NO. ______

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Four years ago, this Court unanimously rejected the Ninth Circuit's so-called "provocation rule," under which a police officer's objectively reasonable use of force to effect a seizure could nonetheless be deemed a Fourth Amendment violation if the officer engaged in some "independent constitutional violation" that "intentionally or recklessly provoked a violent response." *Cnty. of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1545 (2017). But the Court declined to decide whether courts may "tak[e] into account" whether "unreasonable police conduct prior to the use of force … foreseeably created the need to use it" when assessing whether a seizure was reasonable. *Id.* at 1547 n.*. Although most circuits have continued to answer that question with a resounding no, the Ninth and Tenth Circuits have now repeatedly held that an objectively reasonable use of force can nonetheless violate the Fourth Amendment if police "deliberately or recklessly created the situation that led to the" need to use it. App.26. In the decision below, the Tenth Circuit declared that such pre-seizure conduct was "determinative" in concluding that petitioners could be held liable for responding with lethal force when an intoxicated individual they had been asked to remove from a private residence grabbed a clawed hammer, wielded it at them, and repeatedly refused their commands to drop it. App.18. The court then held that petitioners lacked qualified immunity to boot.

The questions presented are:

1. Whether use of force that is reasonable at the moment it is employed can nonetheless violate the

Fourth Amendment if the officers recklessly or deliberately created the need to use force.

2. 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.

PARTIES TO THE PROCEEDING

Petitioners are the City of Tahlequah, Oklahoma; Brandon Vick; and Josh Girdner. Petitioners were defendants in the district court and appellees in the Tenth Circuit.

Respondent is Austin P. Bond, as Special Administrator of the Estate of Dominic F. Rollice. Respondent was appellant in the Tenth Circuit. Plaintiff in the district court was Robbie Emery Burke, as Special Administrator of the Estate of Dominic F. Rollice. Ms. Burke passed away during the pendency of the proceedings below and Mr. Bond was substituted for her.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner City of Tahlequah, Oklahoma, is not a nongovernmental corporation. Petitioners Vick and Girdner are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Bond v. City of Tahlequah*, No. 19-7056 (10th Cir.) (opinion reversing judgment of district court, issued December 1, 2020); and
- *Burke v. City of Tahlequah*, No. CIV-18-257-RAW (E.D. Okla.) (order granting summary judgment to defendants, filed Sept. 25, 2019).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Four years ago, this Court unanimously rejected the Ninth Circuit's so-called "provocation rule," under which "an officer's otherwise reasonable (and lawful) defensive use of force" to effect a seizure was deemed "unreasonable as a matter of law" under the Fourth Amendment if "the officer intentionally or recklessly provoked a violent response" and "that provocation [wa]s an independent constitutional violation." *Cnty. of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1545 (2017). As the Court explained, the "fundamental flaw" with that rule was "that it use[d] another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* at 1546. The Court declined to decide, however, whether courts may "tak[e] into account" whether "unreasonable police conduct prior to the use of force … foreseeably created the need to use it" when determining whether the force ultimately employed was reasonable or excessive. *Id.* at 1547 n.*.

While the majority of circuits have answered that question with a resounding no, in the four years since *Mendez* the Ninth and Tenth Circuits have repeatedly reached the opposite conclusion. Indeed, the Tenth Circuit has expressly reaffirmed its approach even after acknowledging that it is an outlier and is in considerable tension with *Mendez*. The Ninth Circuit likewise has expressly concluded that nothing in *Mendez* precludes it from continuing to apply that rule to reach the same results it would have reached under the provocation rule that this Court unanimously rejected in *Mendez*. In fact, the Ninth and Tenth Circuits' outlier test is even broader than the one

Mendez rejected, as it allows courts to find a Fourth Amendment violation based on *any* “reckless and deliberate” (or perhaps even negligent) conduct by an officer that purportedly “creat[es] a situation requiring deadly force,” App.15, even if that conduct did not rise to the level of “an independent constitutional violation,” *Mendez*, 137 S.Ct. at 1545. The rule thus has the “anomalous” effect of “imposing liability for what is arguably a violation of best police practices,” but inarguably not a Fourth Amendment violation. Tr. of Oral Argument at 32, *Cnty. of Los Angeles v. Mendez*, 137 S.Ct. 1539 (2017) (No. 16-369) (Alito, J.).

This case is illustrative. Petitioners are police officers who were called to a woman’s home to remove her ex-husband, Dominic Rollice, a registered sex offender, from the premises. Petitioners knew that Rollice was intoxicated, and that his ex-wife was afraid of what he might do if he remained in her home. Petitioners found Rollice in the garage. They tried to engage him in conversation and explained that they only wanted to get him a ride out of there. But Rollice had no interest in cooperating. When asked for consent to a pat-down, Rollice refused, and instead grabbed a clawed hammer, gripping it with both hands at shoulder level. At that point, less than eight feet separated Rollice and the hammer from the nearest officer. Petitioners repeatedly ordered Rollice to drop the hammer; he repeatedly refused. Instead, Rollice raised the hammer above his head, putting petitioners in fear that he was about to charge or throw the hammer at them. Petitioners discharged their firearms, and Rollice died of his wounds.

The district court granted petitioners summary judgment, but the Tenth Circuit reversed. The Tenth Circuit did not find that there was a triable issue of fact as to whether lethal force was a reasonable response to the threat Rollice posed. In the Tenth Circuit's view that question was not "determinative." App.28. Instead, what mattered was not the reasonableness of the force used in Rollice's actual seizure, but whether the officers' earlier missteps may have "recklessly created the situation that led to the fatal shooting," App.26—*i.e.*, "whether the officers approached the situation in a manner they knew or should have known would result in escalation of the danger," App.11. Whatever merits such a standard might have as a matter of state tort law, it has no place in the constitutional analysis. Indeed, the Tenth Circuit's free-form inquiry into whether officers contributed to the danger, without regard to whether those prior actions were themselves unconstitutional, is even more problematic than the provocation rule this Court unanimously rejected in *Mendez*.

This case is an ideal vehicle to resolve the acknowledged circuit split over the question *Mendez* left open. That question is plainly recurring, as evidenced by how frequently it has arisen even in the four years since *Mendez*. It is plainly important, as evidenced by the life-or-death circumstances in which it typically arises. And the Tenth Circuit's outlier rule is plainly wrong, as evidenced by the untenable position in which it leaves officers, who face liability and being branded unconstitutional actors even if they act reasonably in self-defense. Officers deserve better than to be put in that no-win position. At a bare

minimum, petitioners deserved qualified immunity. Either way, the Court should grant certiorari.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 981 F.3d 808 and reproduced at App.1-33. The district court's decision granting summary judgment to petitioners is not reported in the Federal Reporter but is reproduced at App.36-48.

JURISDICTION

The Tenth Circuit issued its decision on December 1, 2020, and denied a timely petition for rehearing on December 28, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. §1983 are reproduced at App.49.

STATEMENT OF THE CASE

A. Legal Background

In its seminal decision in *Graham v. Connor*, 490 U.S. 386 (1989), this Court held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395. When "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth

Amendment," *Graham* instructed courts to pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. The Court also emphasized that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* The Court further cautioned that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The Court has had several occasions since *Graham* to opine on the reasonableness of a particular use of force to effect a seizure. In doing so, the Court has consistently focused on "the circumstances at the moment when the shots were fired," assessing whether the individual against whom force was used was, at that moment, posing a threat to officer and/or public safety. *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014); *see also, e.g.*, *Scott v. Harris*, 550 U.S. 372, 385-86 (2007); *cf. City of San Francisco v. Sheehan*, 575 U.S. 600, 612-13 (2015) ("Nothing in the Fourth Amendment bar[s] [police officers] from protecting themselves, … even when, judged with the benefit of hindsight, the officers may have made 'some mistakes.'"). Nonetheless, over the years, lower courts have occasionally embraced Fourth Amendment tests

that look to not just whether the officer's ultimate use of force was a reasonable response to a threat to officer or public safety, but whether the officer engaged in conduct that contributed to or somehow "provoked" the threat.

This Court confronted one such doctrine in *Mendez*, which involved the Ninth Circuit's so-called "provocation rule," under which "an officer's otherwise reasonable (and lawful) defensive use of force [wa]s unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation [wa]s an independent constitutional violation." 137 S.Ct. at 1545. The Court squarely and unanimously rejected that rule. As the Court explained, "[w]hen an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." *Id.* at 1547. Yet rather than "stop there," the provocation rule "instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force." *Id.* The Court rejected that effort to "permit[] excessive force claims that cannot succeed on their own terms." *Id.* The Court reserved judgment, however, on whether courts may "tak[e] into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it" when assessing "under the 'totality of the circumstances'" test whether a particular use of force was reasonable. *Id.* at 1547 n.*.

B. Factual Background

On August 12, 2016, Joy Rollice called 911. App.2. She told the dispatcher: "'my ex-husband is in the

garage, he will not leave, he's drunk and it's going to get ugly real quick.'" App.2. She confirmed that she wanted her ex-husband sent to jail and informed the dispatcher that "'he doesn't live here. He's a registered sex offender and lives in Park Hill. He's my ex-husband. He's still got tools in the garage. He doesn't live here.'" App.2-3. Petitioners—Officers Brandon Vick and Josh Girdner—responded, along with Officer Chase Reed. App.3. It is undisputed that petitioners knew that Rollice was Joy's ex-husband, that he was intoxicated, and that Joy was afraid of what he might do if he remained in her home. App.3.

Upon the officers' arrival, Joy led them to the side entrance of the garage. App.3. There they met Rollice and began speaking with him. App.3-4. The officers told him that they did not intend to take him to jail and only wanted "'to get him a ride out of there.'" App.3-4. Rollice was "fidgeting with something in his hands." App.4. He also appeared "nervous and fidgety" to Officer Girdner, who "asked [Rollice] to step outside so [Officer Girdner] could pat him down for officer safety." CA10.Aplt.Appx.000198; *see* App.4. Rollice refused. App.4. Officer Girdner testified that Rollice "did not step outside but backed further into the garage," and "then turned and began to walk away from me. I stepped into the garage and ordered him to stop and turn around." CA10.Aplt.Appx.000198. Based on body camera footage, the district court agreed that Rollice "backed up and then turned and walked away from Girdner to the back of the garage. All three officers followed [Rollice] into the garage." App.39. The Tenth Circuit, however, posited that a jury could view the video as showing that "Officer Girdner took the first step toward Dominic, and

Dominic took a step back only after Officer Girdner moved toward him." App.4 n.9. In any event, there is no dispute that Officer Girdner ordered Rollice to stop, and he refused. App.5.[1]

Upon reaching the back of the garage, Rollice grabbed a hammer and stood facing the officers holding it with both hands at shoulder level. App.5; CA10.Aplt.Appx.000198. The officers backed up, drew their guns, ordered Rollice to drop the hammer, and explained that they only wanted to talk to him—but "he repeatedly refuse[d], saying 'No.'" App.6; *see* CA10.Aplt.Appx.000198. Rollice spun the hammer around so that its claws were facing Officer Girdner. CA10.Aplt.Appx.000198; CA10.Aplt.Appx.000297. Rollice then moved to his right, creating a clear path between himself and the officers. App.6. He stood eight to ten feet from Officer Girdner. App.6. Officer Reed was even closer. App.21.

The officers continued ordering Rollice to drop the hammer, but he again said "No." App.6. He then pulled the hammer back behind his head. App.6. Officer Girdner testified that Rollice "took a stance which made me believe he was going to charge at me or throw the hammer at me or the other officers present. At that time, I was in fear for my life and the lives of the other officers present because [Rollice] posed an immediate threat of serious bodily injury or death to me and the other officers." CA10.Aplt.Appx.000199. The body camera footage confirmed that Rollice "raised the hammer still higher

[1] All three officers testified that Rollice told them, "One of us is going to fucking die tonight." App.5 n.10. Respondent disputed that claim, and neither court below considered it. *Id.*

as if he might be preparing to throw it, or alternatively, charge the officers." App.40. "In response to Dominic's movement with the hammer, Officers Girdner and Vick fire[d] multiple shots," fatally wounding Rollice. App.6. Officer Reed fired his Taser but missed. App.40.

C. Proceedings Below

Respondent, the administrator of Rollice's estate, sued petitioners under 42 U.S.C. §1983, claiming that they used excessive force against Rollice in violation of the Fourth Amendment. App.7.[2]

1. The district court granted petitioners summary judgment on respondent's Fourth Amendment claim, both on the merits and qualified immunity. On the merits, the court held that, "[e]ven viewing the record in the light most favorable to" respondent, the evidence "strongly favor[ed]" petitioners on the all-important question of "whether [Rollice] posed an immediate threat to the safety of officers or others" at the moment of the shooting. App.40-41, 42. But the court concluded that it could not end its analysis there because "[t]he Tenth Circuit holds that the reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." App.42. Even so, the court rejected

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[2] Respondent also filed a claim against the City of Tahleqah under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). App.7. The district court granted the city summary judgment on the *Monell* claim, and respondent did not appeal. App.7.

respondent's argument "that the officers' conduct toward Rollice 'inflamed the tensions' and created the need to use such force," finding "no issue for a reasonable jury in this regard." App.42-43.

The court further held that petitioners would be entitled to qualified immunity anyway because no precedent, from the Tenth Circuit or elsewhere (much less from this Court), "clearly established" that petitioners violated Rollice's Fourth Amendment rights. App.44-48. The court found the only arguably relevant precedent, a 20-year-old Tenth Circuit decision called *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), readily distinguishable. App.47.

2. The Tenth Circuit reversed, both on the merits and on qualified immunity, and remanded the case for trial. App.33. On the merits, the court began by explaining that, under Tenth Circuit precedent, "e*ven when an officer uses deadly force in response to a clear threat of such force being employed against him*, the *Graham* inquiry does not end there." App.11 (emphasis added). "Instead," the Tenth Circuit's "totality of the circumstances" analysis goes on to ask "whether the officers approached the situation in a manner they knew or should have known would result in escalation of the danger." App.11. Under that approach, the court explained, officers can be liable for shooting a suspect even if, "'viewed in isolation, the shooting was objectively reasonable under the Fourth Amendment,'" because the "officers' reckless and deliberate conduct in creating a situation requiring deadly force may result in a Fourth Amendment violation." App.15 (quoting *Hastings v. Barnes*, 252 F.App'x 197, 203 (10th Cir. 2007)).

Applying that rule, the court held that petitioners could be liable for using excessive force when they shot Rollice in response to his raising the hammer as an apparent prelude to throwing it at or charging them. The court conceded (with considerable understatement) that "whether summary judgment was proper" "would present a close call" if it considered only "the few seconds in which Dominic was wielding a hammer." App.24.[3] But the court expressly declined to "reach any conclusion on that issue because our review is not limited to that narrow timeframe." App.24. Instead, the court turned its attention to "whether a jury could conclude Officer Girdner's initial advance toward Dominic and the officers' subsequent cornering of Dominic in the back of the garage recklessly created the situation that led to the fatal shooting." App.26. In the court's view, because "the *Graham* analysis would likely not have justified any force" "[w]hen the officers first made contact," "[a] reasonable jury could find" a Fourth Amendment violation even if the officers' use of force was justified in the moment, on the theory "that the officers'

[3] In the Tenth Circuit's view, that was still a "close call" because, "[a]lthough Dominic does raise the hammer above his head, the video shows no winding up movements made by Dominic in preparation of throwing it at the officers," because his posture with hammer aloft could be viewed as "a defensive stance," and because, "before raising the hammer," he said, in what the Tenth Circuit characterized as "a relatively calm manner, 'I have done nothing wrong here, man. I'm in my house. I'm doing nothing wrong.'" App.21. In fact, Rollice was not in his house; the house belonged to his ex-wife, who called 911 to have him removed from the premises because he was drunk and "'she feared ... [what might] happen.'" App.3 (alterations in original); App.6 n.11.

reckless conduct unreasonably created the situation that ended Dominic's life." App.28.

Turning to qualified immunity, the Tenth Circuit explained that its "analysis of clearly established law narrow[ed] to" two decades-old Tenth Circuit decisions: *Allen*, 119 F.3d 837, and *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995). App.30. Although the Tenth Circuit did not acknowledge as much, neither decision held that a police officer violated the Fourth Amendment by using lethal force in response to a lethal threat that the officer "recklessly" provoked. In *Sevier*, the Tenth Circuit merely observed in *dicta* before dismissing an appeal for lack of jurisdiction that "[t]he reasonableness of [police officers'] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." 60 F.3d at 699-703.

In *Allen*, police received a call about an armed man who was threatening suicide and had previously threatened his family. *Allen*, 119 F.3d at 839. The man was alone in a car when the police arrived; officers approached the car and tried to wrest the gun from him, but he fired on the officers, who returned fire, killing him. *Id.* The Tenth Circuit denied summary judgment to the officers, reasoning that there were genuine issues of material fact because "some deposition testimony indicates that [one of the officers] ran 'screaming' up to Mr. Allen's car and immediately began shouting at Mr. Allen to get out of his car." *Id.* at 841. The Tenth Circuit "express[ed] no

opinion on the merits," but held that "a reasonable jury could conclude on the basis of some of the testimony presented that the officers' actions were reckless and precipitated the need to use deadly force." *Id.*

In the panel's view here, the combination of those two decisions sufficed to clearly "establish[] that applying lethal force after deliberately or recklessly manufacturing the need to do so in such a scenario is a constitutional violation." App.31. The Tenth Circuit said next to nothing, however, about how either decision would have made clear to every reasonable officer that stepping into the garage was a reckless act that would render any subsequent use of lethal force in response to a threat to officer safety unconstitutional. Instead, the court simply declared that "[a] reasonable officer, faced with the circumstances here and presumptively aware of our decision in *Allen*, would have known that cornering Dominic in the garage might recklessly or deliberately escalate the situation, such that an officer's ultimate use of deadly force would be unconstitutional." App.32. The Tenth Circuit further posited that "the distinction in facts between this case and *Allen* tends to show why this matter is further from the line of reasonableness, not closer." App.32.

The Tenth Circuit did not cite this Court's decision in *Mendez* or otherwise explain how its "provocation" rule is consistent with *Mendez*. However, earlier Tenth Circuit decisions acknowledged that the circuits are split on whether "pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions" and noted that

"[t]he Supreme Court very recently had an opportunity to resolve this issue [in *Mendez*] but declined to do so." *Pauly v. White*, 874 F.3d 1197, 1220 n.7 (10th Cir. 2017). "Thus, at least for now, *Sevier* and *Allen* remain good law in [the Tenth] [C]ircuit." *Id.*; *see also Est. of Ceballos v. Husk*, 919 F.3d 1204, 1214 n.2 (10th Cir. 2019) ("We recently reaffirmed this longstanding Tenth Circuit law, notwithstanding [*Mendez*].").

REASONS FOR GRANTING THE PETITION

The circuits are in open conflict over the question this Court left unresolved in *Mendez*—namely, whether an officer's use of force that is reasonable in the moment can nonetheless violate the Fourth Amendment if the officer's pre-seizure conduct unreasonably "created" the situation that led to the need to use force. The Tenth Circuit itself has acknowledged that conflict, observing (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*, 874 F.3d at 1219 n.7. In fact, the vast weight of circuit precedent rejects the Tenth Circuit approach. Indeed, only one other circuit has embraced that rule: the Ninth Circuit, the source of the closely related provocation rule that this Court unanimously rejected in *Mendez*.

That acknowledged circuit split is reason enough for this Court to grant certiorari, as the Tenth Circuit squarely held that its outlier rule was "determinative" of its Fourth Amendment analysis. App.28. But there is a good reason why most of the circuits have rejected that rule: Whatever its merits as a rule of state tort

law, it is plainly contrary to this Court's *constitutional* excessive force jurisprudence, including *Graham* itself. The defining feature of the Tenth Circuit's approach is that it allows a court to find a Fourth Amendment violation based on an officer's contribution to a dangerous situation even when everyone agrees that the officer's ultimate use of force was objectively reasonable in the moment. There is no better illustration of that than this case, as the Tenth Circuit concluded that it did not even *matter* if petitioners' use of force was an objectively reasonable response to the threat Rollice posed because, in the Tenth Circuit, the Fourth Amendment analysis "is not limited to that narrow timeframe." App.24. Accordingly, by the Tenth Circuit's own telling, its test can make it *unconstitutional* for an officer to use an objectively reasonable amount of force to defend himself or innocent bystanders from a deadly threat. That rule would essentially punish officers for reasonably defending themselves, because they contributed to the situation in some undefined and not independently unconstitutional manner. As virtually every other court to consider the question has recognized, that effort to cobble together a constitutional violation from two sets of constitutional conduct is not and cannot be the law.

In short, this petition presents an excellent opportunity to resolve a frequently recurring question of constitutional law on which the lower courts are openly divided and the Ninth and Tenth Circuits are deeply mistaken. By imposing liability even when officers reasonably respond to an immediate threat, the decision below needlessly jeopardizes the lives of

police officers and places them in an impossible position. The Court should grant certiorari.

I. The Tenth Circuit's Capacious *Graham* Test Squarely Conflicts With The Fourth Amendment Tests Used In Other Circuits.

Four years ago, this Court held that an earlier constitutional violation that occurs in the course of a police encounter that ultimately leads to an objectively reasonable use of force cannot be used "to manufacture an excessive force claim where one would not otherwise exist." *Mendez*, 137 S.Ct. at 1546. The Court declined to resolve, however, whether the "totality of the circumstances" analysis for assessing the reasonableness of the force used to effect a seizure can "tak[e] into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Id.* at 1547 n.*. At the time, it was not clear that any lower court had embraced such a capacious conception of *Graham*'s totality-of-the-circumstances test. But it is now plain that the circuits are in open and acknowledged disagreement over that question.

The decision below makes clear beyond cavil that in the Tenth Circuit, "even when an officer uses deadly force in response to a clear threat of such force being employed against him," the officer may still be held to have violated the Fourth Amendment if he "approached the situation in a manner [he] knew or should have known would result in escalation of the danger." App.11 (emphasis added). Indeed, the Tenth Circuit has had three opportunities since *Mendez* to address this issue, and each time it has confirmed that, "notwithstanding [*Mendez*]," in the Tenth

Circuit, "the reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment they used force but also on whether the officers' own conduct during the seizure unreasonably created the need to use such force." *Ceballos*, 919 F.3d at 1214 & n.2. "Thus, at least for now," that rule "remain[s] good law in [the Tenth] [C]ircuit." *Pauly*, 874 F.3d at 1219 n.7.

That is decidedly not the rule in most of the circuits that have considered this issue. In fact, the majority of the circuits had squarely rejected the rule now embraced by the Tenth Circuit even before *Mendez*, and several have observed that it is even more obviously incorrect in the wake of *Mendez*. For example, the Second Circuit not only has long rejected the Tenth Circuit's approach, *see, e.g.*, *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996), but recently reiterated that view, explaining that an officer's "'actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force,'" *Ferreira v. City of Binghamton*, 975 F.3d 255, 279 (2d Cir. 2020) (quoting *Salim*, 93 F.3d at 92). *Ferreira* noted that a contrary rule would suffer the same flaws as "the provocation rule" rejected in *Mendez*. *Id.* at 280.

The Fourth Circuit has also consistently rejected the Tenth Circuit's view. In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005), for example, it reaffirmed its longstanding rule that "the reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment

that force is employed." *Id.* at 477; *see also, e.g.*, *Drewitt v. Pratt*, 999 F.2d 774, 779-80 (4th Cir. 1993). As Judge Wilkinson has explained, "*Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force." *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996).

That is the rule in the Fifth Circuit as well. In *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992), a §1983 plaintiff argued that a police officer used excessive force in violation of the Fourth Amendment because the officer "manufactured the circumstances that gave rise to the fatal shooting." *Id.* at 1275. The Fifth Circuit disagreed: "[R]egardless of what had transpired up until the shooting itself," the court explained, if the plaintiff's "movements gave the officer reason to believe, at that moment, that there was a threat of physical harm," then his use of deadly force did not violate the Fourth Amendment. *Id.* at 1276. The court recently reaffirmed that rule in the wake of *Mendez*, again holding that it is irrelevant under *Graham* whether "the officers recklessly created the circumstances leading up to" their use of deadly force. *Hale v. City of Biloxi*, 731 F. App'x 259, 263 (5th Cir. 2018). Like the Second Circuit, the court noted that the contrary argument "sounds much like the rejected 'provocation doctrine' of *Mendez*." *Id.*

The Sixth Circuit has also repeatedly rejected the Tenth Circuit's rule. In *Thomas v. City of Columbus*, 854 F.3d 361 (6th Cir. 2017), the court explained that, "[i]n this circuit, 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.'" *Id.* at 365 (emphasis added); *see also, e.g.*, *Goodwin v. Richland Cnty.*, 832 F.App'x 354, 358 (6th Cir. 2020) (citing *Mendez* in reaffirming that rule); *Livermore ex rel Rohm v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007).

The Seventh Circuit is in accord. In *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992), a plaintiff brought an excessive force claim, arguing "that the Fourth Amendment prohibits creating a foreseeably dangerous situation in which to arrest a suspect." *Id.* at 1331. The Seventh Circuit disagreed, explaining that "the officer's actions prior to 'seizure,' even if unjustified, [are] not subject to Fourth Amendment scrutiny" as part of the excessive-force analysis. *Id.*; *see also Felton v. City of Chicago*, 827 F.3d 632, 635 (7th Cir. 2016); *Marion v. City of Corydon*, 559 F.3d 700, 705 (7th Cir. 2009). And the court recently reiterated that "[*Mendez*] holds that officers who make errors that lead to a dangerous situation retain the ability to defend themselves." *Gysan v. Francisko*, 965 F.3d 567, 570 (7th Cir. 2020).

The Eighth Circuit has also long rejected the Tenth Circuit's rule. In *Frederick v. Motsinger*, 873 F.3d 641 (8th Cir. 2017), it reaffirmed its longstanding rule that whether "officers created need for use of deadly force [is] irrelevant to reasonableness issue" under *Graham*. *Id.* at 645; *see also Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995). And the Third Circuit has taken an approach at odds with the Tenth Circuit's as well. Before *Mendez*, it squarely rejected the Ninth Circuit's provocation rule, concluding that "if the officers' use of force was reasonable given the

plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause that limited the officers' liability." *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2000). And after *Mendez*, it rejected the Tenth Circuit's approach, concluding that, "where [the officer's] provocation was not even an independent Fourth Amendment violation, it cannot be used to render improper a later-in-time and otherwise valid use of force." *Fields v. City of Pittsburgh*, 714 F.App'x 137, 143 (3d Cir. 2017).

Only one other circuit has embraced the Tenth Circuit's approach: the Ninth Circuit, the source of the provocation rule that *Mendez* rejected. Like the Tenth Circuit, the Ninth Circuit now claims that *Graham* itself compels courts to "consider when evaluating excessive force … whether the officer was 'simply responding to a preexisting situation,' or instead 'create[d] the very emergency he then resort[ed] to ... force to resolve.'" *Winkler v. City of Phoenix*, 2021 WL 982276, at *2 (9th Cir. Mar. 16, 2021); *see also, e.g.*, *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) (reversing grant of summary judgment to officer because "a reasonable factfinder could conclude that any sense of urgency was of [the officer's] own making"). Thus, in the Ninth and Tenth Circuits, an officer can now be held liable for an ultimate use of force that was reasonable in the moment if the officer engaged in conduct that "intentionally or recklessly provoked a violent response" even if that conduct did not rise to the level of "an independent constitutional violation." *Mendez*, 137 S.Ct. at 1545. In fact, it is not even clear that the earlier conduct need to rise to the level of recklessness, as the Tenth Circuit used the classic language of

negligence in deeming it relevant whether "the officers approached the situation in a manner they knew or should have known would result in escalation of the danger." App.11. But whatever the standard the court may apply for assessing what counts as contribution, one thing is clear: It is now even easier in the Ninth and Tenth circuits than it was before *Mendez* to hold officers liable for objectively reasonable uses of force in effecting seizures.

In sum, the circuits are squarely divided over whether the totality-of-the-circumstances test for evaluating the reasonableness of the force used in effecting a seizure should "tak[e] into account" whether "unreasonable police conduct prior to the use of force … foreseeably created the need to use it." *Id.* at 1547 n.*. That split has become clear and entrenched in the wake of *Mendez*, and this case presents an ideal opportunity to resolve it, as the Tenth Circuit explicitly held that its view that petitioners may have "unreasonably created the situation" that led to their need to use force was "determinative." App.28. The Court should grant certiorari and resolve the persistent circuit split over the recurring question that *Mendez* left open.

II. The Decision Below Is Wrong Several Times Over.

A. The Tenth Circuit's Rule Is as Untenable as the Ninth Circuit Rule *Mendez* Rejected.

1. Much like the provocation rule this Court rejected in *Mendez*, the defining feature of the Tenth Circuit's approach is that it allows courts to find a Fourth Amendment violation "even when an officer

uses deadly force in response to a clear threat of such force being employed against him"—in other words, even when an officer's ultimate use of force in effecting a seizure was "'objectively reasonable under the Fourth Amendment.'" App.11, 15. In the Tenth Circuit's view, liability should turn not on whether the officers' use of force was a reasonable "at the moment" force was employed, *Graham*, 490 U.S. at 396, but on whether "the officers approached the situation in a manner they knew or should have known would result in escalation of the danger," App.11.

Whatever could be said for such a rule as a state-law negligence doctrine, it has no place in the constitutional analysis required by *Graham* and *Mendez*. In fact, the Tenth Circuit's rule suffers from many of the same defects this Court identified in invalidating the Ninth Circuit's provocation rule in *Mendez*. *Mendez* involved a set of facts similar to the facts here: Police officers used deadly force against a person who was threatening their lives in the moment in which the force was used—which made their use of force reasonable in the moment—"[b]ut the [Ninth Circuit] did not end its excessive force analysis at this point." 137 S.Ct. at 1545. "Instead, the court turned to the ... provocation rule," which asked whether "(1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." *Id.* at 1545. This Court unanimously rejected that rule, finding it "incompatible with our excessive force jurisprudence" because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id.* at 1546.

The Tenth Circuit's rule suffers even more acutely from the same basic problem: It provides "a novel and unsupported path to liability in cases in which the use of force was reasonable." *Id.* at 1547. That is clear from how the court approached this case. In its view, it did not even need to decide whether "the *Graham* factors as applied to the few seconds in which Dominic was wielding a hammer" would compel the conclusion that petitioners' use of force was objectively reasonable because its "review is not limited to that narrow timeframe." App.24. In other words, it did not even matter to the Tenth Circuit whether petitioners' ultimate use of force was an objectively reasonable (or even necessary) response to a grave threat to their safety because, under the Tenth Circuit's test, their conduct could still violate the Fourth Amendment and the officers could still face liability based on earlier missteps. Thus, unlike in the majority of the circuits, officers in the Tenth Circuit "who make errors that lead to a dangerous situation" no longer "retain the ability to defend themselves." *Gysan*, 965 F.3d at 570.

Indeed, the Tenth Circuit's rule is even more obviously problematic than the rule rejected in *Mendez*, as it does not require that the officer's pre-seizure conduct independently violate the Fourth Amendment, or even clearly rise to the level of recklessness. Under the Ninth Circuit's rule, two conditions had to be satisfied: "(1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation [wa]s an independent constitutional violation." *Mendez*, 137 S.Ct. at 1545. The Tenth Circuit's rule, by contrast, arguably allows the finding of a Fourth Amendment violation even if neither condition is satisfied.

Although the Tenth Circuit sometimes seemed to require reckless or deliberate conduct in creating the situation that precipitated the need for deadly force, it also used the classic language of negligence in asking whether "the officers approached the situation in a manner they knew or should have known would result in escalation of the danger." App.11. And, whether or not conduct short of recklessness would suffice, the Tenth Circuit plainly does not require the conduct that precipitated the need for force to rise to the level of a separate constitutional violation. The Tenth Circuit's rule thus not only concocts a Fourth Amendment violation in every case in which the Ninth Circuit's rule would have, but does so in an even broader set of cases in which the officers' pre-seizure conduct was not itself unconstitutional.

This is a case in point. Although the Tenth Circuit held that a jury could find that petitioners "recklessly" provoked a confrontation with Rollice by entering his ex-wife's garage, it did *not* hold that petitioners violated the Fourth Amendment in doing so. Nor could the court have concluded that such conduct independently violated the Fourth Amendment because petitioners had Joy's consent to enter her garage.[4] Petitioners therefore would not have been

[4] The court did note that it "assume[d] Officer Girdner lacked reasonable suspicion for an involuntary pat down." App.25-26 n.15. But even accepting that dubious assumption, the Tenth Circuit did not hold that a reasonable jury could conclude that Dominic's death was proximately caused by that purported constitutional violation. It instead held that a reasonable jury could find that the mere act of "cornering Dominic in the garage" (*i.e.*, entering Joy's property to assist in removing her intoxicated

liable under the Ninth Circuit's erroneous test, which at least required the purportedly "provoking" conduct to be a constitutional violation. Yet under the Tenth Circuit's test, they can be held liable under §1983 even if their *use of force* was objectively reasonable as long as a jury finds that they "approached the situation in a manner they knew or should have known would result in escalation of the danger." App.11.

Whatever could be said for that standard as a state-law tort doctrine, the Fourth Amendment does not prohibit entering a garage with the owner's consent in a manner that an officer knows or should have known would result in an escalation of danger. It prohibits unreasonable searches or seizures, and the relevant seizure occurred only when the officers used deadly force. The Tenth Circuit's rule thus out-*Mendez*es the rule rejected in *Mendez*. Even worse than "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 rule conjures a constitutional violation out of two sets of conduct, neither of which independently violates the Constitution. The rule thus has the "anomalous" effect of "imposing liability for what is arguably a violation of best police practices," but inarguably not a violation of the Fourth Amendment. Tr. of Oral Argument at 32, *Mendez*, 137 S.Ct. 1539 (No. 16-369).

2. Unsurprisingly, the Tenth Circuit's rule is flatly inconsistent with this Court's precedent, which

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ex-husband) "recklessly or deliberately escalate[d] the situation." App.32.

has always focused on the reasonableness of the officer's conduct "at 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) ("The proper perspective in judging an excessive force claim ... is that of 'a reasonable officer on the scene' and 'at the moment' force was employed."). As the Court put it in *Sheehan*, a plaintiff "cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" 575 U.S. at 615. And "[n]othing in the Fourth Amendment bar[s] [police officers] from protecting themselves, … even when, judged with the benefit of hindsight, the officers may have made 'some mistakes.'" *Id.* at 612-13. The rule could hardly be otherwise, lest officers be placed in a situation where earlier missteps deprive them of the ability to take reasonable steps to defend themselves.

The Court's car chase cases are instructive. In those cases, the Court has restricted its Fourth Amendment analysis to whether the force employed was reasonable at the moment of its use, rejecting arguments that the analysis should be broadened to encompass whether police unreasonably created the situation that necessitated its use. In *Plumhoff v. Rickard*, 572 U.S. 765 (2014), the Court repudiated a lower-court analysis holding "that the danger presented by a high-speed chase cannot justify the use of deadly force because that danger was caused by the officers' decision to continue the chase." *Id.* at 776 n.3. Instead, *Plumhoff* held that the only relevant questions were whether the suspect "posed a grave public safety risk" and whether "the police acted

reasonably in using deadly force to end that risk." *Id.* at 777. The Court followed a similar approach in *Scott v. Harris*, 550 U.S. 372 (2007), rejecting the argument that the officers violated the Fourth Amendment because their own conduct escalated the risk of harm. Instead, the Court announced a "sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment." *Id.* at 385-86 The Tenth Circuit's approach squarely conflicts with that approach.

B. Petitioners Are Plainly Entitled to Summary Judgment, Both on the Merits and Under Qualified Immunity.

There can be little doubt that, under a correct Fourth Amendment analysis, the Tenth Circuit should have affirmed the district court's grant of summary judgment to petitioners.

The Fourth Amendment allows a police officer to use deadly force 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). At the moment petitioners employed deadly force, they were standing mere feet from an intoxicated suspect whom they knew had been menacing his ex-wife, who had armed himself with a clawed hammer, who had repeatedly refused orders to drop it, and who "raise[d] the hammer above his head." App.21. Officer Girdner testified that Rollice "took a stance which made me believe he was going to charge at me or throw the hammer at me or the other officers present. At that time, I was in fear for my life and the lives of the other

officers present because [Rollice] posed an immediate threat of serious bodily injury or death to me and the other officers." CA10.Aplt.Appx.000199. The district court agreed that Rollice "raised the hammer still higher as if he might be preparing to throw it, or alternatively, charge the officers," App.40, and the Tenth Circuit conceded that "the district court's interpretation of the video evidence is plausible," App.21—which is tantamount to conceding that petitioners had probable cause to believe they were in danger of serious physical harm at the moment of the shooting. *See, e.g.*, *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("the substance of all the definitions of probable cause is a reasonable ground for belief"). That should have been the end of the analysis.

Although the Tenth Circuit did not ultimately decide whether petitioners' use of force was reasonable (because, under its test, that was not "determinative"), it went on to opine that "we are not convinced it is the only way [the evidence] can be viewed," and that "[a] reasonable jury could find that Dominic was assuming a defensive, rather than an aggressive, stance." App.17. That is a textbook example of a court ignoring the reality that police officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. As the Court admonished in *Graham*, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id.* This Court has often repeated that "[c]ourts must not judge officers with 'the 20/20 vision of hindsight.'" *Sheehan*, 575 U.S. at 615. Accordingly, once the Tenth

Circuit's misguided rule is rejected, it is clear that petitioners are entitled to summary judgment.

At a bare minimum, the Tenth Circuit plainly erred in denying petitioners qualified immunity, as it was certainly not "clearly established" that anything they did violated the Fourth Amendment. As an initial matter, it was not even "clearly established" that the Fourth Amendment prohibits officers from using an objectively reasonable amount of force to respond to a threat to their safety if they engaged in some pre-seizure conduct that in some sense "created" the threat. App.28. In holding otherwise, the Tenth Circuit relied exclusively on its decisions in *Allen*, 119 F.3d 837, and *Sevier*, 60 F.3d 695, which were decided in 1997 and 1995, respectively. App.30. For the reasons explained above, those decisions are in clear conflict with a host of cases this Court decided between *Allen* and the events at issue here—not to mention with the overwhelming weight of authority from other circuits. At the very least, reasonable officers in 2016 could have disagreed about whether pre-seizure conduct dictates whether they may use force to defend themselves consistent with the Fourth Amendment even in the Tenth Circuit. It therefore cannot be said that existing precedent "placed beyond debate the unconstitutionality of" petitioners' actions when they confronted Rollice in his ex-wife's garage. *Taylor v. Barkes*, 575 U.S. 822, 825 (2015).

Even assuming it had been clearly established in the Tenth Circuit that pre-seizure conduct is relevant to whether officers may use force to defend themselves, the decision below paid scant attention to whether any law "clearly established" that petitioners'

specific actions, in the particular circumstances preceding their use of force, constituted "reckless conduct" that could be deemed to have "unreasonably created the situation" that led to the need to use force. App.28. "To be clearly established, a right must be sufficiently clear that *every* reasonable official would have understood that *what he is doing* violates that right." *Taylor*, 575 U.S. at 825 (emphasis added). "'[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Kisela v. Hughes*, 138 S.Ct. 1148, 1152-53 (2018) (per curiam). Thus, when, as here, the question is whether officers acted reasonably, the qualified-immunity question "is whether existing precedent placed the conclusion that [the officers] acted unreasonably in these circumstances 'beyond debate.'" *Mullenix v. Luna*, 136 S.Ct. 305, 309 (2015) (per curiam).

The Tenth Circuit all but ignored those principles. Its analysis boiled down to whether "Officer Girdner's initial advance toward Dominic and the officers' subsequent cornering of Dominic in the back of the garage recklessly created the situation that led to the fatal shooting." App.26. But the court did not cite a single precedential decision holding that police officers violated the Fourth Amendment by recklessly creating a situation that necessitated force—let alone so held in circumstances anything like these. The closest the court came was its 20-year-old decision in *Allen*, which denied summary judgment to police officers on an excessive-force claim based on less than a page of

analysis. *See* 119 F.3d at 840-41. *Allen* involved officers who attempted to physically wrest a pistol from an armed and suicidal man who responded by firing on the officers, who returned fire, killing him. *Id.* at 839. The Tenth Circuit denied summary judgment, but "express[ed] no opinion on the merits." *Id.* at 841. That very different decision, refraining from definitively addressing the merits, certainly did not permit the Tenth Circuit to "say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have" failed to realize that the bare act of taking a step toward an intoxicated individual whom police had been asked to remove from a private residence was so obviously "reckless" as to forfeit the police's right to respond with appropriate force should the individual choose to pick up a deadly weapon and repeatedly defy orders to drop it. *Mullenix*, 136 S.Ct. at 310.[5]

In short, the Tenth Circuit did little more than "state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela*, 138 S.Ct. at 1153. That was clear error. That petitioners were plainly entitled to qualified immunity even under the Tenth Circuit's

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[5] *Sevier* is even less relevant than *Allen*. As explained, *Sevier* merely noted in dicta before dismissing an appeal for lack of jurisdiction that deliberate or reckless pre-seizure conduct can render a later use of force excessive. 60 F.3d at 699-703. To state the obvious, a decision in which the court did not even have jurisdiction cannot "clearly establish" substantive constitutional law.

anomalous provocation rule underscores the need for this Court's intervention.

III. The Question Presented Is Critically Important, And This Is An Ideal Vehicle To Resolve It.

The question presented is plainly certworthy. It has divided the circuits, and it recurs with considerable frequency, as evidenced by the fact that multiple circuits have addressed it (some multiple times) even in the four short years since *Mendez*. The issue is also plainly important, as the Ninth and Tenth Circuit's rule places officers facing life-or-death decisions in an impossible position. By imposing liability and branding police officers constitutional violators in circumstances in which their immediate reaction to a life-threatening circumstance was reasonable, the decision below risks either depriving officers of the right to defend themselves—and the public—or imposing liability for reasonable acts of self-defense. Neither consequence is tenable. Making matters worse, the Tenth Circuit's rule effectively treats armed resistance as a reasonable response to a commonplace interaction with a police officer—a distorted outlook that is likely to lead to more regrettable consequences, not fewer.

The Tenth Circuit's rule is all the more regrettable because, just like the Ninth Circuit's now-rejected provocation rule, it is not necessary to prevent officers from escaping accountability for earlier missteps that are in fact unconstitutional. As *Mendez* explained, §1983 "plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment

violation." 137 S.Ct. at 1548. Accordingly, "there is no need to dress up every Fourth Amendment claim as an excessive force claim." *Id.* The decision below, unlike the rule rejected in *Mendez*, would extend liability even where the earlier missteps are merely regrettable (in hindsight) but not unconstitutional. That is a serious bug, and not a feature. State tort-law regimes may still provide compensation for conduct that officers "knew or should have known" raised risks unnecessarily, but absent a constitutional violation, that is not a proper office for §1983.

This case is an ideal vehicle in which to resolve this recurring issue. The Tenth Circuit made crystal clear that petitioners' pre-seizure conduct was "determinative" of its Fourth Amendment analysis. App.28. And while the court declined to resolve whether petitioners' use of force was reasonable under the standard employed by the majority of the circuits (*i.e.*, focusing on the moment when they discharged their weapons), that is no obstacle to resolution of the question presented, particularly since the answer to that question is plain (especially under qualified-immunity principles). Accordingly, absent this Court's intervention, petitioners will face a trial, with all of the costs and risks of second-guessing that this Court's excessive-force jurisprudence is designed to prevent. The Court should grant certiorari and reject the Tenth Circuit's anomalous rule.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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