No. _____

In the Supreme Court of the United States

SUZAN EVANS, Individually, and as Wife and Next of kin of SCOTT EVANS, deceased,
Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL BUREAU OF INVESTIGATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the totality of the circumstances test for assessing the reasonableness of a use of force under this Court's decisions in *Tennessee v. Garner,* 471 U.S. 1 (1985) and *Graham v. Connor,* 490 U.S. 386 (1989), means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it, as the First, Third and Tenth Circuits hold or whether the court may only consider the moment of the seizure as the Second and Eleventh Circuits hold and as the divided panel of the Sixth Circuit held in this case.

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Susan Evans both individually and as Wife and personal representative of the Estate of Scott Evans. She was a party to all proceedings below.

Respondents are the United States and the Federal Bureau of Investigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Susan Evans, as Wife and personal representative of the Estate of Scott Evans, deceased, and Susan Evans, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1) is reported at 728 Fed. Appx. 554. The memorandum opinion of the district court (Pet. App. 19) is not published, but it is available at 2017 WL 1208552. The denial of the Petition for Rehearing En Banc is reproduced in the Appendix at Pet. App. 36.

JURISDICTION

The Sixth Circuit denied Petitioners' Petition for Rehearing En Banc on June 11, 2018. Pet. App. 36. This Court's has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Federal Tort Claims Act, 28 U.S.C.A. § 1346(b)(1), provides, a cause of action:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

> employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Tenn. Code Ann. § 20-5-106(a) provides a cause of action to the surviving spouse of any "person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another."

INTRODUCTION

The Fourth Amendment enshrines a promise that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Despite the importance of the promise and of the uniformity of its application, there are and remain deep divisions between and among the circuit courts of appeal regarding whether the reasonableness of a seizure involving deadly force may be evaluated taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. As such this case presents a recognized circuit split, as well as an important and frequently occurring issue that this Court has not yet had the opportunity to address. On numerous occasions, this Court has had to leave the issue undecided because it was either not properly raised below or before this Court. See, e.g., *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1548 n.* (2017); *White v. Pauly*, 137 S. Ct. 548, 552-3 (2017). This case presents the proper vehicle to address this important question.

As this case illustrates, the issue is outcome determinative. Early in the morning on March 6, 2013, Petitioner heard a loud banging on her front door and when she looked outside, she saw multiple men all dressed in black with nothing to identify them. Pet. App. 6, 41-42. Without saying a word, the men violently broke in her door, flinging Petitioner backward and breaking her nose. Pet. App. 6. The men restrained Petitioner and her children in the hallway of the family's home and then proceeded to the bedroom, where Petitioner's husband had not yet gotten out of bed. *Id*. Petitioner and her children believed themselves to be the victims of an armed home invasion, when Petitioner heard shots from the bedroom. Pet. App. 6, 39. Petitioner later learned that the men she believed to be violent criminals were, in fact, federal agents there to serve a warrant on her husband, whom they had fatally shot in the bedroom. Pet. App. 2-6.

The panel majority recognized that the parties vigorously disputed what had occurred before the shooting, but found the dispute to be immaterial based upon the fact that the federal agents were the only witnesses to the moment of the shooting and that they testified in their affidavits that Petitioner's husband had a gun and that he was removing it from its holster, when they shot him. Pet. App. 6, 14-15. The majority reasoned that it could not look past the moment of the seizure and that what happened before the seizure was immaterial. Pet. App. 12, 14-15. Senior Judge Merritt dissented. Pet. App. 17-18. Judge Merritt found that there was a dispute of material fact and that the agents' conduct was such that the jury could have concluded that the agents behaved unreasonably and

extremely and caused Petitioner's husband to believe that he needed to defend himself. Pet. App. 18.

The outcome of the case is explained based upon a deep division within the Sixth Circuit between cases which hold that an officers' pre-seizure conduct may be considered, e.g., *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991), and those that hold that it may not, e.g. *Mullins v. Cyranek*, 805 F.3d 760, 769 (6th Cir. 2015). These divisions similarly divide the remaining circuits. The Second and Eleventh Circuits have adopted the same narrow definition of the totality of the circumstances as the panel majority in the decision below. In contrast, the First, Third and Tenth Circuits have held that the totality of the circumstances encompasses the officer's unreasonable pre-seizure conduct that foreseeably created the need to use deadly force. The Fourth, Seventh, and Eighth Circuits are internally divided in the same manner as the Sixth Circuit.

Courts that myopically cabin the totality of the circumstances to mean the moment of the seizure and nothing else simply misapply *Garner* and *Graham* and forget that the purpose of the Fourth Amendment is the security of the people, including in their persons. The totality of the circumstances under *Garner* and *Graham* means just that. Myopically focusing on the moment of the seizure means that killing a citizen is reasonable no matter how reckless, unreasonable or even criminal the officer's conduct was leading up to the seizure or how foreseeable the results. That is simply not the result that the Framers or this Court in *Garner* and *Graham* intended. E.g., *Boyd v. United States*, 116 U.S. 616, 630 (1886) (discussing the history

of the Fourth Amendment and concluding that "[i]t is not the breaking of [a person's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence").

Despite the importance of the issues, as noted above, this Court has not yet decided whether an officer's pre-seizure conduct may be considered because the issue either was not addressed below or was not presented for review by this Court. This case is different. It presents a timely opportunity for this Court to resolve an important question of federal constitutional law and resolve a recognized circuit split.

STATEMENT OF THE CASE

Following the shooting death of her husband by federal agents, Petitioner filed suit on her own behalf and as the representative of her husband's estate in the United States District Court for the Eastern District of Tennessee under the Federal Tort Claims Act claiming the wrongful death of her husband. Pet. App. 19-34. The District Court granted the United States summary judgment on all claims. Pet. App. 19-35. A divided panel of the Sixth Circuit affirmed. Pet. App. 1-18. Petitioner filed a timely request for en banc review, which the court denied on the grounds that "the issues raised in the petition were fully considered upon the original submission and decision of the case," with the dissenting judge from the panel opinion stating that he would grant a rehearing for the same reasons as in his dissent. Pet. App. 36-37. This appeal followed.

1. In the early morning of March 6, 2013, Petitioner and her children were at home, when Petitioner heard a loud banging on her front door. Pet. App. 6, 41-42. Petitioner went to the door to investigate and saw individuals dressed all in black standing outside her door. *Id.* The men said nothing, but proceeded to violently break in the door with such force that it threw Petitioner backwards and broke her nose. *Id.* Still saying nothing, the men entered Petitioner's home and restrained Petitioner and her children in the hallway. *Id.* The men then proceeded to enter the bedroom, where Petitioner's husband had still not gotten out of bed. *Id.* Although Petitioner and her children were within earshot of the bedroom, they heard nothing until they heard two shots. *Id.* Petitioner and her children believed themselves to be the victims of a violent home invasion. Pet. App. 39. They found out later that the men were federal agents there to serve an arrest warrant on Petitioner's husband and that Petitioner's husband had been fatally shot in the bedroom. Pet. App. 2-6.

The agents told a very different story of the events of March 6, 2013. Pet. App. 2-6, 20-22. In the agents' version, they carefully planned the arrest through multiple meetings and discussions of the use of force policy. Pet. App. 3, 20. When they went to the home, they loudly announced themselves as federal agents and waited for a response before breaking in the door. Pet. App. 4, 20-21. They acknowledged that Petitioner was injured when they did so. Pet. App. 4. The agents claimed that after they entered the home, they secured Petitioner and her children in the hallway and left them in the custody of a female agent, while they proceeded to the bedroom. *Id.* In the bedroom, they

encountered Petitioner's husband, who was undressed and had a gun. Pet. App. 5. The agents identified themselves and told Petitioner's husband to put the gun down. *Id.* Petitioner's husband had the gun in a holster held to his head and refused to comply with the agents' commands, but instead began to remove the gun from the holster. *Id.* One of the agents then fired three shots, which killed Petitioner's husband. *Id.* The agents claimed that the gun was unholstered when Petitioner's husband collapsed and that it was loaded. Pet. App. 6, 13. The female agent in the hallway claimed that she could hear everything from the bedroom and corroborated the agents' testimony as to what was said there. Pet. App. 4.

The conflicting stories of the parties told radically different versions of the events leading up to the shooting. In Petitioner's version, the events were consistent with a violent crime. In the agents' version, the events were a well-planned execution of an arrest warrant, which resulted in tragedy despite the agents' best efforts to avoid the same. The case, therefore, presented a classic dispute of material fact warranting a trial.

2. The District Court disagreed, because it found the parties' conflicting versions of events to be immaterial. The District Court held that the test announced in *Tennessee v. Garner* and *Graham v. Connor* required the court to focus solely on the moments before the shooting. Pet. App. 31. The District Court noted that the only witnesses to what happened in the bedroom were the agents and that they told an uncontradicted story that Petitioner's husband had a gun and was removing it from the

holster, when one of them shot him. Pet. App. 28-31. In the District Court's view, even if Mr. Evans had intended to commit suicide, the gun still would have been pointed toward the agents, endangering them. Pet. App. 29. As a result, the District Court concluded that the shooting was reasonable under the Fourth Amendment and granted summary judgment to the defendant. Pet. App. 34-35.

3. A divided panel of the Sixth Circuit affirmed. Pet. App. 1-18. The majority concluded, as had the District Court, that the parties' conflicting versions of events were immaterial, because the only material facts were those at the moments directly preceding the shooting. Pet. App. 12, 14-16. In support of its holding, the majority relied upon Sixth Circuit cases holding that the totality of the circumstances test is confined to the shooting itself and the moments immediately preceding it. Pet. App. 14-15.

Judge Merritt dissented. Pet. App. 17-18. In Judge Merritt's view, the case presented a classic dispute of material fact warranting a trial. *Id.* Judge Merritt noted that the facts alleged by Petitioner "are pertinent and indicate an attitude and pattern of behavior on the agents' behalf that a jury may find extreme and unwarranted." Pet. App. 18. Judge Merritt concluded that "[t]he dispute of fact may convince the jury that the officers' alleged violent behavior caused the decedent to try to protect himself with a pistol in self-defense before he was killed." *Id.*

4. Petitioners petitioned for en banc review based in part upon an intra circuit split of authority between cases upholding the majority's view and cases upholding Judge Merritt's. Pet. App. 36. The court

denied the petition with Judge Merritt voting to grant reconsideration for the same reasons as in his dissent. Pet. App. 36-37.

REASONS FOR GRANTING REVIEW

The question presented involves an acknowledged circuit split—one exacerbated by contradictory decisions from within the federal circuits themselves. That is reason enough to grant a petition for certiorari in any case involving federal law, but it is a particularly strong reason to grant a petition arising under the Fourth Amendment, where the seizure at issue involves matters of life and death. On top of all that, the decision below is wrong, and will cause further confusion and division.

I. THERE IS A CLEAR INTER-CIRCUIT SPLIT OF AUTHORITY ON THE QUESTION PRESENTED

This case presents a clear and incontrovertible inter-circuit split. E.g., *Abraham v. Raso*, 183 F.3d 279, 291 (3rd Cir. 1999) (acknowledging the same); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 n. 12 (1st Cir. 2005) (same); *Pauly v. White*, 874 F.3d 1197, 1220 n. 7 (10th Cir. 2017) (same and implicitly asking this Court to resolve the issue). The First, Third and Tenth Circuits[1] hold that considering the officer's

[1] The decisions of the Tenth Circuit are admittedly internally inconsistent. Compare *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) *with Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994). However, panels of the Tenth Circuit appear to have consistently followed *Sevier* and to have abandoned *Bella* with a panel of the Circuit recently noting that considering the

pre-seizure conduct is most consistent with this court's decisions in *Garner* and *Graham* directing the courts to consider the totality of the circumstances. E.g., *Young*, 404 F.3d at 22 (explaining that its approach of considering pre-seizure conduct "is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances'" (quoting *Garner*, 471 U.S. at 8–9)); *Abraham*, 183 F.3d at 291 ("we do not see how [an approach excluding the officer's pre-seizure conduct] can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished"); *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) ("This approach [of considering officers' pre-seizure conduct] is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard." (quoting *Garner*, 471 U.S. at 8–9)).

In stark contrast, however, the Second and Eleventh Circuits exclude all pre-seizure conduct as irrelevant. E.g., *Salim v. Proulx*, 93 F.3d 86, 92 (2nd Cir. 1996) ("[The officer's] actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."); *Menuel v. City of Atlanta*, 25 F.3d 990,

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officer's pre-seizure conduct "has been the law in our circuit since 1995." *Pauly*, 874 F.3d 1197 at n. 7. Given that pronouncement, the decision was made to include the Tenth Circuit in this section of the Petition and not in the following section concerning intra-circuit splits of authority with the caveat that the Tenth Circuit would be appropriate for inclusion in that section as well.

997 (11th Cir. 1994) (limiting consideration to the moment when the officer's shooting began because "[r]econsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred" (internal citations omitted)).

The First, Third and Tenth Circuits are, thus, in direct conflict with the Second and Eleventh Circuits. A division involving such a large number of the circuit courts is reason enough to grant certiorari.

II. THERE IS A CLEAR INTRA-CIRCUIT SPLIT OF AUTHORITY ON THE QUESTION PRESENTED

The situation gets worse, however, because there are deep divisions within the Fourth, Sixth, Seventh, and Eighth circuits concerning the question presented with contradictory and outcome-determinative opinions on both sides of the issue.

This case is an example. The majority followed a line of Sixth Circuit cases beginning with *Dickerson v. McClellan* holding that the circumstances surrounding a seizure must be divided into segments with only the moments immediately preceding the officer's use of force to be considered. *Dickerson v. McClellan*, 101 F.3d 1151, 1160 (6th Cir. 1996), see also e.g., *Greathouse v. Couch*, 433 F. App'x 370, 372-3 (6th Cir. 2011) ("We apply a 'segmented approach' to excessive- force claims, in which we 'carve up' the events surrounding the challenged police action and evaluate the reasonableness of the force by looking only at the moments immediately preceding the officer's use of force." (internal citations omitted)). Yet, these cases

directly conflict with a line of cases beginning with *Yates v. City of Cleveland*, which hold that an officer's pre-seizure conduct may be considered. *Yates*, 941 F.2d. at 447, see also e.g., *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) ("Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.").

The Fourth, Seventh and Eighth Circuits are similarly divided with different panels reaching different and conflicting conclusions on the question presented. Compare *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2004) (noting that "the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed"), *Marion v. City of Corydon, Indiana*, 559 F.3d 700, 705 (7th Cir. 2009) ("Pre-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment; we limit our analysis to force used when a seizure occurs."), *and Cole v. Bone,* 993 F.2d 1328, 1333 (8th Cir. 1993) (holding that the police chase of a fleeing tractor trailer was not relevant to the subsequent shooting of the civilian driver because courts should consider "only the seizure itself, and not the events leading up to the seizure, for reasonableness under the Fourth Amendment") *with Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015) (holding that it is necessary to determine whether the force used was objectively reasonable in "full context," because a segmented view of the events "misses the forest for the trees." (brackets and internal quotation marks omitted)), *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) (agreeing with the Sixth Circuit's determination

(in *Yates)* that an officer violates the Fourth Amendment if he "unreasonably create[s an] encounter that [leads] to a use of force" by "entering a private residence late at night with no indication of identity"), *Doornbos v. City of Chicago*, 868 F.3d 572, 583 (7th Cir. 2017) (holding in light of *Mendez* that under the Fourth Amendment when an officer's unreasonable pre-seizure conduct "proximately causes the disputed use of force, that conduct is part of the 'totality of the circumstances' that should be considered to determine if the use of force was reasonable, especially since the officers here were not in uniform"), *and Atkinson v. City of Mountain View*, 709 F.3d 1201, 1210 (8th Cir. 2013) (considering officer's pre-seizure conduct of failing to identify himself as a police officer as material to *Graham* factor of whether the plaintiff was resisting arrest).

III. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW

When it comes to officers' pre-seizure conduct, plaintiffs and defendants simply are not subject to uniform rules. Because the issue is literally one of life and death, it can hardly inspire confidence that a shooting is a violation of the Fourth Amendment in one circuit, but not in another or that whether it is a violation depends upon the composition of the appellate panel hearing the case. In matters of constitutional law and particularly in constitutional matters of life and death, a uniform nationwide rule is critical.

Although this case arises under the Federal Torts Claims Act and not under 42 U.S.C. § 1983, the issue is most likely to arise in the context of a § 1983 suit,

which means that even in those circuits and among those panels that consider the officers' pre-seizure conduct, the unsettled state of the law effectively gives plaintiffs a right without a remedy. The case law is not clearly established and, therefore, officers will have qualified immunity in the vast majority of cases under § 1983. E.g., *Pauly*, 874 F.3d at 1223 (holding on remand from this Court that although officer's unreasonable pre-seizure conduct created a dispute of material fact on excessive force claim, officer was entitled to qualified immunity, because the law was not clearly established). If someone dies because the officer violated the Fourth Amendment, it is unfair for there to be no remedy for the wrong. If the seizure did not, in fact, violate the Constitution, then the officer does not deserve to live under a cloud of opprobrium that he killed someone in violation of the Constitution, but escaped liability due to a "technicality" of qualified immunity. The Court's intervention is, therefore, necessary to say what the law is once and for all.

IV. THIS CASE PRESENTS A PROPER VEHICLE TO ADDRESS THIS IMPORTANT ISSUE

This Court has not yet had an opportunity to address whether the totality of the circumstances test for assessing the reasonableness of a use of force means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. In numerous cases, this Court had to leave that issue undecided because it was not properly presented below or raised before this Court.

In *Mendez*, for example, the Court noted that the issue had not been raised below and that the Court had

not granted certiorari on it. *Mendez*, 137 S. Ct. at 1548 n.*. Accordingly, the Court declined to address it. *Id.* Similarly, in *White v. Pauly*, the Court again expressed no position on the issue, because neither the District Court nor the appellate panel addressed it. *White*, 137 S. Ct. at 552-3.

These obstacles to review are not present here. There is no question the Sixth Circuit concluded that the parties' conflicting versions of events leading to the shooting were immaterial, because only the moments immediately preceding the shooting could be considered. And there is no question that the panel's decision conflicts with other circuits and with other cases within the Sixth Circuit. This case presents a timely opportunity for this Court to resolve this important issue.

V. THE DECISION BELOW WAS INCORRECT

This Court's intervention is also needed because the decision below is wrong. Among other issues, the Sixth Circuit's decision (i) is inconsistent with this Court's precedent; (ii) contravenes the plain language of the Fourth Amendment; and (iii) contravenes the purpose behind the Fourth Amendment, which was to prevent arbitrary and unreasonable government conduct.

A. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENT

In *Tennessee v. Garner*, this Court held that deadly force will be considered reasonable, when "it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to

the officer or others." *Garner*, 471 U.S. at 3. The Court expressly recognized that suspects who do not pose a significant threat and successfully flee may never be apprehended: "we proceed on the assumption that subsequent arrest is not likely." *Garner*, 471 U.S. at 9 n. 8. However, "applying a balancing approach, the Court concluded that the government's interest in effective law enforcement was insufficient to justify killing fleeing felons who did not pose a significant threat of death or serious injury to anyone." *Abraham*, 183 F.3d at 288. As this Court explained, "The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Garner*, 471 U.S. at 9.

In *Graham v. Connor*, this Court amplified the reasonableness standard applied under the Fourth Amendment and determined that how much force is permissible to effectuate an arrest is determined based on the "totality of the circumstances." *Graham*, 490 U.S. at 394, see also *Abraham*, 183 F.3d at 289. As the Third Circuit observed, "'Totality' is an encompassing word" and it is hard to "reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished." *Abraham*, 183 F.3d at 292.

In *Brower v. County of Inyo*, the plaintiff was involved in a car chase and alleged that the police designed the roadblock in a way likely to kill him by placing a tractor trailer behind a curve and blinding the plaintiff with car headlights as he rounded the

curve. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). This Court remanded the case for a determination of whether the police acted reasonably in constructing the roadblock. *Id.* As the Third Circuit accurately explained, "if preceding conduct could not be considered, remand in *Brower* would have been pointless, for the only basis for saying the seizure was unreasonable was the police's pre-seizure planning and conduct." *Abraham*, 183 F.3d at 292.

As these cases make clear, the totality of the circumstances means just that. The Sixth Circuit's holding that only the circumstances at the moment of the shooting may be considered is inconsistent with this Court's precedent.

B. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF THE FOURTH AMENDMENT

Additionally, the decision below contravenes the plain language of the Fourth Amendment that the people have a right to be secure in their persons against unreasonable seizures. See e.g., *United States v. Jones*, 565 U.S. 400, 406 (2012) ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (`persons, houses, papers, and effects') it enumerates."); *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (noting that in addition to privacy interests, the Fourth Amendment protects citizens' interests in being free from physical intrusions). The people can hardly be secure in their persons, if the police can unreasonably create a situation that would ordinarily justify the person in using deadly force. See e.g., *Doornbos*, 868

F.3d at 584-5 (noting that it is "generally not a reasonable tactic for plainclothes officers to fail to identify themselves" when seizing someone because it "creates needless risks " given that "[a] fight-or-flight reaction is both understandable and foreseeable"). Under Tennessee law, Petitioner's husband was privileged to use deadly force against armed home invaders. E.g., *State v. Perrier,* 536 S.W.3d 388 (Tenn. 2017). See also *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008). Although through the lens of hindsight, there was no home invasion, there are many cases with similar facts that are home invasions. E.g., *Sykes v. United States*, 564 U.S. 1, 9 (2011) (stating that "[b]urglary is dangerous because it can end in confrontation leading to violence."), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015); *James v. United States*, 550 U.S. 192, 203 (2007) (explaining that burglary is dangerous because it foreseeably creates the "possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander"), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). Mr. Evans was hardly secure in his person, if he died, because the people he reasonably believed to be armed criminals turned out to be federal agents. See *McDonald v. United States*, 335 U.S. 451, 461 (1948) (Jackson, J., concurring) (condemning police conduct as reckless and fraught with danger, because "[w]hen a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot").

C. THE DECISION BELOW CONTRAVENES THE PURPOSE AND INTENT OF THE FOURTH AMENDMENT

The decision below also contravenes the purpose of the Fourth Amendment to avoid unreasonable government conduct and arbitrariness. E.g., William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1837-1840, 1845-1850 (2016) (discussing the history and purposes of the Fourth Amendment). The use of deadly force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Garner*, 471 U.S. at 9, see also e.g., *Boyd*, 116 U.S. at 630 (explaining that the Fourth Amendment protects against invasions of the "indefeasible right of personal security" in the absence of a criminal conviction). As police-citizen encounters have expanded, as leading scholars have noted, so too have the opportunities for these encounters to escalate into deadly encounters. See e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017). Even in contexts other than the use of deadly force, members of this Court have expressed concern that "the countless people who are [subject to these encounters] . . . are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere." *Utah v. Strieff*, 136 S. Ct. 2056, 2070-1 (2016) (Sotomayor, J., dissenting). Myopically focusing solely on the moment of the seizure leeches the situation of all context and excuses police conduct no matter how unreasonable, reckless or even criminal and no matter how

foreseeable its results. That is precisely the type of situation that the Framers were trying to escape and designed the Fourth Amendment to prevent. E.g., *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967) (noting that the purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

The facts of this case presented a genuine issue as to whether the agents unreasonably created a situation where Petitioner's husband believed himself to be the victim of a violent crime and consequently pointed a gun at men, whom he reasonably believed to be armed criminals invading his home and threatening him and his family. The agents, of course, dispute every aspect of that story. What the parties do not dispute is that what went on in the bedroom was audible in the hallway. The female agent said that she could hear it all and Petitioner and her children said that there was nothing to hear until the fatal shots were fired. Pet. App. 4, 6. Therefore, the events either happened very quickly and Mr. Evans was awoken from bed and grabbed his gun, because he was surrounded by what he believed to be armed criminals or the events happened more slowly with the agents identifying themselves and Mr. Evans consequently knowing that the men surrounding him were federal agents and disobeying their instructions. Resolution of such disputes is what trials are for, so that the trier of fact can hear the testimony of the witnesses, assess their credibility and come to a resolution of the truth. The agents came to Mr. Evans's home to arrest him, but Mr. Evans never got to have a trial on those charges. He and his family deserve to have one in this civil case

on the circumstances of his death and the public deserves to know whether its law enforcement officers acted reasonably or they did not.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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