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

REPLY BRIEF FOR PETITIONERS

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August 4, 2021

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REPLY BRIEF

There can be no serious dispute that the circuits are divided over the question left open in *County of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017)—*i.e.*, whether the Fourth Amendment forbids police officers from using reasonable force to repel a serious threat if the officers' conduct *before* the threat materialized in some vague sense contributed to the life-threatening situation. The Tenth Circuit itself has acknowledged that its rule conflicts with the rule employed by several other circuits—and is in serious tension with this Court's precedent to boot. Respondent tries to wish away the circuit split by noting that courts often consider things like whether warnings were issued before shots were fired, or whether the suspect was complying or retreating at the time, when determining whether a use of force was constitutional. But respondent confuses the inquiry into whether the officer reasonably perceived a threat *at the time force was used*—an inquiry that courts can and do undertake—with an inquiry into whether the officer acted reasonably *before* the threat materialized—an inquiry that most circuits correctly view as having no place in a Fourth Amendment excessive-force analysis. Whether that latter inquiry is proper is the question that has squarely divided the circuits, and the question that this petition squarely presents.

It is little surprise, then, that most of respondent's brief in opposition is devoted to trying to gin up vehicle problems. But far from making some unchallenged "factual finding" that petitioners never faced any lethal threat, the Tenth Circuit expressly *declined* to decide whether petitioners' use of force was a

reasonable response to Rollice's conduct, because in its view petitioners' actions *before* the threat materialized were "determinative." And far from identifying any "waiver," respondent points only to arguments that petitioners expressly made in the *alternative* to their core contention that the legal test respondent urged and the Tenth Circuit employed was incorrect. This case thus presents an ideal opportunity to resolve an entrenched circuit conflict over a recurring Fourth Amendment question with life-or-death stakes for police officers and the public.

I. The Circuits Are Deeply Divided Over The Question Left Open In *Mendez*.

The decision below explained that, in the Tenth Circuit, the established rule—reaffirmed several times post-*Mendez*—is that "even when an officer uses deadly force in response to a clear threat of such force being employed against him," the officer may still violate the Fourth Amendment if he "approached the situation in a manner [he] knew or should have known would result in escalation of the danger." Pet.App.11. The Ninth Circuit applies the same rule. *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019); *Winkler v. City of Phoenix*, 849 F.App'x 664, 666-67 (9th Cir. 2021). At least seven other circuits have emphatically disagreed, *see* Pet.16-21, as the Tenth Circuit acknowledged when it conceded (with considerable understatement) that "the concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits." *Pauly v. White*, 874 F.3d 1197, 1219 n.7 (10th Cir. 2017). Notwithstanding the Tenth Circuit's concession, respondent denies any

division among the circuits. That is wishful thinking in the extreme.

Respondent first tries to distinguish away all the cases on the majority side of the split by arguing that none "include[s] an appellate finding that officers did not have a reasonable fear of serious harm at any point in the interaction." BIO.11. But contrary to respondent's contentions, BIO.8-9, neither does this case. To be sure, the Tenth Circuit expounded at length on its own post hoc views of the seriousness of the threat petitioners faced when they fired. Pet.App.18-24. But the court concluded that discussion by expressly *declining* to resolve whether petitioners would be entitled to summary judgment if the court considered only "the *Graham* factors as applied to the few seconds in which [Rollice] was wielding a hammer." Pet.App.24. In the Tenth Circuit's (mistaken) view, *that* question "would present a close call." *Id.* [1] But the court decided that "we need not and do not reach any conclusion on that issue because our review is not limited to that narrow timeframe." *Id.* In its view, it was petitioners' conduct

[1] In fact, that question is not close. As the district court explained, rather than obey their repeated commands to drop his weapon, Rollice "raised the hammer still higher as if he might be preparing to throw it, or alternatively, charge the officers." Pet.App.40. And notwithstanding its lengthy musings about whether Rollice was acting "offensively" or "defensively," the Tenth Circuit ultimately conceded that "the district court's interpretation of the video evidence is plausible." Pet.App.21. Given the objective nature of the Fourth Amendment inquiry, *see Graham v. Connor*, 490 U.S. 386, 397 (1989), and the qualified immunity standard, that should have been enough to resolve the question in petitioners' favor.

before the threat to their safety materialized that was "determinative," because even *if* they reasonably perceived and reasonably responded to a lethal threat, they could still have violated the Fourth Amendment if they "recklessly created [that] lethal situation." Pet.App.28. That is precisely the approach that most circuits have rejected. *See* Pet.16-21.

Respondent insists that the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth 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." BIO.12. But that claim attacks a strawman and ignores the actual issue that has divided the circuits. Petitioners are not insisting that "courts must disregard pre-shooting conduct entirely" and focus on nothing but the use of force in the literal second in which the shots were fired. BIO.17. As the cases respondent cites illustrate, courts certainly can and do take into account things that speak to the reasonableness of the officer's perception that the suspect posed a serious threat—*e.g.*, whether the suspect had been issued any warnings, or whether the suspect was retreating. *See, e.g.*, *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc) (affirming denial of summary judgment where officers "had the time and opportunity to give a warning" before using lethal force but did not); *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011) (affirming denial of qualified immunity where officer fired as suspect was complying with command to lower his gun); *Est. of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020) (affirming denial of qualified immunity where officer fired at suspect who was retreating from altercation and not pointing his weapon at anyone); *cf.*

Stephenson v. Doe, 332 F.3d 68 (2d Cir. 2003) (upholding instruction that allowed jury to consider whether warning was given before shooting).

But there is a fundamental difference between examining facts that speak to the reasonableness of the perception that the suspect posed a serious threat, and examining the reasonableness of the officer's actions *before* the threat materialized. Perhaps unreasonable actions that give rise to a situation where the use of deadly force is reasonable may raise issues under state tort law, but they are not the province of a Fourth Amendment excessive-force claim. As the majority of circuits to consider the question have correctly explained, under the Fourth Amendment, "we consider the officer's reasonableness under the circumstances he faced at the time he decided to use force.… *We do not scrutinize whether it was reasonable for the officer 'to create the circumstances*.'" *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017) (emphasis added); *Hale v. City of Biloxi*, 731 F.App'x 259, 263 (5th Cir. 2018); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992); *Frederick v. Motsinger*, 873 F.3d 641, 645 (8th Cir. 2017); *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995); *Gysan v. Francisko*, 965 F.3d 567, 570 (7th Cir. 2020); *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992).

Indeed, one of the very cases respondent invokes, *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999), aptly explained the difference between those two inquiries before expressly *declining* to endorse the approach employed by the Tenth Circuit, and instead focusing exclusively on "whether it was objectively reasonable

for [the officer] to believe that she was" in danger when she fired her weapon. *Id.* at 294. In reaching that conclusion, the Third Circuit recognized that several circuits—including (at the time) the Seventh and Eighth—"have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure.'" *Id.* at 291. Respondent suggests that the Seventh Circuit reversed course in *Doornbos v. City of Chicago*, 868 F.3d 572 (7th Cir. 2017), but the court has more recently reiterated that "officers who make errors that lead to a dangerous situation retain the ability to defend themselves." *Gysan*, 965 F.3d at 570. And to the extent *Doornbos* or the Fourth Circuit's decision in *Betton v. Belue*, 942 F.3d 184 (4th Cir. 2019), conflated the reasonableness of the perceived need for force when employed with the reasonableness of the officer's actions *before* the threat materialized, that just underscores the need for this Court's review.

Respondent next contends that the Tenth Circuit's approach is not an outlier because some Tenth Circuit decisions instruct courts to disregard officers' pre-seizure conduct if a "superseding cause" severed any link between the conduct and the threat the officers faced at the moment they employed force. BIO.13. But the very fact that the Tenth Circuit is talking about superseding causes underscores the fundamental problem with its outlier rule. When courts are forced to discuss the causal links between earlier action (itself not unconstitutional) and later uses of force that are a reasonable response to a threat, it is a tell-tale sign they are focusing on the wrong conduct. The Tenth Circuit's approach raises

the same concerns as the Ninth Circuit's "vague causal standard" that this Court criticized in *Mendez*. 137 S.Ct. at 1548.

Finally, respondent asserts—with no accompanying analysis—that the Tenth Circuit would have reached the same outcome as other circuits in all of the cases cited in the petition because "[t]he officer conduct" in those cases purportedly "was attenuated either by time or intervening events from the later use of deadly force." BIO.14. That *ipse dixit* blinks reality. To take just one example, in *Thomas*, the Sixth Circuit held that it was irrelevant under *Graham* whether the officer recklessly "rush[ed] toward the apartment without backup," even assuming such conduct violated police procedures and unreasonably "increased the likelihood" of a violent confrontation, because *Graham* requires focusing exclusively on "the circumstances that Officer Kaufman faced *in the moment he decided to use force*." 854 F.3d at 365 (emphasis added). Those facts, irrelevant in the Sixth Circuit, would be "determinative" in the Tenth Circuit. Pet.App.28. The same can be said for all of the other cases cited in the petition. *See* Pet.16-21. That state of affairs is untenable and calls out for this Court's intervention.

II. The Decision Below Is Plainly Wrong.

The provocation rule that this Court unanimously rejected in *Mendez* provided "a novel and unsupported path to liability in cases in which the use of force was reasonable," by "us[ing] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Mendez*, 137 S.Ct. at 1546. The Tenth Circuit's approach does *Mendez* one better. Not only does it permit an officer's

use of force to be treated as constitutionally excessive even if it was a reasonable response to a serious threat; it does so even if the officer's pre-seizure conduct did not rise to the level of a constitutional violation. *See* Pet.App.11, 15; *Est. of Ceballos v. Husk*, 919 F.3d 1204, 1214 (10th Cir. 2019); *Pauly*, 874 F.3d at 1219-20. Indeed, by asking whether "the officers approached the situation in a manner they knew or should have known would result in escalation of the danger," Pet.App.11, the test uses the classic language of negligence and blurs the distinction between state tort law and a Fourth Amendment violation. *See* Nat'l.Police.Assoc.Br.15-18.

That approach is decidedly at odds with decades of this Court's precedent focusing on "the moment" force is used. *Graham*, 490 U.S. at 396; *Saucier v. Katz*, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring in the judgment); *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014); *Scott v. Harris*, 550 U.S. 372, 385-86 (2007). As the Court recently put it, a plaintiff "cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" *City of San Francisco v. Sheehan*, 575 U.S. 600, 615 (2015). Any other rule would put officers in the impossible position of having an earlier misstep render them unable to defend themselves or others from what everyone agrees is a clear threat.

Respondent has no good answer to any of that. Respondent's principal contention is that *in this case*, the Tenth Circuit believed petitioners' use of force was *un*reasonable at the moment they fired on Rollice. BIO.18-19. But, as discussed above, that is simply

wrong. *See* Section I.A, *supra*. Respondent also claims that the Tenth Circuit's rule aligns with statements in this Court's cases that *approved* officers' use of force by noting, *inter alia*, that the officers issued a warning before deploying force. BIO.17-18. Once again, respondent confuses the reasonableness of the officer's perception that a threat existed (as to which the presence of warnings is plainly relevant) with the reasonableness of the officer's conduct *before* the threat materialized. Whether a suspect ignored repeated orders to lower a deadly weapon (as Rollice did) before the officer resorted to force is legally relevant because it speaks directly to whether the use of force was reasonable. But that does not begin to support the untenable proposition that officers are constitutionally forbidden from defending themselves or others whenever, in some vague sense, earlier missteps "unreasonably contributed" to a confrontation.

At a bare minimum, it was certainly not clearly established that petitioners constitutionally forfeited their ability to reasonably respond to a lethal threat. *See* Nat'l.Sherrifs.Assoc.Br.19-20. Respondent's strained attempts to analogize this case to *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), only underscore why that 20-year-old decision—which involved dramatically different facts and did not even find a Fourth Amendment violation—cannot plausibly have put everyone but the "plainly incompetent" or "knowing[]" constitutional violators, *Mullenix v. Luna*, 136 S.Ct. 305, 310 (2015) (per curiam), on notice that taking a single step toward an intoxicated individual they had been called to remove from the premises would constitutionally disable them from responding

with reasonable force should he pick up a deadly weapon, threaten them with it, and refuse repeated commands to put it down. Pet.29-32.

III. This Is An Excellent Vehicle To Resolve Critically Important Questions.

Respondent does not and cannot dispute that the question presented is enormously consequential. It implicates life-or-death stakes, it recurs frequently, and the Tenth Circuit's rule places officers in an untenable position with no redeeming policy consequences; to the contrary, the consequences promise to be tragic. *See* FOP.Amicus.Br.13-16. As *Mendez* explained, the Fourth Amendment already ensures that officers can be held accountable for injuries that are proximately caused by real constitutional violations. *See* 137 S.Ct. at 1548. And to the extent additional remedies are needed, state tort law is more than up to the task. There is thus neither legal nor practical justification for the Tenth Circuit's anomalous constitutional rule.

Nor is there any merit to respondent's efforts to conjure up a vehicle problem. As explained, respondent's repeated refrain that the Tenth Circuit made some unchallenged factual finding against them is demonstrably wrong. *See* Part I, *supra*. And respondent's claim that petitioners "waived" the argument that the excessive-force analysis should focus on the moment they discharged their weapons, BIO.7-8, borders on frivolous. Petitioners repeatedly argued below that "[t]he second *Graham* factor, the immediacy of the harm, ... is analyzed 'at the precise moment that the officer used force.'" CA10.Appellee.Br.11. The use of deadly force,

petitioners added, is constitutional "if the officer had probable cause to believe that there was a threat of serious physical harm to himself or others. *And to clarify, 'if threatened by a weapon, an officer may use deadly force*.'" *Id.* at 12 (emphasis added) (citation omitted). "Further," petitioners continued, "the court's focus should be on the circumstances *at the moment force was used*[.]'" *Id.* at 14 (emphasis added). Petitioners then argued that their decision to fire on Rollice was constitutional because they reasonably feared for their lives when they fired. *Id.* at 18. And petitioners criticized respondent for "rel[ying] almost entirely on the actions and conduct of [petitioners] ... prior to the shooting." *Id.* at 14. Those actions, petitioners urged, were "immaterial." *Id.*[2] Those are the precise arguments that petitioners make now.

Ignoring all of that, respondent instead focuses on petitioners' *alternative* argument that respondent was wrong as a matter of fact—even under the Tenth Circuit's misguided rule—in asserting that petitioners "recklessly created the need for force." *Id.* at 20. Petitioners naturally contested that claim, which the Tenth Circuit erroneously made a critical part of its Fourth Amendment analysis. But, to state the obvious, arguing in the alternative that petitioners should win even under the wrong legal standard does not constitute a "waiver" of the more fundamental point, advanced at length, that the excessive-force

[2] Petitioners' rehearing petition likewise argued that the panel erred by considering conduct that was not "immediately connected to the seizure," and further argued that the panel's decision contradicted *Mendez*. CA10.Reh'rg.Pet.10-11.

analysis must be trained on whether an officer reasonably perceived a threat when he used force, not on whether the officer somehow "contributed" to the materialization of that threat. The Tenth Circuit's acceptance of that position is inconsistent with this Court's precedent, squarely conflicts with decisions of other circuits, and poses a grave risk to both officer and public safety. The Court should grant certiorari and resolve the circuit split that has only deepened in the wake of *Mendez*.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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