No. 18-323

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, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined in this action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, that petitioner failed to establish the elements of negligence under Tennessee law for a claim arising from an FBI agent's use of deadly force in self-defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is not published in the Federal Reporter but is reprinted at 728 Fed. Appx. 554. The opinion of the district court (Pet. App. 19-34) is not published in the Federal Supplement but is available at 2017 WL 1208552.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2018. A petition for rehearing en banc was denied on June 11, 2018 (Pet. App. 36-37). The petition for a writ of certiorari was filed on September 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, waives the United States' sovereign immunity

and establishes its liability for torts of federal employees acting within the scope of their 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." 28 U.S.C. 1346(b)(1). Congress vested the federal district courts with exclusive jurisdiction to hear such claims, *ibid.*, and provided that, subject to certain exceptions, the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674; see *United States* v. *Olson*, 546 U.S. 43, 44 (2005) (FTCA "waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort.").

2. a. This case arises from a "wide ranging investigation" into a child-pornography ring in which Scott Evans (Evans) participated. Pet. App. 3. The Federal Bureau of Investigation (FBI) discovered that Evans had sent and received thousands of emails containing sexually explicit images or videos of prepubescent or early pubescent children. *Ibid.*; Gov't C.A. Br. 4. In 2013, federal prosecutors filed a criminal complaint against Evans alleging distribution and receipt of child pornography, in violation of 18 U.S.C. 2252A(a)(2) (2012). Pet. App. 3, 19. Prosecutors also obtained a warrant for Evans' arrest and a search warrant to be executed at his residence, a "double wide" manufactured home in which Evans lived with his wife and two daughters. *Id.* at 3.

FBI Special Agent Bianca Pearson led the operation. Agent Pearson advised her agents that Evans had obtained a concealed-carry permit and thus "likely would have weapons at the residence." Pet. App. 3, 20. Agent Pearson was also concerned about "recent cases involving child pornography suspects who shot themselves or

fired at officers" in an effort to avoid arrest. *Id.* at 20; see D. Ct. Doc. 27, ¶¶ 3-7 (July 22, 2016) (Smith affidavit). In light of those and other considerations, Agent Pearson determined that "multiple agents would be required to secure the location"; she "briefed all [participating] agents on the FBI deadly force policy," Pet. App. 3, and "reiterated that the Evans children likely would be home," *id.* at 20.

Eight FBI agents later offered sworn affidavits attesting to the events that transpired at Evans' home. According to those affidavits, on March 6, 2013, the arrest team arrived there in a police caravan sometime after 7 a.m. Pet. App. 20. "Officers in marked police vehicles turned on their blue lights when approaching the residence," and "the arrest team wore clothing identifying them as law enforcement." *Ibid.* One of the FBI agents announced the team's presence by knocking on the front door and shouting words to the effect of "FBI! Search Warrant! Come to the door!" *Ibid.*; see *id.* at 4. "After waiting a 'reasonable amount of time' with no response to the knock and announce," another agent forced the door open. *Id.* at 4 (quoting D. Ct. Doc. 24, ¶ 11 (July 22, 2016) (Pearson affidavit)). The arrest team then entered the house. Several agents located petitioner and her daughters and secured them in the living room, where a television was loudly playing. *Id.* at 4, 21.

In the meantime, Special Agents Lane Rushing and Paul Scown headed toward the master bedroom. Pet. App. 5, 21. Upon reaching the doorway, Agent Rushing saw Evans, who was naked and carrying a holstered revolver, move quickly from the adjoining bathroom into the bedroom and then up onto the bed. *Ibid.* Agent Rushing shouted "FBI! FBI!" and instructed Evans to

drop the gun and raise his hands. *Ibid.* Evans did not comply, instead telling Agent Rushing to "Get out of my face" and aiming the holstered weapon at his own head. *Ibid.* Concerned that Evans might use the gun to harm himself or others, Agent Rushing yelled "Don't do this!" *Id.* at 21. As three other agents approached the bedroom, Evans began removing the revolver from the holster while focusing his attention on Agents Rushing and Scown. *Id.* at 5, 21-22. Agent Scown then fired his weapon, striking Evans three times in the side. *Id.* at 5, 22. After handcuffing Evans and recovering his weapon, agents called for an ambulance, but Evans died at the scene. *Id.* at 6, 22.

Petitioner later disputed some portions of the agents' narrative. Petitioner maintained that, although the agents loudly knocked on the front door, she heard no accompanying announcement, and that she did not notice any law-enforcement markings on the agents' clothing. Pet. App. 6, 23. Petitioner also stated that, while being detained in the living room, she did not hear any "shouting, talking, commands, or anything like that coming from the bedroom." *Id.* at 6 (citation omitted). But "[n]either [petitioner] nor her daughters claimed that they were in the bedroom or near enough to its entrance to observe the agents' encounter with Evans." *Id.* at 6-7.

b. Petitioner is Evans' surviving spouse and the personal representative of his estate. Pet. ii, 1. Following the denial of her administrative tort claim filed with the Department of Justice, petitioner brought suit in federal district court alleging that the United States was liable under the FTCA for Evans' death in accordance

with Tennessee's wrongful-death statute, Tenn. Code Ann. § 20-5-106 (Supp. 2011). Pet. App. 7.[1]

The district court granted summary judgment in favor of the government. Pet. App. 19-34. The court recognized that "Tennessee law applies to determine whether [the United States] may be held liable for Evans' death." *Id.* at 26. The court then suggested that the government's use of deadly force could be found negligent under Tennessee law only if the FBI agents' actions failed to meet "the objective reasonableness standard" applicable to constitutional claims brought under the Fourth Amendment. *Id.* at 27-28.

The district court concluded that "based on the totality of the circumstances known to S[pecial] A[gent] Sc[]own at the time of the shooting, the use of deadly force was objectively reasonable." Pet. App. 28. The court noted that Evans had refused to comply with numerous orders to drop his weapon and had "manifested his intention to harm himself, or the agents, in raising the gun to his own temple and then moving his left hand to unholster the gun." *Id.* at 29. Agent Scown thus had "reason to believe that Evans posed an imminent threat of serious harm to the agents and others in the trailer." *Ibid.*

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-18.

a. The court of appeals observed that the United States is liable in tort only "to the extent afforded by

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[1] Petitioner also identifies the FBI as a respondent to this petition. Pet. ii. However, because "a federal agency * * * cannot be sued under the FTCA," the district court dismissed the FBI as a defendant. Pet. App. 25. Petitioner did not appeal that dismissal. *Id.* at 2 n.1.

the law of the place—here, Tennessee—where the alleged tortious act or omission occurred." Pet. App. 9. The court stated that "[a]ccording to Tennessee courts, when the alleged negligence is committed by a police officer 'during a legitimate confrontation with an armed person . . . the normal definition of negligence' is altered." *Id.* at 10 (quoting *Johnson* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, No. 08-CV-551, 2008 WL 5206303, at *5 (Tenn. Ct. App. Dec. 12, 2008)). And the court further stated that "the standard of care owed to the claimant under said circumstances is the 'reasonableness' standard applicable to claims of excessive force brought pursuant to the Fourth Amendment of the United States Constitution." *Ibid.* (citing *Johnson*, 2008 WL 5206303, at *6-*8). The court accordingly "turn[ed] to the Fourth Amendment" in adjudicating petitioner's claim. *Ibid.* The court of appeals' reasoning in this respect was consistent with the briefing of both parties below, which assumed that Fourth Amendment standards applied in determining the scope of the government's liability under Tennessee law and the FTCA. See Pet. C.A. Br. 12-13; Gov't C.A. Br. 31-33.

The court of appeals noted that the Fourth Amendment reasonableness analysis is "fluid and 'not capable of precise definition or mechanical application,'" Pet. App. 11 (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)), and "amounts to a determination of whether the totality of the circumstances justifies the seizure," *ibid.* (citing *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985)). The court stated that this analysis should consider "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest

or attempting to evade arrest by flight." *Ibid.* (quoting *Graham*, 490 U.S. at 396) (brackets in original).

Applying these principles, the court of appeals concluded that Agent Scown's use of deadly force against Evans was justified because "an objectively reasonable officer armed with Scown's knowledge and in his position" could reasonably believe that Evans "posed a threat of serious physical harm to the officers." Pet. App. 12-13. The court noted that the agents had encountered Evans brandishing a firearm in an enclosed space, and "[r]ather than submit to the agents' show of force, Evans reached with his other hand and began to remove the revolver from its holster." *Id.* at 13. When agents later recovered the gun from Evans' hand, it was "completely unholstered, loaded, and cocked, confirming the agents' impression that Evans was in the process of releasing the revolver from the holster just before the shots were fired." *Ibid.*

The court of appeals rejected petitioner's arguments that factual disputes concerning other matters were sufficient to defeat summary judgment. Pet. App. 14-16. As the court explained, "[t]he conduct relevant to" petitioner's claim that Agent Scown used excessive force against Evans was "Scown's discharge of his firearm in the bedroom, and the moments immediately preceding, not what may have occurred in the adjoining room or at the front door." *Id.* at 14-15.

b. Judge Merritt dissented. Pet. App. 17-18. He suggested there were "dispute[s] of fact" regarding whether the agents properly identified themselves upon arrival and whether they issued warnings to Evans in the bedroom, *ibid.*, and he theorized that "th[ese] dispute[s] 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.* at 18. Judge Merritt further asserted that "[w]e have a long-standing tradition of trial by jury in these kind of cases." *Ibid.* But see 28 U.S.C. 2402 (directing that, with one exception not applicable here, "any action against the United States under section 1346 shall be tried by the court without a jury").

c. Petitioner sought rehearing en banc, which was denied without any judge requesting a vote. Pet. App. 36-37.

ARGUMENT

Petitioner urges (Pet. 9-21) this Court to grant review to address the temporal scope of the "totality of the circumstances" that should be considered when evaluating excessive-force claims under the Fourth Amendment. But liability under the FTCA is generally governed by state tort law applicable to private persons, not by federal constitutional constraints applicable to governmental actors. Properly conceived, then, this case presents a question of state law, not federal law, and in addition there is a threshold question concerning the court of appeals' analysis of the applicability of state tort law. This case would therefore be an inappropriate vehicle for announcing or refining Fourth Amendment principles. A writ of certiorari would not be warranted here in any event because, even under the standard petitioner urges, there is no genuine issue of material fact as to whether Agent Scown's use of force was objectively reasonable under the circumstances. And this Court recently denied a writ of certiorari in a case presenting the Fourth Amendment question that petitioner seeks to raise here. See *Pauly* v. *White*, 138 S. Ct. 2650 (2018) (No. 17-1078). Review of the court of appeals' unpublished decision therefore is not warranted.

1. a. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). The FTCA affords such a waiver of sovereign immunity for "claims against the United States[] for money damages" arising from torts committed by federal employees within the scope of their 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." 28 U.S.C. 1346(b)(1).

A plaintiff cannot establish liability under the FTCA merely by showing a violation of a federal constitutional standard. See *Meyer*, 510 U.S. at 478 ("[T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims."). Rather, a plaintiff must show that a private person who engaged in the same or similar conduct would be liable under the "law of the State." *Ibid.*; see *id.* at 477-478; see also *United States* v. *Olson*, 546 U.S. 43, 44 (2005) (emphasizing that the FTCA "waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort").

Arguments about the proper substantive analysis for adjudicating this FTCA case on the merits thus principally present questions of state law. See *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) ("[T]he extent of the United States' liability under the FTCA is generally determined by reference to state law."). This Court rarely, if ever, grants a writ of certiorari to review questions of state law. Petitioner's assertion that the court of appeals' unpublished decision erred in its application of Tennessee law thus is not the type of argument that would typically provide a basis for this Court's review.

See Sup. Ct. R. 10(a)-(c) (referring to "important" questions of "federal" law).

b. The court of appeals stated in its unpublished decision that the governing "standard of care" under Tennessee law is "the 'reasonableness' standard applicable to claims of excessive force brought pursuant to the Fourth Amendment of the United States Constitution," and it then assumed that it could therefore properly rely on circuit precedent applying Fourth Amendment principles. Pet. App. 10. But it is unclear whether the Tennessee Supreme Court would agree. The court of appeals did cite one intermediate state-court decision observing in general terms that "[w]hether a police shooting case is brought as a 'civil rights' case or a negligence case, both come down to determining if the officer's actions were 'reasonable' under the circumstances." *Ibid.* (quoting *Johnson* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, No. 08-CV-551, 2008 WL 5206303, at *6 n.6 (Tenn. Ct. App. Dec. 12, 2008)).[2] But the state court in *Johnson* did not purport to decide that the "reasonable[ness]" test under state tort law was identical in all respects to Fourth Amendment reasonableness analysis. Moreover, *Johnson* concerned the tort liability of a state public entity under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. §§ 29-20-101 *et seq.* (2012 & Supp. 2018), not that of a private person under generally applicable tort

[2] That decision was vacated by the Tennessee Supreme Court and remanded for reconsideration in light of intervening precedent clarifying state-law summary-judgment procedures. On remand, the intermediate court issued a new opinion that was materially identical to the prior, vacated decision. See *Johnson* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, No. 09-CV-1243, 2009 WL 2868757 (Tenn. Ct. App. Sept. 2, 2009)).

standards. See Pet. App. 10 n.3. Indeed, Tennessee law governing the use of deadly force embodies different sets of permissions for law enforcement and private citizens. Compare Tenn. Code Ann. § 39-11-620 (2018) (law enforcement), with *id.* § 39-11-621 (2018) (private citizens).

As this Court has explained, however, the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the [Federal] Government's liability." *Olson*, 546 U.S. at 46. Thus, although the parties below and the court of appeals proceeded on the assumption that, under Tennessee law, this case should be governed by Fourth Amendment standards applicable to law enforcement officers, see p. 6, *supra*, that assumption is not necessarily correct. Accordingly, even if *Johnson* were read to mean that Tennessee tort law for state *public* entities should mirror federal constitutional standards in all respects, that still would not determine the scope of the United States' liability under the FTCA because it does not address whether Tennessee's tort law applicable to private uses of deadly force also follows those federal standards. See also 28 U.S.C. 2674 ("The United States shall be liable * * * in the same manner and to the same extent as a *private individual* under like circumstances.") (emphasis added).

Under general Tennessee tort law, negligence is the breach of a defendant's "legal obligation * * * to conform to a reasonable person's standard of care in order to protect against unreasonable risks of harm." *Giggers* v. *Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009). In addition, Tennessee law governing self-defense recognizes that "a person who is not engaged in unlawful activity and is in a place where the person has a right

to be has no duty to retreat before * * * using force intended or likely to cause death or serious bodily injury, if * * * the person has a reasonable belief that there is an imminent danger of death or serious bodily injury" caused by another's conduct. Tenn. Code Ann. § 39-11-611(b)(2)(A) (2018); see *id.* § 39-11-612 (recognizing an identical standard for the defense of third parties).

Here, there is no genuine dispute that Evans' conduct presented an imminent danger of death or serious bodily injury to himself and others in the home. As the court of appeals explained, an objectively reasonable person in Agent Scown's position would have believed that Evans "posed a threat of serious physical harm." Pet. App. 12-13. At the time that Agent Scown encountered Evans, he was holding a weapon pointed at his head; moments later, "[r]ather than submit to the agents' show of force, Evans reached with his other hand and began to remove the revolver from its holster." *Id.* at 13. When agents recovered the gun, it was "completely unholstered, loaded, and cocked, confirming the agents' impression that Evans was in the process of releasing the revolver from the holster just before the shots were fired." *Ibid.* On these uncontradicted facts and under these circumstances, no reasonable trier of fact could find unreasonable Agent Scown's decision to use deadly force to counteract the threat posed by Evans.

2. For the foregoing reasons, this FTCA case governed by state law applicable to private persons would not present a proper vehicle for exploring the appropriate temporal scope of the "totality of the circumstances" to be considered when evaluating excessive-force claims

under the United States Constitution. Cf. Pet. 13 (acknowledging that the constitutional question she presents "is most likely to arise in the context of a § 1983 suit"). The court of appeals' decision is unpublished and did not fully address the framework for ascertaining the appropriate principles of state tort law under the FTCA. It therefore does not establish circuit precedent even on that threshold question, much less on the Fourth Amendment question petitioner seeks to raise. Even assuming, however, that federal Fourth Amendment standards controlled Tennessee's tort-law negligence analysis that would be applied under the FTCA, this Court's review of the Fourth Amendment question raised by petitioner would not be warranted here.

a. First, even assuming that any incorporated federal constitutional standards specifically applicable to law enforcement could be construed as *more* restrictive than Tennessee tort law applicable to private persons, the Fourth Amendment question that petitioner seeks to litigate would make no difference to the appropriate disposition of this case. Petitioner notes that the court of appeals concluded that "the only material facts were those at the moments directly preceding the shooting." Pet. 8; cf. Pet. App. 14-15 ("The conduct relevant to the substantive claim * * * is Scown's discharge of his firearm in the bedroom, and the moments immediately preceding, not what may have occurred in the adjoining room or at the front door."). But even if, as petitioner urges (Pet. 13), a court were to consider the "officers' pre-seizure conduct," summary judgment in the government's favor would still be warranted.

In *County of Los Angeles* v. *Mendez*, 137 S. Ct. 1539 (2017), this Court held that if law enforcement officers "make a 'seizure' of a person using force that is judged

to be reasonable based on a consideration of the circumstances relevant to that determination," a plaintiff's allegation that officers previously "committed a separate Fourth Amendment violation that contributed to their need to use force" cannot establish "liab[ility] for injuries caused by the seizure." *Id.* at 1543; see *id.* at 1544 ("A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."). The Court therefore overruled Ninth Circuit precedent holding that a "separate Fourth Amendment violation"—such as an unlawful "warrantless entry" or a violation of the "knock-and-announce" rule—"may 'render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law.'" *Id.* at 1545-1546 (quoting *Billington* v. *Smith*, 292 F.3d 1177, 1190-1191 (9th Cir. 2002), abrogated by *Mendez*, 137 S. Ct. 1539); see also *id.* at 1546 (criticizing the Ninth Circuit rule for "us[ing] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist").

As petitioner notes (Pet. 14-15), *Mendez* did not pass upon the precise question whether, in deciding whether the use of force itself was reasonable in the first instance, a court should or should not "tak[e] into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." 137 S. Ct. at 1547 n.*. But that question is not implicated here because even those courts of appeals that consider the reasonableness of police conduct prior to the use of force recognize that any unreasonable conduct by a law enforcement officer preceding a use of deadly force cannot serve as the basis of liability when a superseding or intervening cause cuts the chain of proximate causation between that conduct and the use of deadly force. See,

e.g., *Johnson* v. *City of Philadelphia*, 837 F.3d 343, 351-353 (3d Cir. 2016) (citing *Bodine* v. *Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (Alito, J.)); *Trask* v. *Franco*, 446 F.3d 1036, 1046-1047 (10th Cir. 2006). Petitioner has not tendered any evidence from which a trier of fact could reasonably infer that Agent Scown's use of force was actually and foreseeably caused by any alleged prior wrongful police conduct. See *Mendez*, 137 S. Ct. at 1549 (cautioning courts to require more than "only a murky causal link" between allegedly unreasonable law enforcement conduct "and the injuries attributed to it").

Petitioner asserts (Pet. 18) that Evans would have been "privileged to use deadly force against armed home invaders," but she has offered no evidence showing that Evans "believed himself to be the victim of a violent crime." Pet. 20; cf. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (A party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial.") (citation omitted). Rather, the only reasonable inference supported by the record evidence on summary judgment—including the uncontroverted evidence that Evans pointed a gun at his own head—is that Evans understood that he was facing imminent arrest by the FBI. See D. Ct. Doc. 24, ¶¶ 13-18 (Pearson affidavit); D. Ct. Doc. 25, ¶¶ 8-13 (July 22, 2018) (Helm affidavit); D. Ct. Doc. 26, ¶¶ 11-20 (July 22, 2018) (Bishop affidavit); D. Ct. Doc. 27, ¶¶ 16-26 (Smith affidavit); D. Ct. Doc. 28, ¶¶ 11-14 (July 22, 2018) (Blanton affidavit); D. Ct. Doc. 29, ¶¶ 8-17 (July 22, 2018) (Rushing affidavit); D. Ct. Doc. 30, ¶¶ 12-20 (July 22, 2018) (Jones affidavit); D. Ct. Doc. 31, ¶¶ 13-26 (July 22, 2018) (Scown affidavit). Therefore, even if the district court at a bench trial, cf. 28 U.S.C. 2402, had credited petitioner's testimony that the agents had failed to

clearly announce themselves upon arriving at the house, petitioner could not show that any such failure proximately caused Evans' subsequent threatening behavior or Agent Scown's use of deadly force, or that Evans' behavior was not a supervening cause of Agent Scown's response.

b. In any event, petitioner has failed to show that the circuit conflict she alleges would currently warrant this Court's review, quite aside from the unsuitability of this case as a vehicle for considering the issue.

As petitioner notes (Pet. 9-11), several courts of appeals have perceived a disagreement among the circuits concerning the proper temporal scope of constitutional excessive-force claims.[3] The First Circuit, for example, stated that "[t]he various circuits have taken somewhat different positions on the question of how conduct leading up to a challenged shooting should be weighed in an excessive force case." *Young* v. *City of Providence*, 404 F.3d 4, 22 n.12 (2005); see also, *e.g.*, *Abraham* v. *Raso*, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e want to express our disagreement with those courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'").

It is not clear, however, to what extent the courts of appeals' varying descriptions of the temporal scope of

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[3] Petitioner also asserts a "deep division within the Sixth Circuit" and within four other circuits as to whether "officers' pre-seizure conduct may be considered" in deciding whether a Fourth Amendment seizure was reasonable. Pet. 4; see also Pet. 9 n.1, 11-13. But this Court does not grant review to resolve intra-circuit conflicts because "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Fourth Amendment analysis would yield different results on the same facts. This Court has made clear that the "proper application" of the Fourth Amendment reasonableness standard "requires careful attention to the facts and circumstances of each particular case," *Graham*, 490 U.S. at 396, and is "not capable of precise definition or mechanical application," *ibid.* (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979)); cf. *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (articulating various "[c]onsiderations" that "may bear on the reasonableness * * * of the force used" in evaluating a pretrial detainee's excessive-force claim, but noting that those considerations were not "exclusive"). The varying outcomes of different Fourth Amendment cases are generally best explained by factual considerations unique to each case. See, *e.g.*, *Medina* v. *Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (concluding that, even taking into consideration the officers' allegedly unreasonable preseizure conduct, the officers' use of force was "reasonable under the circumstances").

Moreover, all but two of the decisions cited by petitioner predated this Court's recent decision in *Mendez*, which abrogated the Ninth Circuit's "provocation rule." See pp. 13-14, *supra*. Indeed, in identifying the "somewhat different positions" taken by the circuits on the question petitioner seeks to raise, the First Circuit cited *Billington*—one of the now-abrogated Ninth Circuit decisions—as "collecting cases and explaining the different approaches." *Young*, 404 F.3d at 22 n.12. One post-*Mendez* case relied upon by petitioner (Pet. 9) adhered to existing circuit case law, but noted that that circuit's view was "not universally held among other circuits" and stated that, following *Mendez*, its precedent remained intact "at least for now." See *Pauly* v. *White*,

874 F.3d 1197, 1219 n.7 (10th Cir. 2017), cert. denied, 138 S. Ct. 2650 (2018). And while petitioner cites (Pet. 13, 17-18) the Seventh Circuit's post-*Mendez* decision in *Doornbos* v. *City of Chicago*, 868 F.3d 572 (7th Cir. 2017), she also concedes (Pet. 12) that the Seventh Circuit's position on this issue is not entirely settled. Before *Doornbos*, a different Seventh Circuit panel maintained that "[p]re-seizure police conduct cannot serve as a basis for liability under the Fourth Amendment" and "limit[ed] [its] analysis to force used when a seizure occurs." *Marion* v. *City of Corydon*, 559 F.3d 700, 705 (7th Cir. 2009). Therefore, it is unclear to what extent the Seventh Circuit contributes to any division among the courts of appeals. Moreover, *Doornbos* acknowledged that an officer's allegedly unreasonable conduct must proximately cause the disputed use of force in order to be "part of the 'totality of the circumstances' that should be considered to determine if the use of force was reasonable." 868 F.3d at 583; see also *Fields* v. *City of Pittsburgh*, 714 Fed. Appx. 137, 142-143 (3d Cir. 2017) (acknowledging that an individual's "threatening behavior" and "active resistance of arrest" was a "superseding cause that broke the chain of proximate causation" between an officer's allegedly unreasonable decision to slap the individual and the officer's subsequent, reasonable use of force).[4]

Particularly in light of *Mendez*, this Court may decide, even in a case properly raising the issue, that further percolation in the lower courts is warranted before making any definitive determination as to whether the notional conflict identified by petitioner is real and of

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[4] As described above, see pp. 14-16, *supra*, petitioner has not established that the agents' prior conduct proximately caused Agent Scown's subsequent use of force against Evans.

sufficient practical importance to warrant this Court's review. Indeed, the petitioner in *Pauly* sought certiorari on the same question petitioner seeks to raise, see Pet. at i, *Pauly*, *supra* (No. 17-1078) (second question presented), and this Court denied review.

A fortiori review is unwarranted here because the court of appeals' decision is unpublished and nonprecedential, the constitutional question is implicated only indirectly as a result of the court of appeals' interpretation of Tennessee law, and there is a significant threshold question concerning the correctness of the court of appeals' understanding of the framework for applying state tort law under the FTCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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