No. 20-1668

IN THE
Supreme Court of the United States

CITY OF TAHLEQUAH, OKLAHOMA; BRANDON VICK; JOSH GIRDNER,

Petitioners,

v.

AUSTIN P. BOND, as Special Administrator of the ESTATE OF DOMINIC F. ROLLICE, deceased,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts must categorically disregard the actions of police officers in the moments before they kill a civilian in a Fourth Amendment deadly force case.

2. Whether Petitioners violated clearly established law by aggressively advancing on an impaired individual, cornering him in a garage, and then killing him, even though he did not pose a serious threat at any point in the encounter.

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STATEMENT OF THE CASE

1. On August 12, 2016, Dominic Rollice arrived at the home of his former wife to return a car she lent him. Aplt. Appx. 334. She had granted him permission to enter her property earlier in the day. Aplt. Appx. 328. After Rollice arrived, she called 911 and asked police to come to her property. Pet. App. 2. She told the police that Rollice, who no longer lived there, was in the garage and that he still had tools there. Pet. App. 2-3. Officers Josh Girdner, Brandon Vick, and Chase Reed arrived at the property. Pet. App. 3. They had been apprised that Rollice was intoxicated and that his former wife wanted him to leave. *Id.*

Encountering Rollice at the doorway to the garage, the officers told him they were not going to take him to jail, and were instead "going to try to get him a ride out of there." Pet. App. 3-4. Rollice replied that he had a ride coming already. Pet. App. 4.

Rollice declined consent to a frisk, and Girdner advanced toward him. Pet. App. 26. It is undisputed that Girdner lacked reasonable suspicion for a frisk. Pet. App. 25-26 n.15. Girdner stepped toward Rollice to "back [ ] him into the garage," pointing at Rollice as he followed him, and forcing Rollice through the doorway and into the garage. Pet. App. 4 n.9, 4-5. Rollice retreated further into the garage and Girdner continued after him. Pet. App. 2-5. The officers "confined" Rollice by "effectively corner[ing] him in the garage" and "blocking the only exit." Pet. App. 4-5 n.9, 25-27, 31.

Cornered in the back of the garage, Rollice briefly turned toward the officers. Pet. App. 5. Then he picked

up a hammer and held it with both hands. *Id.* The officers stepped back and drew their weapons. *Id.* Rollice "drop[ped] his left hand down, holding it out in front of him as if to signal the officers to stop or to create distance between himself and them." *Id.* Rollice continued to hold the hammer in the other hand, just above his head. *Id.*

The Tenth Circuit described the scene as follows: "[T]he video shows no winding up movements made by [Rollice] in preparation of throwing [the hammer] at the officers." Pet. App. 21. In addition, "immediately before raising the hammer in response to Officer Reed's approach, [Rollice] says, in a relatively calm manner, 'I have done nothing wrong here, man. I'm in my house. I'm doing nothing wrong.'" *Id.* During the entire interaction, Rollice was "engaging verbally with the officers, and [he] never dropped his left arm from what can be interpreted as a defensive position." Pet. App. 24

Reed stated that he was going "less lethal," and he holstered his gun and pulled out his taser. Pet. App. 6. Reed testified that Rollice did not lunge at him or any other officer, and that Rollice's "attention was on [Reed] the whole time." Aplt. Appx. 360. Reed's goal was deescalating the situation verbally. Aplt. Appx. 357.

Girdner and Vick, on the other hand, unleashed a barrage of gunfire. Pet. App. 6. Rollice "double[d] over into a squatting position as the bullets hit him." *Id.* The shooting paused for about two seconds, and Rollice appeared to lift the hammer. Pet. App. 23. However, he was "in a crouched position and angled away from the officers," and it was "unclear whether the cry he utter[ed] [was] due to pain or aggression." *Id.*

Nonetheless, Officer Girder shot Rollice again. Pet. App. 7. Rollice was later pronounced dead at the hospital. *Id.*

2. Rollice's estate (Respondent here) brought this action pursuant to 42 U.S.C. § 1983. Pet. App. 7. In the operative complaint, the estate sued Girdner, Vick, and the City of Tahlequah, Oklahoma. *Id.* The district court granted Girdner and Vick summary judgment based on qualified immunity. *Id.* The City obtained summary judgment as well. *Id.*

3. Rollice's estate appealed to the Tenth Circuit, which concluded that Girdner and Vick, Petitioners here, were not entitled to summary judgment based on qualified immunity.

a. First, the Tenth Circuit analyzed the circumstances at the moment the officers began firing their weapons. It determined that "a reasonable jury could conclude [Rollice] did not make any movements to put the officers in fear of serious physical harm." Pet. App. 21. A jury could also conclude that the officers were unreasonable in perceiving otherwise: "That [Rollice] had only a hammer rather than a gun or other long-range weapon, was engaging verbally with the officers, and never dropped his left arm from what can be interpreted as a defensive position, could allow a jury to find that the officers unreasonably misperceived his raising the hammer as an aggressive movement." Pet. App. 24. The Tenth Circuit also found that when the final shot was fired—at which point Rollice was wounded and on the ground—the facts could allow a jury to reject as unreasonable any perception Rollice was a threat: "[T]hat [Rollice] was on his knees angled away from the officers when he again raised the hammer could allow a jury to conclude Officer Girdner's

final shot was also based on an unreasonable misperception of [Rollice] as a continuing threat." Pet. App. 24.[1] Not one of these conclusions was based on the officers' pre-shooting conduct.

b. The Tenth Circuit then went on to analyze the officers' conduct in the moments before they pulled the trigger. It did so under a standard explicitly endorsed by Petitioners, who asserted that "conduct which is relevant to the qualified immunity analysis" includes not only the shooting itself but "those actions immediately prior to the shooting" and that such conduct is "actionable if it rises to the level of recklessness." Appellees' Br. 15, 21.

The Tenth Circuit determined that the officers' conduct before they fired on Rollice was reckless or deliberate—not merely negligent. Pet. App. 28. The court limited its analysis to officer action less than one minute before the shooting. *See* Pet. App. 26-27. It recognized that only "immediately connected actions" can be relevant. *Id.* at 16. And for summary judgment purposes, the court concluded that Rollice's "arming and perceived offensive movements were in *direct response* to the officers' conduct." Pet. App. 27 (emphasis added). The court concluded "[t]he full encounter, from the request to frisk to [Rollice's] collapse on the floor, took less than a minute and is properly considered as part of the totality of the circumstances." Pet. App. 27.

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[1] These determinations were based on what a juror could find for summary judgment purposes. Pet. App. 21, 24; *see Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1996) (stating that summary judgment depends on what "reasonable jurors could find"). The Tenth Circuit reached "no conclusion" on ultimate findings of fact. Pet. App. 28.

4. Petitioners sought rehearing *en banc*. They again endorsed the proposition that "[w]hen determining whether the use of force violated the Fourth Amendment, only reckless and deliberate conduct by police officers that is immediately connected to the seizure will be considered." Pet. for Reh'g 10. They conceded that "the reasonableness inquiry includes an evaluation of the officer's actions leading up to the use of force." *Id*. 9. The Tenth Circuit denied rehearing *en banc* with no judge requesting a vote. *See* Pet. App. 34-35.

REASONS FOR DENYING THE PETITION

The Court should deny certiorari on the first question presented for five reasons. First, Petitioners have waived review of that question. In the appellate court, they argued that officer "conduct which is relevant to the qualified immunity analysis" includes not only the shooting itself but "those actions immediately prior to the shooting." Appellees' Br. 15. They stated that the reasonableness inquiry includes "conduct by police officers that is immediately connected to the seizure." Pet. for Reh'g. 10. They cannot now contend that such conduct is irrelevant.

Second, Petitioners are bound by the Tenth Circuit's determination that, for summary judgment purposes, they did not confront a serious threat at any point in the encounter with Rollice. They have not properly challenged that determination in this Court. This is therefore the wrong case to address Petitioners' argument that any judicial consideration of police conduct moments before a trigger pull will prevent officers from defending themselves. If the Court wishes to consider such an argument, it should do so in a case

where the lack of a threat is not locked in as a factual premise for purposes of this Court's review.

Third, because Petitioners do not challenge the Tenth Circuit's determination that there was no threat, this Court's review would not disturb the outcome on summary judgment. The Fourth Amendment prohibits the use of deadly force unless "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

Fourth, this case does not implicate a circuit split. Unlike this case, not one of Petitioners' authorities from other circuits includes an appellate determination that a reasonable jury could find that no threat existed when officers used deadly force. Moreover, every circuit considers an officer's conduct in the moments before a shooting in some circumstances but not in others. Petitioners cite cases where other circuits disregarded particular pre-shooting conduct, but the Tenth Circuit would disregard the very same conduct. Petitioners' cases therefore do not illustrate a split of authority.

Finally, Petitioners' extreme view that courts can never consider pre-shooting conduct in evaluating deadly force under the Fourth Amendment does not square with this Court's precedents. This Court has always considered whether officers admonished suspects to "drop the weapon" in the moments leading up to the use of deadly force. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018); *Garner*, 471 U.S. at 11-12.

The Court also should deny certiorari on the second question presented. This question is fact-bound, it

does not involve a circuit split, it is not outcome-determinative, and Petitioners themselves do not contend that it is important. In any event, the officers' conduct—aggressively moving in on an impaired person and backing him into a garage full of tools, immediately inflaming the situation and causing him to pick up a hammer—was indeed reckless behavior under clearly established Tenth Circuit law.

I. The First Question Presented Does Not Warrant Review.

A. Petitioners Waived The First Question Presented.

The Court should deny certiorari because Petitioners waived the first question presented. In the Tenth Circuit, all parties took the same position on the standard for evaluating pre-shooting conduct. They agreed that reckless officer conduct immediately connected to a shooting is relevant to the Fourth Amendment analysis. Appellee's Br. 15, 20-21; Appellant's Br. 17-18. Thus, both sides affirmatively embraced the very rule the Tenth Circuit applied. Appellee's Br. 15, 20-21; Appellant's Br. 17-18. They diverged only on how to apply the standard to the facts. Appellee's Br. 21-22; Appellant's Br. 18-20.

In the Tenth Circuit, Petitioners argued that "conduct which is relevant to the qualified immunity analysis" includes not only the shooting itself but "those actions immediately prior to the shooting." Appellees' Br. 15. They argued that "[m]ere negligent actions precipitating a confrontation are not to be considered in an excessive force case," *id.* at 20, but conceded that such conduct is "actionable if it rises to the level of recklessness." *Id.* at 20-21. Instead of disagreeing as

to the standard for considering pre-shooting officer actions, Petitioners argued that Respondent "simply did not establish the conduct of [Petitioners] met that standard." *Id.* at 21. The Tenth Circuit applied the very standard Petitioners set out, considering "deliberate or reckless" actions by the officers that were "immediately connected" to the use of deadly force. Pet. App. 10, 16, 28.

Seeking rehearing *en banc*, Petitioners repeated the same position again: "[T]he reasonableness inquiry includes an evaluation of the officer's actions leading up to the use of force." Pet. for Rehn'g. 9. They continued: "When determining whether the use of force violated the Fourth Amendment, only reckless and deliberate conduct by police officers that is immediately connected to the seizure will be considered." *Id*. 10.

Petitioners complain that the Tenth Circuit "did not cite this Court's decision in [*Cnty. of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017)] or otherwise explain how its . . . rule is consistent with *Mendez*." Pet. 13. Presumably, that is because the parties agreed on the applicable standard and did not cite *Mendez* in their panel briefs or at argument.

In sum, the Tenth Circuit applied the exact legal standard that Petitioners asked it to apply. This Court should deny certiorari because Petitioners waived the first question presented

B. Petitioners Are Bound By the Tenth Circuit's Conclusion That They Did Not Confront A Serious Threat.

Petitioners do not challenge the Tenth Circuit's factbound determination that they did not confront a

serious threat of harm at any point in the encounter. Pet. App. 21, 24. With that finding unchallenged, this case provides a poor opportunity to consider Petitioners' argument that officers must retain the ability to defend themselves in the face of serious threats. The Tenth Circuit's factual determinations about the lack of a threat also mean that the officers would still be denied qualified immunity if the court of appeals ignored all officer conduct before the first trigger pull.

1. For summary judgment purposes, the Tenth Circuit concluded that "a reasonable jury could conclude [Rollice] did not make any movements to put the officers in fear of serious physical harm" when they opened fire. *See* Pet. App. 21. It also determined, for summary judgment purposes, that the final bullet, which the officers fired after a pause, "reflected an unreasonable misperception of [Rollice] as a continuing threat." Pet. App. 24.

2. Neither of the questions presented asks the Court to review the Tenth Circuit's fact-based conclusions that for summary judgment purposes the officers did not confront, nor could they reasonably have perceived, a serious threat. If the Court granted certiorari, it would be bound by these determinations. "[T]he fact that [petitioner] discussed this issue in the text of its petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review." *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993).

3. With the conclusion locked in that the officers did not face a serious threat of harm, this case provides a poor opportunity to consider Petitioners' main

argument. They contend that any judicial consideration of conduct before an officer pulls the trigger will deprive officers of the "ability to take reasonable steps to defend themselves," even when they face a "grave threat to their safety." Pet. 3, 23, 26. If the Court wishes to consider such an argument, it not should do so in a case where the lower court's determination that no threat existed is unchallenged.

4. The Tenth Circuit's conclusion that Rollice posed no threat of serious physical harm—and that it would be unreasonable to conclude otherwise—precludes summary judgment. The Fourth Amendment allows the use of deadly force only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Therefore, even ignoring the officers' actions in the moments before they pulled the triggers, they violated the Fourth Amendment by firing their weapons. This Court's intervention would not change that.

The lack of a threat makes the operative facts in this case very similar to the circumstances in *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006). There, the Tenth Circuit found it clearly "established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect." *Id.* at 1160. The facts here are quite similar: Neither Walker nor Rollice had a gun. *See Walker*, 451 F.3d at 1159; Pet. App. 5. Neither approached the officers. *See Walker*, 451 F.3d at 1158; Pet. App. 21.

Just as Walker did not make stabbing or slicing motions with the knife, Rollice made "no winding up movements" with the hammer. *See Walker*, 451 F.3d at 1160; Pet. App. 21. And neither posed an immediate physical threat. *See Walker*, 451 F.3d at 1160; Pet. App. 21. In light of these factual similarities between the two cases, the officers here violated clearly established law when they opened fire on Rollice despite the absence of a serious threat.

This case is going to trial irrespective of the Court's intervention. For summary judgment purposes, the officers could not have reasonably "believe[d] that [Rollice] pose[d] a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. They shot and killed him anyway. Even if one does not consider the officer's conduct prior to their use of deadly force, they violated clearly established law.

C. This Case Does Not Involve A Circuit Split.

Petitioners have failed to show that any other circuit would have decided this case differently based on the officers' conduct in the moments before they killed Rollice. *First*, in contrast to this case, none of the cases Petitioners cite include an appellate finding that officers did not have a reasonable fear of serious harm at any point in the interaction. *Second*, every circuit considers at least some officer conduct in the moments before the use of deadly force. *Third*, the conduct deemed irrelevant in the cases cited by Petitioners is also irrelevant under Tenth Circuit law.

1. None of Petitioners' cited cases suggest that other circuits would have decided this case differently

than the Tenth Circuit. Here, the Tenth Circuit concluded that the officers did not face a serious threat to their safety. *See* Pet. App. 21. *Not one* of Petitioners' cases includes this critical and distinguishing feature—an appellate determination that the officers did not face a serious threat. Determinations of whether a Fourth Amendment violation occurred obviously will differ between cases where appellate courts find no threat to officers at any point and cases like *Carter v. Buscher*, 973 F.2d 1328, 1330, 1333 (7th Cir. 1992), *see* Pet. 19, where officers used deadly force because a suspect fired an automatic weapon at them. That does not amount to a circuit split.

2. Petitioners contend that the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits refuse to consider officer conduct in the moments before a shooting. Not so.

These circuits all agree with the Tenth Circuit that at least some conduct before an officer pulls the trigger is relevant to the reasonableness of deadly force. *See Stephenson v. Doe*, 332 F.3d 68, 74 (2d Cir. 2003) (upholding reasonableness instruction requiring jury to assess whether "where feasible, some warning has been given" prior to a shooting); *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) ("We are not saying, of course, that all preceding events are equally important, or even of any importance. Some events may have too attenuated a connection to the officer's use of force."); *Betton v. Belue*, 942 F.3d 184, 191 (4th Cir. 2019) (events "immediately prior to and at the very moment" of the use of deadly force are relevant to the reasonableness analysis); *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) (en banc) (finding it relevant

to reasonableness that officers "had the time and opportunity to give a warning" in the moments before shooting but chose not to); *Bletz v. Gribble*, 641 F.3d 743, 752 (6th Cir. 2011) ("[E]vents preceding the shooting . . . in close temporal proximity to the shooting . . [are] considered in analyzing whether excessive force was used."); *Doornbos v. City of Chicago*, 868 F.3d 572, 584 (7th Cir. 2017) ("[P]olice officers 'who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force.'" (quoting *Catlin v. City of Wheaton*, 574 F.3d 361, 368 n.7 (7th Cir. 2009)); *Cole Estate of Richards v. Hutchins*, 959 F.3d 1127, 1133-1134 (8th Cir. 2020) (concluding that an officer's choosing to "stand silent before shooting" rather than giving a warning confirmed his use of deadly force was objectively unreasonable).

3. Nor is there any conflict over the relevance of particular conduct in the moments before a shooting: the conduct found irrelevant in Petitioners' cited cases is also irrelevant under Tenth Circuit law.

a. In the Tenth Circuit, "conduct attenuated by time or intervening events is not to be considered." *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 n.8 (10th Cir.1995) (same); *Hastings v. Barnes*, 252 F. App'x 197, 203 (10th Cir. 2007) (same). "As part of the proximate cause analysis" in a deadly force case, "a defendant is not liable for harm produced by a 'superseding cause.'" *James v. Chavez*, 511 F. App'x 742, 747 (10th Cir. 2013). "A superseding cause is one that is 'not within the scope of the risk created by the actor's conduct.'" *Id.* (quoting Restatement (Second) of Torts

§ 442B (1965)). In other words, "conduct arguably creating the need for force must be *immediately connected* with the seizure." *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (emphasis added); *Ceballos*, 919 F.3d at 1214, 1216 (same). For example, the Tenth Circuit disregarded evidence that an officer "failed to arrest and handcuff" a driver who later attacked him, finding the evidence "not relevant to the reasonableness of [the officer's] decision to shoot [the driver]."*Romero v. Bd. of Cnty. Com'rs of Cnty. of Lake*, 60 F.3d 702, 704-05 (10th Cir. 1995).

Consistent with its precedent, the Tenth Circuit in this case analyzed a tightly-compacted encounter that "took less than a minute." Pet. App. 27. It recognized that only "immediately connected actions" can be relevant to the reasonableness of deadly force. Pet. App. 16, 27.

b. Petitioners fail to show a meaningful difference between the Tenth Circuit and other courts of appeals in their analysis of officer conduct moments before a shooting. The officer conduct courts of appeals deemed irrelevant in each of Petitioners' cited cases was attenuated either by time or intervening events from the later use of deadly force. Therefore, the Tenth Circuit would find the same conduct irrelevant. *See Ferreira v. City of Binghamton*, 975 F.3d 255, 280 (2d Cir. 2020) (addressing negligence in advance planning of SWAT team raid); *Salim v. Proulx*, 93 F.3d 86, 93 (2d Cir. 1996) (declining to consider the fact that an officer did not carry a radio and tussled with suspects for five minutes prior to a shooting); *Fields v. City of Pittsburgh*, 714 F. App'x 137, 143 (3d Cir. 2017) (officer's slapping a suspect not relevant to tasing that occurred

"at some later point" after the slap when suspect confronted other officers); *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (officer's failure to display his badge not relevant to subsequent use of deadly force; in the intervening time, the plaintiff hit the officer with his car); *Elliott v. Leavitt*, 99 F.3d 640, 643-44 (4th Cir. 1996) (cursory pat-down search not relevant to use of deadly force; in the intervening time the officer placed the suspect in a police car and the suspect pointed a gun at the officer); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275-76 (5th 1992) (officer's failure to identify himself or display a badge irrelevant where driver attempted to hit officer's car and then tried to run him over); *Hale v. City of Biloxi*, 731 F. App'x 259 (5th Cir. 2018) (unpublished) (purported knock and announce violation not relevant to excessive force claim; suspect reached into his pockets repeatedly during the discussion with the officers that followed); *Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007) (supervisor's negligent operational planning not relevant to reasonableness of later use of deadly force during raid); *Thomas v. City of Columbus*, 854 F.3d 361, 363, 365-66 (officer's manner of approaching apartment building did not create need to use deadly force against person who emerged from apartment building and ran at him with a gun); *Goodwin v. Richland County*, 832 F. App'x 354, 357-58 (6th Cir. 2020) (unpublished) (failure to "reasonably plan [a] tactical operation" irrelevant to claim of excessive force during the operation itself); *Carter*, 973 F.2d at 1330, 1333 (arrest ruse not relevant to reasonableness of officers' deadly force after suspect fired automatic weapon at officers); *Marion v. City of Corydon*, 559 F.3d 700, 705 (7th Cir. 2009) (car chase not relevant to deadly force used after the chase had

ended); *Gysan v. Francisko*, 965 F.3d 567, 569-70 (7th Cir. 2020) (even if a vehicle "should not have been stopped" by police in the first place, that would not automatically mean that the subsequent use of deadly force violated the Fourth Amendment); *Felton v. City of Chicago*, 827 F.3d 632, 635-36 (7th Cir. 2016) (officers' liability for shooting a motorist with stun guns after a car chase did not depend on the reasonableness of the officers' initial decision to commence the chase); *Frederick v. Motsinger*, 873 F.3d 641, 644-45 (8th Cir. 2017) (following unsuccessful tasing, suspect "yelled, raised her knife, and charged toward [the officer] in an apparent effort to stab him"); *Schulz v. Long*, 44 F.3d 643, 646 (8th Cir. 1995) (officer's decision to charge a barricade not relevant to deadly force inquiry where intervening events included the officer becoming entangled in the barricade and the suspect approaching him "very deliberate[ly]" while wielding an ax in both hands).[2]

There is no split. The same conduct held irrelevant in the above cases is also irrelevant in the Tenth Circuit, which disregards officer action that is "attenuated by time or intervening events" and that does not proximately cause the use of deadly force. *Ceballos*, 919 F.3d at 1214; *Sevier*, 60 F.3d at 699; *Hastings*, 252 F. App'x at 203; *James*, 511 F. App'x at 747.

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[2] In other cases cited by Petitioners, officer conduct prior to the use of deadly force was not an issue before the court. *See Hector v. Watt*, 235 F.3d 154, 155 (3d Cir. 2000) (defining the issue in the case as "what type of damages [the plaintiff] [could] obtain under the Fourth Amendment . . . for expenses he incurred during his criminal prosecution"); *Waterman v. Batton*, 393 F.3d 471, 476-77 (4th Cir. 2005).

D. The Fourth Amendment Does Not Permit Courts To Categorically Ignore All Conduct In the Seconds Before A Shooting.

Petitioners seek to upend the fact-driven analysis used by every circuit and replace it with an extreme and categorical rule: courts must disregard pre-shooting conduct entirely, no matter how tight the temporal and causal connection between those actions and a shooting that results from them. In effect, that approach would require courts to close their eyes and imagine that much of the conduct immediately surrounding a shooting never occurred.

Graham commands the opposite: courts must resolve "whether the *totality of the circumstances* justifie[s] a particular sort of … seizure." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (emphasis added; brackets and ellipsis in original). As *Graham* explains, "proper application" of the reasonableness test "requires careful attention to the facts and circumstances of each particular case." 490 U.S. at 396. It follows that officer actions seconds before a shooting that are immediately connected to the shooting are "properly considered as part of the totality of the circumstances." *See* Pet. App. 27. Disregarding such actions would replace this Court's totality of the circumstances test with a fraction of the circumstances test.

In any event, this Court's precedents plainly forbid such an approach. For example, this Court considers whether officers gave warnings to suspects in the moments before pulling the trigger. In *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018), the Court deemed it relevant that the officers gave "orders to drop the weapon" in the course of a "situation [that] unfolded

in less than a minute." Indeed, the brief opinion in *Kisela* mentions the officers' commands to drop the knife four separate times. *Id.* at 1150. And in *Garner*, the Court held that "if the suspect threatens the officer with a weapon . . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." 471 U.S. at 11-12.

Unlike the Ninth Circuit in *County of Los Angeles v. Mendez*, the Tenth Circuit in this case did not allow pre-shooting conduct to "come [] into play after a forceful seizure has been judged reasonable under *Graham*." 137 S. Ct. 1539, 1546 (2017). Rather, in a case where the officers did *not* face a reasonable fear of serious physical harm at any point, the conduct in the seconds before they pulled the trigger made the shooting all the more unreasonable under *Graham*. The Tenth Circuit treated officer conduct immediately connected to the shooting and occurring seconds before the shooting as part of *Graham*'s totality of the circumstances analysis—just as *Kisela* and *Garner* recognize that the totality of the circumstances includes an officer's warning or failing to warn before pulling the trigger. In fact, Petitioners' themselves underscore the relevance of their conduct in the moments before the shooting by repeatedly noting that they warned Rollice to drop the hammer. Pet. i, 2, 8, 27. Just as these warnings are relevant to *Graham*'s totality of the circumstances, officer conduct that immediately and directly inflamed the encounter in the seconds before the shooting are relevant too.

Nothing in *Mendez* suggests that courts must categorically exclude actions tightly connected to the use of deadly force from the reasonableness analysis. In

Mendez, the Court criticized the Ninth Circuit's "provocation rule," which created liability for any pre-shooting conduct that was "somehow tied to the eventual use of force" by a "murky causal link." *Mendez*, 137 S. Ct. at 1548-49. This allowed courts to base Fourth Amendment violations on conduct that did nothing more than vaguely "set the table for the use of force." *Mendez*, 137 S. Ct. at 1547. The Tenth Circuit does not do that—it requires proximate cause and an immediate connection between the pre-shooting conduct and the shooting itself. *See supra* § I.c.3.a. In this case specifically, the Tenth Circuit determined that Rollice's "arming and perceived offensive movements," which led the officers to open fire, were in "direct response to the officers' conduct" in advancing on Rollice and cornering him in the garage. Pet. App. 27.

II. The Second Question Presented Does Not Warrant Review.

The second question presented asks: "Whether it was clearly established for qualified immunity purposes that advancing toward an intoxicated individual wielding a deadly weapon inside a garage was a 'reckless' act that would render unconstitutional any subsequent use of lethal force in response to a threat to officer safety." *See* Pet. ii. Petitioners do not make any serious argument for reviewing this question. Nor could they, as the issue is wholly fact-based. Petitioners do not contend that this question relates to any split. They offer no reason to consider it "cert-worthy"—or even important.

This case does not properly present the second question. It does not involve a "use of lethal force in response to a threat to officer safety," *see* Pet. ii, because Petitioners have conceded the factual premise

that no such threat existed. *See supra* § I.B. Nor did the court of appeals hold that the officers' pre-shooting conduct "render[s] unconstitutional any subsequent use of lethal force in response to a threat to officer safety." *See* Pet. ii. The court treated pre-shooting conduct as relevant to the reasonableness inquiry in a case where police killed a person even though they did not face a serious threat. *See supra* § I.B.

Nor is the second question outcome determinative. As explained above, this case is plainly headed for trial based on the Tenth Circuit's conclusion that a reasonable juror could find that the officers did not face a threat at the precise moment they killed Rollice. Hypothetically, if Petitioners were to establish that the Tenth Circuit erred in analyzing the pre-shooting conduct, the officers would still be liable based on the shooting standing alone. *See supra* § I.B.4.

Finally, the court of appeals correctly resolved the question: Petitioners' pre-shooting conduct was reckless and deliberate under clearly established Tenth Circuit law, which forbids advancing on an impaired person in a way that foreseeably inflames an encounter. Just as the officers advanced on Rollice, aggressively pointing at him, forcing him back, and cornering him, a lieutenant in *Allen v. Muskogee*, 119 F.3d 837, 840, 841 (10th Cir. 1997), recklessly precipitated a shooting by aggressively advancing on a mentally ill individual and reaching through his car window to grab a gun.

The court cogently explained that any "distinction in facts between this case and *Allen* tends to show why this matter is further from the line of reasonableness, not closer." For one, "[i]n *Allen*, the officers had not threatened the decedent, but here Officer Girdner was

moving toward [Rollice], in an apparent effort to search him without a reasonable suspicion [Rollice] was armed." Pet. App. 32. Second, "[i]n *Allen*, the decedent was already armed when the officers arrived, whereas [Rollice] did not arm himself until after the officers had cornered him." *Id.*

In sum, the Court should deny certiorari on the second question presented. There is no reason to review the issue and no error to correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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