the prescient concern—even with respect to outright

flight—that a simplistic approach associating flight from police with criminal activity "fails to account for the experiences of many citizens of this country, particularly those who are minorities." (*Wardlow*, *supra*, 528 U.S. at p. 129, fn. 3 (conc. opn. of Stevens, J.).)

The 21st-century technological and social environment has vastly amplified the impacts of police violence on community behavior: specific instances of this violence can now proliferate near-instantaneously throughout the national popular consciousness. The deaths of Eric Garner and Michael Brown in 2014 were among the first police killings to gain widespread online attention.[1] Since then, viral instances of police violence have recurred with tragic, outrageous regularity. By 2019, few people in the country remained unaware of or unaffected by this context.[2] This pervasive media exposure demands that courts accord careful attention to the

---

[1] Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof* (2018) 18 Nev. L.J. 1091, 1100.

[2] See Stafford & Fingerhut, *AP-NORC Poll: Sweeping Change in US Views of Police Violence*, AP News (Jun. 17, 2020) <https://apnews.com/article/728b414b8742129329081f7092179d1f> (as of Jan. 4, 2024) (showing two out of three Americans considered police violence against the public a "serious" problem a few months after Freddie Gray's killing in 2015, rising to nearly 80 percent by 2020); Alemany, *Power Up: There's Been a Dramatic Shift in Public Opinion About Police Treatment of Black Americans*, Washington Post (Jun. 9, 2020) <https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/06/09/powerup-there-s-been-a-dramatic-shift-in-public-opinion-over-police-treatment-of-black-americans/5edef042602ff12947e87b23/> (as of Jan. 4, 2024) (showing Americans in 2020 overwhelmingly believed police killing of Black men represents a broader problem in how police treat Black people, a dramatic difference from similar polling in 2014).

impacts of police violence when conducting an objective, totality-of-the-circumstances analysis.

High-profile killings represent the gravest possible outcomes, but courts should also account for a person's reasonable apprehension of lesser—but still serious—escalations of police encounters. Mr. Flores's arrest presents one such example. (See generally Def. Exh. A.) The police advanced on Mr. Flores as he stood on the sidewalk tying his shoes and immediately initiated a seizure. (See Section A.3, *post*.) As soon as Mr. Flores stood up, an officer handcuffed him despite no apparent reason to suspect him of physical threat or flight. (Cf. *People v. Stier* (2008) 168 Cal.App.4th 21, 27 ["Generally, handcuffing a suspect during a detention has only been sanctioned in cases where the police officer has a reasonable basis for believing the suspect poses a present physical threat or might flee."].) Immediately after that, the officer searched Mr. Flores's person without formal arrest or reason to think he was armed and dangerous. (Cf. *Terry*, *supra*, 392 U.S. 1, 27 [holding that, absent arrest, an officer may undertake a pat-down search only "where he has reason to believe that he is dealing with an armed and dangerous individual"].) At each step of the seconds-long encounter, the police further constrained Mr. Flores's liberty—a sudden and baseless escalation that exemplifies the aggression that members of heavily policed communities regularly face.[3]

---

[3] Cf. Am. Civil Liberties Union of Southern Cal., A Study of Racially Disparate Outcomes in the Los Angeles Police Dept. (Oct. 2008) <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf> (as of Jan. 4, 2024) (concluding that Black and Latino

Apprehension of this aggression would naturally make someone reluctant or afraid to engage with police.

Consequently, a reasonable officer in 2019 would expect community members to be aware—more than ever—that some members of law enforcement escalate interactions with unarmed people without cause, and that these interactions sometimes culminate in deadly violence. (See *Ornelas v. United States* (1996) 517 U.S. 690, 696 [directing that reasonable suspicion be assessed "from the standpoint of an objectively reasonable police officer"].) A reasonable police officer would further expect this widespread awareness to shape the reaction of anyone who unexpectedly became a target of coercive police attention, especially when alone and late at night. This dynamic is particularly relevant when assessing the conduct of Black and Latino community members, who have collectively been subject to disproportionate levels and frequency of police violence.[4] But regardless of a person's identity,

---

residents of Los Angeles are stopped, frisked, searched, and arrested at disproportionate and alarming rates).

[4] See Davis, et al., DOJ Bureau of Justice Statistics, Contacts Between Police and the Public (2015) pp. 16-17 <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> (as of Jan. 4, 2024) (reporting that "Blacks . . . and Hispanics . . . were more likely than whites . . . to experience the threat or use of force" by police); Mapping Police Violence (Nov. 30, 2023) <https://mappingpoliceviolence.org> (as of Jan. 4, 2024) (showing that, in California, Black people are 3.6 times more likely to be killed by police than White people); *Fatal Police Violence by Race and State in the USA, 1980-2019: A Network Meta-Regression* (2021) 398 Lancet 1239 (showing Hispanic people were killed by police at a rate 1.8 times that of non-Hispanic White people).

the scope of what is considered a reasonable or non-suspicious reaction to police targeting must factor in this contemporary social context. (See *Flores*, *supra*, 60 Cal.App.5th at p. 993 (dis. opn. of Stratton, J.).)

Doing so requires no departure from longstanding Fourth Amendment doctrine—the pervasive perception of police officers as potential sources of sudden and fatal violence is merely one of the totality of circumstances surrounding a stop. Indeed, courts across the country are increasingly acknowledging and accounting for the realities of police harassment and violence and their effects on police-community relations, particularly among communities of color. (See, e.g., *Washington v. State* (2022) 482 Md. 395, 432-434; *United States v. Brown* (9th Cir. 2019) 925 F.3d 1150, 1156-1157; *Miles v. United States* (D.C. 2018) 181 A.3d 633, 641-644; *Commonwealth v. Warren* (2016) 475 Mass. 530, 539-540; *Jamison v. McClendon* (S.D.Miss. 2020) 476 F.Supp.3d 386, 413-415; see also *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 30-31 (conc. opn. of Liu, J.); *In re Edgerrin J.* (2020) 57 Cal.App.5th 752, 770-772 (conc. opn. of Dato, J.).) This Court can and must likewise confront these realities head-on, not look the other way.

Contrary to the State's assertion (RB at p. 35, fn. 5), accounting for social context is entirely compatible with an objective, reasonable-person standard. Take this case as an example. The central question is whether the police had reasonable suspicion, based on particular and objective facts, that Mr. Flores was engaged or about to engage in criminal activity. Because that inquiry requires consideration of all relevant contextual factors, it was both

reasonable and necessary for police to account for their own likely effect on Mr. Flores before concluding that his behavior was suspicious—particularly where, as here, the only relevant behavior was in reaction to the actions of police. (See *Terry*, *supra*, 392 U.S. at p. 17, fn. 14 [stating that "the degree of community resentment aroused by particular [abusive police] practices is clearly relevant" to assessing an investigatory detention]; *Kansas v. Glover* (2020) 589 U.S. __ [140 S.Ct. 1183, 1189-1190] [directing that officers should draw on "information that is accessible to people generally" to assess whether a person's conduct can reasonably be considered suspicious].) Factoring in such context requires no subjective assumptions about an individual's feelings about law enforcement. It only requires awareness and acknowledgment of the contemporary climate of police-community relations, something a reasonable officer would know.[5]

3. Under the totality of the circumstances, the police unlawfully detained Mr. Flores

Applying these principles, the totality of the circumstances surrounding Mr. Flores's detention did not give police reasonable suspicion that he was engaged in criminal activity—regardless of the point at which he was detained. The trial court found, and the

---

[5] See Morin et al., *Police, Fatal Encounters and Ensuing Protests* (Jan. 11, 2017) Pew Research <https://www.pewresearch.org/social-trends/2017/01/11/police-fatal-encounters-and-ensuing-protests/> (as of Jan. 4, 2024) (finding that three-quarters of police officers perceived increased tensions with Black communities and more than 80 percent felt that high-profile police killings had affected their work).

Court of Appeal affirmed, that the detention occurred "when the officer told Flores to stand and put his hands behind his head."[6] (*Flores*, *supra*, 60 Cal.App.5th 978, 989.) This conclusion was incorrect. When police encounter a person who is not en route somewhere, a seizure occurs at the point a reasonable person would no longer "feel free to decline the officers' requests or otherwise terminate the encounter." (*Florida v. Bostick* (1991) 501 U.S. 429, 435-436.) This test applies here, where police seized Mr. Flores while he stood next to his parked car. Therefore, the seizure occurred as soon as the officers began their approach. A reasonable person in Mr. Flores's position would not have felt free to "terminate the encounter" once the officers boxed him in with their car,

---

[6] Contrary to this characterization, no one ever told Mr. Flores to stand. Both officers said to "post up," an ambiguous phrase that a person could reasonably understand as an order to remain still, or at least one that would reasonably give a person pause as they figured out what police meant in context. (See Def. Exh. A at 00:01:02-00:01:12.) "Post up" is understood—both widely and specifically in California—to mean "wait around," "hang out," or "stay in one place," without any connotation of rising to stand upright. (See *5 California Slang Words Every English Student Needs to Know* (June 23, 2013) Converse International School of Languages <https://cisl.edu/5-california-slang-words-every-english-student-needs-to-know/> [as of Jan. 4, 2024]; *10 California Slang Words You Need to Know* (Mar. 9, 2018) International Education Center at Orange Coast College <https://iec-occ.edu/blog/10-california-slang-words-you-need-to-know/> [as of Jan. 4, 2024]; Hodge, *Slang Dictionary* (Oct. 6, 2018) Writing Academy Blog <https://blog.writingacademy.com/slang-dictionary/> [as of Jan. 4, 2024].) Both the State and the lower courts gloss the officers' commands as orders to "stand" without explaining their interpretation. (RB at p. 10; *Flores*, *supra*, 60 Cal.App.5th at pp. 982, 986, 988.)

emergency lights flashing;[7] spotlighted him with a "huge light" (*Flores*, *supra*, 60 Cal.App.5th at p. 987); and advanced on him from multiple directions. (See AOB at pp. 18-22; see also *Flores*, *supra*, 60 Cal.App.5th at p. 992 [dis. opn. of Stratton, J.].)

But even accepting, arguendo, that the police did not seize Mr. Flores until they ordered him to "post up," the police still lacked any reasonable suspicion that Mr. Flores was engaged in criminal activity—especially after factoring in the fraught police-community relations described above. The Court of Appeal cited three of the trial court's factual findings as the basis for the officers' reasonable suspicion: (1) Mr. Flores "tried to avoid contact" with police by "ducking down" behind his car when he saw the officers, (2) he was "toying with his feet" while the officers approached, and (3) he remained bent over for an extended period of time despite the obvious police presence. (*Flores*, *supra*, 60 Cal.App.5th at p. 989.) Assuming without conceding these findings were based on

---

[7] The State argues that it is "unclear" when or from where "possible flashing emergency lights" were activated during Mr. Flores's detention. (RB at p. 24, fn. 5.) But the record is clear. The flashing emergency lights are plainly visible in the bodycam video that the defense entered into evidence during the suppression hearing—their use was not a mere "possibility." (Def. Exh. A at 00:00:52-00:01:06; 00:01:28-00:01:31; 00:01:57-00:02:04.) The police cruiser on scene is the only reasonable source of the lights, and the video shows the lights were on before the officers first engaged Mr. Flores directly. And the fact that the police activated their emergency lights before approaching Mr. Flores on foot weighs in favor of concluding that a seizure occurred. (See *Tacardon*, *supra*, 14 Cal.5th at pp. 241-242.)

substantial evidence and merit deference, they are legally insufficient.

On their face, the three factual findings on which the Court of Appeal relied do not give rise to a reasonable suspicion of criminal activity. Mr. Flores had the right "to refuse to engage in, and to affirmatively avoid, consensual contact with police." (See RB at p. 10; accord *Florida v. Royer* (1983) 460 U.S. 491, 497-498 (plur. opn. of White, J.) (*Royer*); *United States v. Mendenhall* (1980) 446 U.S. 544, 553 (*Mendenhall*) [citing *Terry*, *supra*, 392 U.S. at pp. 32-33 (conc. opn. of Harlan, J.)].) No evidence from the hearing or reasoning from the courts below establishes how "ducking" and "toying" with one's feet for a few seconds gives any reason to suspect "loitering for the use or sales of narcotics," as the police later alleged. (See *Flores*, *supra*, 60 Cal.App.5th at p. 983). At the least, remaining in place and appearing to silently tie one's shoes is no more suspicious than outright walking away; indeed, it is merely another form of ignoring police and "going about one's business," which a person is explicitly permitted to do if not yet detained. (See *Wardlow*, *supra*, 528 U.S. at p. 125 [noting "an individual, when approached, has a right to ignore the police and go about his business" and also a "right to . . . stay put and remain silent"]; *Mendenhall*, *supra*, 446 U.S. at p. 554.) And even if, by remaining bent over for a few extra seconds, Mr. Flores could be said to have refused to cooperate with the officer's (ambiguous) order to "post up," mere refusal could not justify his seizure. (*Florida v. Bostick*, *supra*, 501 U.S. 429, 437 ["We have consistently held that a refusal

to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."].).

These facts bear even less analytical weight when placed in their contemporary context. As discussed above, unpredictable, deadly police violence in street encounters, especially within heavily policed communities of color, permeated the zeitgeist when this stop occurred. This circumstance is highly relevant to assess whether a person's reaction to police presence was "suspicious," or merely a natural, rational response to the potential for physical harm or other hostile interaction. A reasonable police officer, aware of this context, would not find it suspicious for Mr. Flores to move from the street to the sidewalk as a police cruiser drove toward him, engage in visibly innocuous actions like stretching and tying his shoes, and then take less than 15 seconds to rise as officers confronted him directly.[8]

It was therefore error for the Court of Appeal to conclude that Mr. Flores's actions were beyond what "reasonable and prudent" people do when confronted by police. (See *Flores*, *supra*, 60 Cal.App.5th 978, 989-990.) It was also error for the court to implicitly endorse the trial court's observation that a "normal human being" in Mr. Flores's circumstances would not hesitate to stand up when police approach and give a command. (*Id.* at pp. 987-

---

[8] The State inaccurately asserts that Mr. Flores "remained in a crouched position for more than 20 seconds after being ordered to 'post up.'" (RB at p. 29.) The bodycam footage makes clear that only about 13 seconds elapses between the first command to "post up" and Mr. Flores rising to stand. (Def. Exh. A at 00:01:02-00:01:15.) Although neither duration could reasonably be said to be indicative of criminal activity, 13 seconds provides even less basis for reasonable suspicion.

988.) For someone in Mr. Flores's position, it would be perfectly "normal," "reasonable and prudent" to avoid suddenly standing or moving his hands away from his feet, lest he become one more unarmed man shot by police because they believed their victim was turning around too fast or reaching for a weapon in his waistband.[9] Mr. Flores did not flee or object upon hearing the police commands; instead, he remained in place with his hands far from anywhere that could plausibly conceal a weapon. Especially given the ambiguity inherent in the police's instruction to "post up" (see fn. 6, *ante*), Mr. Flores's conduct can only be described as reasonable and prudent.

The Court of Appeal's suggestions that "prudent" and "normal" people have no reason to shy away, hesitate, or do anything other than take immediate responsive action when confronted by police—despite widespread, tragic indications to the contrary—ignores the realities faced by people of color and those in heavily policed neighborhoods like Mr. Flores. Such willfully acontextual analysis has no place in our system of justice, and the Court should reject this logic.

---

[9] See Arce, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police* (July 21, 2020) Time Magazine <https://time.com/5869568/latinos-police-violence> (as of Jan. 4, 2024) (describing shooting of Sean Monterrosa in Vallejo, whom police later claimed "abruptly turned toward the officers"); Balko, *When Unarmed Men Reach for Their Waistbands*, Washington Post (Aug. 29, 2014) <https://www.washingtonpost.com/news/the-watch/wp/2014/08/29/when-unarmed-men-reach-for-their-waistbands/> (as of Jan. 4, 2024) (collecting cases of police shootings of unarmed men who allegedly reached for their waistbands, including Caesar Cruz, whom Anaheim police shot in a parking lot).

B. Proposition 8 does not constrain Fourth Amendment analyses when no clear-cut federal constitutional rule applies

Forcefully concluding the introduction of its opinion, the Court of Appeal highlighted that it was, under Proposition 8, bound to apply only federal constitutional law. Framing its analysis of Mr. Flores's seizure, the court below first characterized *Wardlow* as establishing a bright-line rule: "[U]nprovoked flight upon noticing the police entering a high crime area gives an officer a reasonable basis to detain the runner to investigate further." (*Flores*, *supra*, 60 Cal.App.5th at p. 981 [citing *Wardlow*, *supra*, 528 U.S. at pp. 121-125].) Citing this Court's opinion applying Proposition 8 in *People v. Souza*, *supra*, 9 Cal.4th 224, 232-233, the court explained that its hands were tied: "This federal approach governs us. We are not permitted some state law departure." (*Ibid.*)

To the extent the Court of Appeal concluded that Prop. 8's "truth-in-evidence" provision compelled its decision, the court erred. By overreading both Prop. 8 and *Wardlow*, the court hamstrung its own Fourth Amendment analysis and failed in its duty to engage meaningfully with the merits of Mr. Flores's suppression motion.

To be sure, in line with decisions of this Court interpreting the scope of Prop. 8, the lower court correctly indicated that it could not suppress evidence on the sole basis of state law or state constitutional provision. It was incorrect, however, to assert that this principle applied to Mr. Flores's case, or that *Wardlow* or any other federal constitutional doctrine prevented the court from granting an exclusionary remedy. The court's resulting reasoning

was legally unsound, and its denial of the suppression motion must be reversed.

1. The Court of Appeal erred in extending Prop. 8's "truth-in-evidence" provision beyond its limited purpose

Proposition 8's "truth-in-evidence" provision has never applied to the type of federal constitutional argument raised here. The relevant portion of this provision, as captured in the California Constitution, provides:

> Right to Truth-in-Evidence. . . . [R]elevant evidence shall not be excluded in any criminal proceeding . . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. . . .

(Cal. Const., art. I, § 28(f)(2).) As the Court explained shortly after Prop. 8's enactment, this provision has a meaningful, but limited, impact on search-and-seizure cases in California: it does not affect what constitutes an unlawful search or seizure, but it eliminates exclusionary remedies for unlawful searches or seizures "except to the extent that exclusion remains federally compelled." (*In re Lance W.*, *supra*, 37 Cal.3d 873, 886-887; see also *People v. May* (1988) 44 Cal.3d 309, 319 [concluding that the intent of this provision was "to preclude . . . reliance on the state Constitution to create new exclusionary rules rejected by applicable decisions of the United States Supreme Court"].) By raising a Fourth Amendment claim, Mr. Flores only asked the court to suppress evidence as is "federally compelled"; he made no argument relying on state law that Prop. 8 would foreclose.

There was therefore no reason for the Court of Appeal to invoke *Souza*'s application of that provision. In *Souza*, this Court considered what precedential value remained in an earlier decision, *People v. Aldridge* (1984) 9 Cal.4th 224 (*Aldridge*), that assessed the lawfulness of an investigatory stop under the state Constitution. The Court concluded that *Aldridge* was not "pertinent authority" for its analysis because *Aldridge*'s holding "rested solely on California constitutional grounds." (*Souza*, *supra*, 9 Cal.4th at pp. 232-233.) Instead, *Souza* assessed the facts of the seizure in question under United States and California Supreme Court decisions that applied Fourth Amendment precepts. (*Ibid.*) This mode of analysis is all that Prop. 8 requires—not, as the Court of Appeal apparently understood, that the court deny exclusionary remedies whenever the United States Supreme Court has considered a case with superficially similar facts and therein denied relief.

In sum, Prop. 8 forecloses relief in search-and-seizure cases only in the rare instances when, on the basis of the state constitution or a state statute, a party asks for an exclusionary remedy that is untethered from or in direct opposition to federal constitutional doctrine. (See, e.g., *People v. McKay* (2002) 27 Cal.4th 601, 608-612; *In re Lance W.*, *supra*, 37 Cal.3d at pp. 884-885.) "In the absence of a decision by the high court directly on point, [California courts] must fulfill [their] independent constitutional obligation to interpret the federal constitutional guarantee against unreasonable searches and seizures . . . ." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 78-79 (overruled on other grounds); see also *People v. Neer* (1986) 177 Cal.App.3d 991, 998 ["Our state Supreme Court is

powerless to mandate exclusion of evidence because of Fourth Amendment violations *only* when the United States Supreme Court has held otherwise."].) As explained below, in this case no United States Supreme Court decision is directly on point, meaning Prop. 8 provided no reason for the lower court to abdicate its duty to grapple with the constitutional question presented. By doing so, the court erred.

2. The Court of Appeal erred in reading *Illinois v. Wardlow* to endorse a bright-line rule, rather than engaging its factual specifics

The Court of Appeal's self-limitation resulted from reading too much into the holding of *Illinois v. Wardlow* and not enough into its facts. *Wardlow* does not establish a bright-line rule regarding reasonable suspicion, and the circumstances it contemplates diverge substantially from those involved here. Therefore, neither *Wardlow* itself nor its possible application via Proposition 8 forecloses the exclusionary remedy Mr. Flores seeks. Moreover, the ramifications of the lower court's flawed reasoning extend beyond the specific context of this case.

From the outset, the Court of Appeal mischaracterized *Wardlow*'s holding. As mentioned above, the court declared that *Wardlow* established a rule that "unprovoked flight upon noticing the police entering a high[-]crime area gives an officer a reasonable basis to detain the runner to investigate further." (*Flores*, *supra*, 60 Cal.App.5th at p. 981.) But *Wardlow* contains no such cut-and-dry pronouncement; rather, the United States Supreme Court identified the relevant inquiry more generally as "whether the circumstances

[were] sufficiently suspicious to warrant further investigation," accounting for "relevant contextual considerations." (*Wardlow*, *supra*, 528 U.S. at p. 124.) *Wardlow* does not define or limit the scope of those relevant contextual considerations, in line with the Supreme Court's invariable endorsement of a broad, totality-of-the-circumstances approach. (See Section A.1, *ante*.) Indeed, other Courts of Appeal have expressly confirmed this point. (See, e.g., *People v. (Antonino) Flores* (2019) 38 Cal.App.5th 617, 631 [directly rejecting the contention that "'flight' plus 'high crime area' equals reasonable suspicion for a detention" because *Wardlow* "did not make such a bright-line holding"].) Per Prop. 8, the lower court could not itself create a new bright-line rule that runs contrary to the Supreme Court's case-by-case standard. Therefore, the rule the court attributed to *Wardlow* could not control this case's outcome.

Wardlow also fails to control this case by analogy, because its facts are significantly different than those presented here. Nothing in this case's record suggests police anticipated encountering other people in the immediate vicinity, let alone numerous others currently engaged in drug sales or use. (Cf. *Wardlow*, *supra*, 528 U.S. at p. 121 [stating that officers, investigating drug transactions, "expected to find a crowd of people in the area, including lookouts and customers"].) Mr. Flores held nothing in his hands, suggestive of drug transactions or otherwise. (Cf. *id.* at pp. 122 [noting Mr. Wardlow was holding an "opaque bag" that officers suspected contained a weapon].) And, perhaps most importantly, *there was no flight*. Mr. Flores remained in place as he watched the officers approach, and any of his actions that could be characterized as

"nervous" or "evasive" fell far short of running away from police. (Cf. *id.* at pp. 124-125 [contrasting Mr. Wardlow's "[h]eadlong," "unprovoked flight upon noticing the police" with "the individual's right to go about his business or to stay put and remain silent in the face of police"].) Finally, as explored above in Section A.2, Mr. Wardlow and the police who detained him in 1995 were not steeped in the cultural and media environment of 2019, in which a long series of highly publicized instances of police violence against unarmed people of color necessarily informed police-community interactions.

These differences materially distinguish Mr. Flores's circumstances from those in *Wardlow*, preventing *Wardlow* from determining the outcome here outright. Moreover, all of these distinctions cut *against* a conclusion of reasonable suspicion, rendering the Court of Appeal's deference to *Wardlow*'s outcome even more inapt.

The harm of this sort of analytical abdication reaches farther than the outcome of one case. Search and seizure decisions from the U.S. Supreme Court are relatively sparse, meaning they cannot resolve each of the "endless variations in the facts and circumstances implicating the Fourth Amendment." (*Ohio v. Robinette* (1996) 519 U.S. 33, 39 [internal quotation marks omitted].) Consequently, the span of rights and protections guaranteed under the Fourth Amendment cannot extend only to the specific situations the U.S. Supreme Court has explicitly addressed. (Cf. *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352 [invalidating a measure under which "ultimate protection of criminal defendants

from deprivation of their constitutional rights would be left in the care of the United States Supreme Court"].) Rather, California courts play an integral role in developing the contours of constitutional doctrine and ensuring its fair application, and they do so by thoroughly evaluating the facts of each case against Fourth Amendment principles. The Court of Appeal's dereliction of this duty here was error.

3. The Court of Appeal erred in failing to weigh the totality of the circumstances surrounding Mr. Flores's detention

Because of the errors above, the Court of Appeal did not fully engage with the totality of the circumstances surrounding Mr. Flores's detention. Had it done so, it would necessarily have arrived at the conclusion reached above in Section A.3: the police seized Mr. Flores without reasonable suspicion of criminal activity, requiring the exclusion of the evidence obtained as a result.

Although the Court of Appeal recounted the facts surrounding Mr. Flores's seizure, its resulting analysis lacked the rigor necessary to ensure a fair and reasoned outcome. First, the court offered no reasoning to support its conclusion that "[t]he *Terry* stop began when the officer told Flores to stand and put his hands behind his head." (*Flores*, *supra*, 60 Cal.App.5th at p. 989.) A multitude of factors—including the use of emergency lights, the positioning of the cars, and the fact that the armed officers outnumbered Mr. Flores—suggest the detention occurred earlier. (See *ante*, Section A.3.) The Court of Appeal left unsaid how these factors weighed in its analysis.

Second, and more troubling, the Court of Appeal was nearly as conclusory in affirming that the police had reasonable suspicion of criminal activity to justify the seizure. It reiterated the trial court's findings and characterized Mr. Flores's behavior as "unlikely," "unusual[]," and "suspicious[]." (*Flores*, *supra*, 60 Cal.App.5th at p. 990.) In so doing, the court did not explain how Mr. Flores's conduct (remaining temporarily disengaged from the officers while intermittently standing and crouching and then seeming to tie his shoe) was a sign, subtle or otherwise, of any form of specific criminal conduct. Indeed, the Court of Appeal explicitly disclaimed that Mr. Flores's actions, even in combination, "establish[ed] Flores was engaged in illegal drug activity." (*Id.* at p. 989.) Yet this Court's precedent is clear: "to be reasonable, the officer's suspicion must be supported by some specific, articulable facts that are '*reasonably consistent with criminal activity*.'" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083 [quoting *In re Tony C.*, *supra*, 21 Cal.3d at p. 894], italics added and internal quotation marks omitted.)

Nor did the Court of Appeal attempt to distinguish Mr. Flores's conduct from merely avoiding police interaction—something Mr. Flores, like any person, had the right to do. (See *Royer*, *supra*, 460 U.S. at pp. 497-498 (plur. opn. of White, J.); *Wardlow*, *supra*, 528 U.S. at p. 125.) The court stated, again invoking *Wardlow*, that "nervous and evasive behavior is a pertinent factor in determining whether suspicion is reasonable." (*Flores*, *supra*, 60 Cal.App.5th at p. 990.) But while it acknowledged that this behavioral factor should be considered "in combination with the other factors," the court did

not identify any other factors it considered. (*Ibid.*) It concluded by summarily declaring that "[c]ourts must permit police to make commonsense judgments and inferences about human behavior." (*Ibid.,* citing *Kansas v. Glover*, *supra*, 140 S.Ct. at p. 1188.) This perfunctory and deferential approach to the question of reasonable suspicion does not reflect the careful and contextual weighing of circumstances that a *Terry* analysis demands.

The Court of Appeal in effect endorsed a rule that any (allegedly) nervous or evasive behavior in the presence of police in an area the police label as "high-crime" gives sufficient grounds to seize someone, regardless of that person's right to avoid engagement. But such a rule extends police authority far past the outer bounds established by the United States Supreme Court, which in *Wardlow* stopped short of endorsing the view that even full-fledged flight from police in a high-crime area necessarily establishes reasonable suspicion. (*Wardlow, supra*, 528 U.S. at p. 126 (conc. opn. of Stevens, J.); *People v. (Antonino) Flores*, *supra*, 38 Cal.App.5th at p. 631.) The lower court's rule also ignores the fraught, life-or-death calculus that many must make when confronted by police. The Court should reject this rule and conclude that, under the totality of the circumstances, the police had no lawful basis to detain Mr. Flores and the resulting evidence should have been suppressed.

CONCLUSION

For the reasons stated above and in the Appellant's Opening Brief, this Court should reverse the Court of Appeal.

DATED: JANUARY 8, 2024

Respectfully submitted,

GALIT LIPA
State Public Defender

/s/ *Marnie Lowe*
MARNIE LOWE
Barry P. Helft Fellow

/s/ *Jessie Hawk*
JESSIE HAWK
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL
Cal. Rules of Court, rule 8.520(f)

I, Marnie Lowe, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 6,699 words in length, excluding the tables and this certificate.

DATED: JANUARY 8, 2024

Respectfully submitted,

/s/ *Marnie Lowe*
Marnie Lowe
Barry P. Helft Fellow

DECLARATION OF SERVICE

Case Name: *People v. Flores*
Case Number: **Supreme Court Case No. S267522**
Los Angeles County Superior Court No. BA477784
2DCA, Div. 8 Case No. B305359

I, **Esmeralda Manzo**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the County of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT MARLON FLORES

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **January 8, 2024**, as follows:

Richard L. Fitzer Law Offices of Richard Fitzer 6285 East Spring Street, No. 276N Long Beach, CA 90808	Honorable Mildred Escobedo Los Angeles Superior Court Dept. # 126 210 West Temple Street Los Angeles, CA 90012
Los Angeles County Public Defender 210 W. Temple St. Suite 19 Los Angeles, CA 90012	

//

The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **January 8, 2024**:

Shezad Thakor Attorney General of California 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Email:Shezad.Thakor@doj.ca.gov	Attorney General – Los Angeles Office 300 South Spring Street, Suite 5000 Los Angeles, CA 90013 Email:docketinglaawt@doj.ca.gov
California Appellate Project – Los Angeles Office 520 S. Grand Ave., 4th Floor Los Angeles, CA 90071 Email:capdocs@lacap.com	Los Angeles County District Attorney 211 W. Temple St. Suite 1200 Los Angeles, CA, 90012 Email:truefiling@da.lacounty.gov
Second Appellate District Div. 8 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 *Served a copy in 2DCA Div. 8 through Truefiling*	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **January 8, 2024**, at Sacramento, CA.

Esmeralda Manzo Digitally signed by Esmeralda Manzo
Date: 2024.01.08 12:44:01 -08'00'

ESMERALDA MANZO

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. FLORES**
Case Number: **S267522**
Lower Court Case Number: **B305359**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **marnie.lowe@ospd.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	2023_01_08_Flores_Amicus_App_TrueFiling
BRIEF	2023_01_08_Flores_Amicus_TrueFile

Service Recipients:

Person Served	Email Address	Type	Date / Time
Shezad Thakor Attorney General of California 317967	shezad.thakor@doj.ca.gov	e-Serve	1/8/2024 12:54:26 PM
Attorney General - Los Angeles Office	docketinglaawt@doj.ca.gov	e-Serve	1/8/2024 12:54:26 PM
California Appellate Project - Los Angeles	capdocs@lacap.com	e-Serve	1/8/2024 12:54:26 PM
Los Angeles County District Attorney	truefiling@da.lacounty.gov	e-Serve	1/8/2024 12:54:26 PM
Office of the State Public Defender 000000	docketing@ospd.ca.gov	e-Serve	1/8/2024 12:54:26 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1/8/2024
Date

/s/Esmeralda Manzo
Signature

Lowe, Marnie (pending)
Last Name, First Name (PNum)