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 and FEDERAL BUREAU OF INVESTIGATION,
*Respondents*.

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

## REPLY BRIEF FOR PETITIONER

T. Scott Jones
*Counsel of Record*
Mary Eugenia Lewis
BANKS & JONES
2125 Middlebrook Pike
Knoxville, TN 37921
(865) 546-2141
tscottjones@banksandjones.com
maryeugenialewis@yahoo.com

*Attorneys for Petitioner*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTIONAL AND STATUTORY PROVISIONS**



**OTHER AUTHORITIES**

## INTRODUCTION

The respondent opposes certiorari with an argument neither addressed nor adopted by the court of appeals: that this case should have been decided under Tennessee's common law of negligence. Opp. 8-13. That is not a reason to deny review. The respondent concedes as it must that it forfeited the issue in the courts below (Opp. 6, 11) and beyond that respondent is responsible for any error because it presented as good authority the Tennessee cases it now seeks to undermine and based its arguments on the very circuit case law it now says the courts should not have considered. Because the respondent relied on the Fourth Amendment below and because it was the sole basis on which the Sixth Circuit ruled, this case presents a clean vehicle for the court to decide the question presented.

Respondent concedes a critical point which counsels strongly in favor of review: there is a five circuit split on the question presented: 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 or whether the court may only consider the moment of the seizure. The Sixth Circuit's holding that courts may only consider the moment of the seizure is directly at odds with the decisions of the First, Third and Tenth Circuits, thereby not only exacerbating a pre-existing circuit split between five circuits, but adding to the confusion in four more, including the Sixth. Pet. 9-13. This admitted split of authority on an important question of federal law can only be resolved by this Court.

In *District of Columbia v. Heller*, this Court recognized "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. 570, 635 (2008). Yet, allowing the Sixth's Circuit decision and similar decisions to stand means that the people must exercise their Second Amendment right of self defense at peril of their own lives, an anomalous result directly at odds with both the text and history of the Fourth Amendment. Pet. 17-21. The respondent's failure to acknowledge the importance of the issue not only for the lives of the people, but for their exercise of other personal rights guaranteed by the Constitution, is a vivid illustration of the need for this Court's intervention.

## ARGUMENT

### I. THIS CASE IS AN IDEAL VEHICLE

In opposing certiorari, the respondent makes one primary argument: that the case should have been decided under Tennessee tort law and not the Fourth Amendment. This argument rejects the Sixth Circuit's reasoning. Pet. App. 12, 14-16. Although the court of appeals held that the case should be decided under the Fourth Amendment, the respondent now contends for the first time that that holding is wrong and that the courts below should have applied Tennessee's common law of negligence.

The respondent's newly discovered quarrel with the opinion below is no reason to deny review. This Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). And the Court routinely grants review to resolve important questions that controlled the lower

courts' decision notwithstanding a respondent's assertion that on remand it may prevail for a different reason. *Dept. of Transp. v. Assoc. of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015); *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 260 (2009). That is the proper course here. The Court should review the issue that governed below - the Fourth Amendment. If the Court determines that the officers' pre-seizure conduct should have been considered, it may leave the question as to whether the case should be governed by state law for remand. *Zivotofsky*, 566 U.S. at 201 (noting that remand is appropriate in the absence of lower court opinions to guide the Court's analysis of the merits, because "[o]urs is a court of final review not of first review" (internal quotations and citations omitted)).

The Court should be especially skeptical of the respondent's argument opposing certiorari given the history of the case. The court of appeals and the district court relied on the Fourth Amendment, because the respondent asked them to. Below citing the very Tennessee cases it now repudiates, the respondent argued "[i]n applying Tennessee's wrongful death statute, this Court should adopt the objective reasonableness standard controlling excessive force cases under the Fourth Amendment." D. Ct. Doc. 21, at 11. Relying upon the very circuit court case law it now says the courts should not have considered, respondent ultimately contended that " [t]he only relevant question is whether the agents' use of deadly force was objectively reasonable under the circumstances [and that] question turns on what occurred when the agents encountered Mr. Evans in his bedroom, in the split seconds before they fired." Gov. C.A. Br. 28-29. Earlier in this case, the respondent thought that the Fourth

Amendment was controlling. In resting its decision on the Fourth Amendment, the Sixth Circuit agreed.

Having expressly embraced - and won with - the Fourth Amendment below, the respondent's current effort to divorce this case from the Fourth Amendment rings hollow. Although respondent speculates that the Tennessee Supreme Court might decide the issue differently, it offers no argument that the Tennessee Supreme Court has decided the issue differently or even that it would. Opp. 10-11. The respondent's decision to abandon the argument it advanced and prevailed upon in the lower courts is all the more reason why this Court's review is warranted. Otherwise, respondents, including the respondent here, may use federal law offensively in the lower courts, but then avoid review by contending before this Court that state law should have governed after all. And allowing the respondent to evade this court's review on that ground in this case would be a manifest injustice to petitioner, as it would allow the judgement to stand although the basis of the decision below was wrong.

Indeed, the FTCA is precisely what makes this case an ideal vehicle. As the respondent correctly notes, this court denied review in *Pauly v. White*, 138 S. Ct. 2650 (2018) (No. 17-1078). In that case, arising under 42 U.S.C. § 1983, the Tenth Circuit considered the officers' pre-seizure conduct and concluded that the officers' use of deadly force was not objectively reasonable. *Pauly v. White*, 874 F.3d 1197, 1219-1222 (10th Cir. 2017), cert. denied, 138 S. Ct. 2650 (2018). The court ultimately (and correctly) ruled against the plaintiff on the second prong of qualified immunity, however, because the law was not clearly established. *Id.* at 1222-3. Virtually

every case arising under § 1983 will present the same vehicle problems. Presenting no such obstacle, this case presents an ideal opportunity for the Court to review the question presented.

## II. THE COURTS OF APPEALS ARE SPLIT ON THE QUESTION PRESENTED

The respondent admits (Opp. 16) that there is a square circuit split involving five circuits regarding the question presented. The best it can do is to quibble with the depth of the split and argue that review is premature, because the split *might* resolve, if allowed to continue to "percolate." Opp. 18. But the respondent offers no good reason to wait, given that this split of authority is affecting litigants now, and has already persisted for over twenty years without any indication it will resolve itself.

The respondent attempts to minimize the split by referring to the conflicting positions of the appellate courts as "somewhat" different and "notional." Opp. 17, 18. It fails to explain, however, how decisions that exclude an officer's pre-seizure conduct as a matter of law are just "somewhat" different from decisions that hold that the same conduct should be considered. The respondent does not dispute that the split exists and its concession (Opp. 18) that the appellate courts continue to reach opposite conclusions makes clear that the split will not heal itself.

In a limpid attempt to evade this Court's review, the respondent speculates that this Court's rejection of the Ninth Circuit's provocation rule might lead to a resolution of the split. Opp. 13-14, 17-19. However, it fails to explain why this would be so, given its

concession that this Court specifically left the question open. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 n* (2017); Opp. 14. The respondent does not even attempt to argue that any of the cases proffered by petitioner in demonstration of the split relied on the provocation rule and not on the more general question of whether the officer's pre-seizure conduct could be considered. The most the respondent can muster is to quibble with the First Circuit's citation *in a footnote* of *Billington v. Smith* for its collection of cases explaining the different approaches taken by the circuits on the question. Opp. 17. Yet, that part of *Billington* involves the Ninth Circuit's summary of the plaintiff's argument for a broader consideration of the officer's pre-seizure conduct than allowed under the provocation rule, an argument the court goes on to reject. 292 F.3d 1177, 1186-91 (9th Cir. 2002). The respondent's implication that the First Circuit's mere citation of *Billington* means the First Circuit relied upon the provocation rule simply does not hold water, especially given the actual language of the opinion that "[t]he rule in this circuit is that once it is clear that a seizure has occurred, 'the court should examine the actions of the government officials leading up to the seizure.'" *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005), quoting *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995).

The respondent next notes that in *Pauly v. White* the Tenth Circuit stated that following this Court's decision in *Mendez* its precedent remained intact "at least for now." Opp. 17. However, any implication that the qualifier "at least for now" means that the circuit is reconsidering its precedent takes the quotation badly out of context. What the court actually said was that

consideration of the officer's pre-seizure conduct "has been the law in our circuit since 1995," but that the view was "not universally held among other circuits" and that the Supreme Court "very recently had an opportunity to resolve this issue but declined to do so" and "[t]hus, at least for now, *Sevier* and *Allen* remain good law in this circuit." *Pauly*, 874 F.3d at 1221 n.7. Accordingly, what the Tenth Circuit meant was that this Court's review of the issue was likely (and by clear implication needed), but that until this Court granted review of the issue, the circuit's precedent remained intact. *Id.*

As the respondent concedes (Opp. 16 n. 3, 18), the Sixth Circuit[1] (and three other circuits) are deeply internally divided on the question presented. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994) (finding debate among the circuits sufficiently illuminating and benefits of additional intracircuit debate "far outweighed" by the benefits of "resolution of legal questions"). The respondent's suggestion that this is simply an internal "debate" within the circuits is untenable, first and foremost because the circuits' decisions conflict with the decisions of other circuits. And the divisions within the circuits have persisted for over two decades and show no signs of abating. Compare for example this case with *Latits v. Phillips*, 878 F.3d 541, 549 (6th Cir.

---

[1] Notwithstanding the respondent's attempt to avoid review, this "Court grants certiorari to review unpublished and summary decisions with some frequency." Stephen M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013) (citing examples and noting that unpublished decisions can "signal[] a persistent conflict" among circuits).

2017) (holding that the court should consider "both the moments before the shots were fired and the prior interactions between Latits and Phillips").

Not to worry, says the respondent, excessive force claims are fact based. Opp. 17. Undoubtedly, they are, but the issue here is not the application of the law to the facts, but whether the courts should apply a rule of law that mechanically limits what facts the court may consider. And the respondent's speculation that consideration of the officer's pre-seizure conduct might not render a seizure unreasonable in every case badly misses the point. The issue is not whether the seizure will always be unreasonable, an absurdity given that the standard is reasonableness, but whether the court may consider the officer's pre-seizure conduct at all. And the respondent fails to give even one example of a case where the court found the officer's pre-seizure conduct to be material but that would come out the same way, if the court had refused to consider it. Certainly in this case, the outcome is explicable only by reference to which the facts the judges considered. The panel majority refused to consider disputes relating to the officers' pre-seizure conduct and concluded that summary judgment was warranted. Pet. App. 12, 14-16. The one judge who considered the officers' pre-seizure conduct reached the opposite conclusion. Pet. App. 17-18. As the Seventh Circuit correctly explained, "'[s]elf-defense is a basic right,' and many civilians who would peaceably comply with a police officer's order will understandably be ready to resist or flee when accosted—let alone grabbed—by an unidentified person who is not in a police officer's uniform." *Doornbos v. City of Chicago*, 868 F.3d 572, 585 (7th Cir. 2017),

quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

Seeking to avoid this Court's review, the respondent attempts to mischaracterize the issue as one of fact. Opp. 13-16, 18. But the question presented by this case, on which the courts of appeals are split, addresses whether as a matter of law a court may consider the officer's pre-seizure conduct. The respondent's fact-bound arguments concerning whether there is a dispute of material fact, whether there is proximate cause and whether Mr. Evans's actions are a superseding cause are inappropriate for this Court's consideration in the first instance because they were not considered by the majority below. In any event, even a cursory review of these issues shows that they are without merit.

The respondent argues that there is no dispute of material fact regarding the officers' pre-seizure conduct. However, the one judge to have considered the issue concluded otherwise. Pet. App. 17-18. And as explained in the petition, contrary to the respondent's assertions, this Court and the lower courts have recognized the foreseeability of a violent confrontation, especially in the home, if intruding officers are unidentified and unidentifiable. Pet. 17-18. A citizen seeking to arm himself in such a situation is entirely within the foreseeable chain of causation and not a superseding cause. Cf. *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1018 (9th Cir. 2018) (holding that plaintiff's pointing a gun at unidentified officers was not a superseding cause, because a "victim's behavior is not a superseding cause where the tortfeasor's actions are unlawful precisely because the

victim foreseeably and innocently might act that way"). In any event, this case presents a purely legal question and at most respondent's arguments are a question for remand. See, e.g., *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017) (remanding arguments never addressed below, as well as "any other still-live issues").

## III. THE QUESTION PRESENTED IS IMPORTANT

All respondent has to offer in response to petitioner's argument that the decision below is wrong (Pet. 15-21), is to argue that its version of the facts should prevail, as respondent is unable to muster any historical evidence in support of the interpretation of the Fourth Amendment advanced by the Sixth Circuit and does not even try to defend the decision below on the text and intent of the Fourth Amendment or on this Court's decisions. The founding generation risked and sometimes sacrificed their lives to conceive a nation in liberty. In the Fourth Amendment, the founders chose the word "secure" to describe the right and applied it to persons. At the time of the founding, "secure" would have been understood to include the meaning "free from danger, that is, safe" and its verbal form to include "to protect," "to make safe," and "to insure." JOHNSON' DICTIONARY OF THE ENGLISH LANGUAGE (1st Am. ed. 1819). And the Oxford English Dictionary with ample reference to Eighteenth century sources defines the verbal form of secure as "to make safe, to guard, or to protect." XIV OXFORD ENGLISH DICTIONARY 852 (2d ed. 1989). Thus, the Fourth Amendment can be understood as a defense and protection of the people against unwarranted searches and seizures by the

government. The concern of the founders with the security of the people is also embodied in the Second Amendment which this Court has recognized as a personal right of self defense and protection. *Heller*, 554 U.S. at 592-5 (discussing the history of the Second Amendment as a right of personal security).

As recognized by this Court, "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 134 S. Ct. 2473, 2494 (2014). Yet, a far more grievous invasion would have been if the British had entered the colonists' homes without identification and indistinguishable from common brigands and then shot the colonists, when the colonists took up arms to defend themselves.

The issue could not be more important. It is literally one of life and death and beyond that it implicates the right of self defense and of personal security that the founders fought and sometimes died to secure. This case presents an ideal vehicle to resolve the issue and the Court should not allow the unsettled state of the law to continue.

*******

## CONCLUSION

Review is warranted.

Respectfully submitted,

T. Scott Jones
*Counsel of Record*
Mary Eugenia Lewis
BANKS & JONES
2125 Middlebrook Pike
Knoxville, TN 37921
(865) 546-2141
tscottjones@banksandjones.com
maryeugenialewis@yahoo.com

*Attorneys for Petitioner*