NO. 23-1239

In the Supreme Court of the United States

JANICE HUGHES BARNES,
INDIVIDUALLY AND AS REPRESENTATIVE OF THE
ESTATE OF ASHTIAN BARNES, DECEASED,

Petitioner,

v.

ROBERTO FELIX, JR.,
AND THE COUNTY OF HARRIS, TEXAS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE NATIONAL POLICE ASSOCIATION AND UNITED COALITION OF PUBLIC SAFETY IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

The NATIONAL POLICE ASSOCIATION is an Indiana non-profit corporation founded to provide educational assistance to law enforcement and support to individual law enforcement officers and the agencies they serve. The NPA seeks to bring important issues in the law enforcement realm to the forefront of public discussion in order to facilitate remedies and broaden public awareness.

The UNITED COALITION OF PUBLIC SAFETY is a Washington § 501(c)(5) nonprofit social policy and education organization with public safety members from across the country. UCOPS was formed to impact policy and the national conversation on policing and public safety by bringing people together, connecting law enforcement and citizens, and building relationships to keep our communities safe.

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[1] Under Rule 37.6 of the Rules of this Court, *amici curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than *amici curiae* funded its preparation or submission.

SUMMARY OF ARGUMENT

Policing is near uniformly recognized as one of society's most difficult tasks. As tellers deposit checks and lawyers send emails, officers negotiate with suspects, evade gun shots to apprehend those who seek to harm others, and pull people from burning cars while sealing off 80-mile-per-hour highway lanes with traffic cones. Law enforcement mans the line between civil society and unlawful disorder. Consider the first thing most people say when they see someone's behavior transgress from improper to dangerous: "Call the police."

People — you, me, petitioner's counsel, respondent's counsel, and so on — respond that way for a few reasons. Certainly the relief posed by the presence of an officer's equipment plays a role. Likely also significant is the sense of protection inherent when the state, in uniform, attempts to defuse raised tension. But perhaps most influential is the knowledge that many officers have unique and specialized training in working with unstable people who tend to defy direction and order. It is rare for the average high-rise employee to encounter someone on high on methamphetamine. For many patrol officers, it is a daily occurrence.

Why does this matter? At issue in this case is whether the Fourth Amendment's "objective reasonableness" test for excessive force applies solely to the moment an officer uses force or more broadly to an officer's acts leading to the moment force is used. Petitioner advocates the latter. She would layer upon the Fourth Amendment an atextual "officer-created-danger" rule which says

that an officer can violate the Fourth Amendment through her acts leading to the use of force, even if the ultimate use of force was constitutionally appropriate. That rule, however, has a glaring problem. It flatly defies the Fourth Amendment's text and decades of this Court's interpreting precedent by training the Fourth Amendment's focus on the suspect's response to an officer's conduct, not the officer's conduct itself. This cedes the question of whether an officer has acted reasonably to the purview of individuals who, notoriously, defy orders with impunity and respond to the slightest act with aggression and violence.

Under petitioner's view, however, that disproportionate response could be relied on as evidence that the officer caused the ultimate need to use force, and thereby turn a reasonable use of force into an unreasonable one. This regime makes policing nearly impossible. That one individual's wholly unpredictable response to an officer's lawful command could suddenly impute constitutional liability to the officer for "creating the need" to then use force is a patent misapplication of the law. Failing to anticipate the un-anticipatable is not a Fourth Amendment violation. And as evidenced by its own text, this cannot be how the Fourth Amendment was intended to apply.

* * *

The Court should reject petitioner's atextual rule and affirm the judgment below.

ARGUMENT

I. Policing is One of the Most Dangerous Jobs in the United States.

At the heart of *amici*'s key point is the nature of their members' jobs. Few people, if any, want to interact with the police. More often, they simply must. Encounters like that are rarely joyful; people, as a general rule, do not like being told what or what not to do. Bu that is more or less a police officer's job. They enforce the law and solve violations of it. As such, law enforcement regularly encounters those acting on the fringe of socially and legally acceptable conduct—and beyond.

People living on this edge are rarely there by choice. A medical or mental-health issue is typically to blame. But the police must deal with the externalities of those issues regardless: things like substance-use disorders, mental-health breakdowns, and the like. The problem is that these externalities themselves have off-shoots; people who are under the influence often respond unpredictably and aggressively to otherwise mundane orders or directives. These chaotic responses add extra weight to an already stressful existence for the average policeman or policewoman. Understanding this reality is fundamental to appreciating the inherent failure in petitioner's proposed officer-created-danger rule.

A. Officers Often Interact with People in the Throes of Mental Health Crises or Under the Influence of Intoxicants.

Lived experience does not lie; police routinely encounter individuals who are struggling with mental health issues or who are under the influence of foreign substances. A 2016 study of all individuals arrested in Marion County, Indiana (the Indianapolis metropolitan area) concluded that 31.3% of arrestees had a mental health diagnosis in the two years prior to the arrest.[2] The same study found that 27.7% of arrestees had a substance-use disorder.[3] In fact, 22.5% of all arrestees had both a mental health and substance-use diagnosis in the two years before arrest.[4] And, as this Court recently observed, police officers conduct approximately 29,000 arrests per day. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019). Basic math shows that officers encounter these individuals regularly.

This is not a regional phenomenon. In a 2009 article published by the American Psychological Association (APA), researchers found that police officers routinely reported coming into contact with intoxicated suspects.[5] In preparing the article, researchers surveyed police officers around the U.S. about their experiences with

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[2] Lauren A. Magee, et al., *Two-Year Prevalence Rates of Mental Health and Substance Use Disorder Diagnoses Among Repeat Arrestees*, 9 HEALTH & JUSTICE 2, 4 (January 7, 2021).

[3] *Id.*

[4] *Id.*

[5] Jacqueline R. Evans et al., *Intoxicated Witnesses and Suspects: Procedures and Prevalence According to Law Enforcement*, 15 PSYCHOL., PUB. POL'Y, & L. 3, 194 (August 2009).

intoxicated witness and suspects.[6] Over 80% of officers surveyed reported that contact with intoxicated suspects was "common" or "very common," and that intoxicated suspects were most often encountered when investigating fights and assaults, domestic disputes, and sexual violence.[7] Though centered on the prevalence of intoxication in witnesses/suspects and police policies/procedures specific to dealing with intoxicated individuals, these findings are routinely cited for the proposition that police officers regularly come into contact with intoxicated individuals.[8], [9] Likewise, a recent study in the Harm Reduction Journal noted that individuals with substance use disorder regularly encounter law enforcement officials due to drug-related criminal activity.[10]

Further, a 2010 report by the U.S. National Center on Addiction and Substance Abuse found that of the 2.3 million inmates in U.S. prisons, around 1.5 million, or 65%, meet the medical criteria for substance

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[6] *Id.*

[7] *Id.* at 209.

[8] Amelia Mindthoff et al., *The Detrimental Impact of Alcohol Intoxication on Facets of Miranda Comprehension*, 46 L. & HUM. BEHAV. 4, 264 (August 2022).

[9] Angelica V. Hagsand, Jacqueline R. Evans, Daniel Pettersson, & Nadja S. Compo, *A Survey of Police Officers Encounters with Sober, Alcohol- and Drug-Intoxicated Suspects in Sweden*, 28 PSYCH., CRIME & L. 5, 523 (May 20, 2021).

[10] Alice Zhang et al., *The Relationship Between Police Contacts for Drug Use-Related Crime and Future Arrests, Incarceration, and Overdoses: A Retrospective Observational Study Highlighting the Need to Break the Vicious Cycle*, 19 HARM REDUCTION J. 1, 67 (June 27, 2022).

abuse.[11] Further, another 458,000 inmates had a history of substance abuse; were incarcerated for alcohol or drug violations; were intoxicated while committing their crime; or committed their crime to get money for drugs. In total, these groups comprised 85% of the American prison population.[12]

These findings confirm what patrol officers across the nation know: law enforcement regularly interacts with people under the influence of intoxicating substances.

B. Individuals in These Conditions are More Prone to Violence and Less Prone to Following Lawful Commands.

Were that the whole story, a policewoman's job would remain tops in difficulty. Evaluating how someone in a mental-health crisis or high on cocaine will respond to a particular situation is a titanic chore on the best day. What compounds the problem is the reality that individuals with altered mental states, especially those influenced by substances, are more likely to react aggressively to neutral triggers than the average person, especially in high-stress situations. A 2018 study, for example, found that even low doses of alcohol triggered a significant relationship between prefrontal cortex

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[11] The National Center on Addiction & Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Population*, at 3 (Feb. 2010), https://tinyurl.com/4e98wfst.

[12] *Id.*

activity and aggression.[13] This conclusion, the authors noted, "corroborate[d] the predictions of many of the major theories of intoxicated aggression."[14] Such as, for example, that when combined with hostile situations or dispositional aggressiveness, alcohol can promote aggressive behavior.[15]

The reality that individuals who interact with law enforcement have, generally, an increased propensity for aggression is not limited to those with substance-use disorders, however. A 2006 article discussing neuroscientific components of the legal insanity defense described a set of studies that reached the following conclusions:

> "Indeed, a recent meta-analysis of thirty-nine studies (totaling 4,589 participants) concluded that persons who exhibit antisocial, criminal, or delinquent behavior perform significantly poorer than normal individuals on neuropsychological tests of the planning, decision making, self-monitoring, and judgment skills that reflect frontal-lobe functioning. Even minimal frontal lobe dysfunction may cause impulsive aggression, as studies have found relationships between sub-clinical

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[13] Thomas F. Denson et al., *The Neural Correlates of Alcohol-Related Aggression*, 18 COGNITIVE, AFFECTIVE & BEHAVIORAL NEUROSCIENCE 203, 214 (January 8, 2018).

[14] *Id.*

[15] *Id.* at 203.

> frontal lobe deficits and aggression in normal populations."[16]

In other words, whether substance-related or not, clinical data reflects the conclusion that citizens interacting with officers are more likely to possess altered mental states and/or react aggressively to simple conduct.

This conclusion is borne out by practical experience. The officers surveyed for the 2009 APA article referenced above estimated that around 50% of violent crime perpetrators were drunk at the time of the incident.[17] A 1998 report by the Bureau of Justice Statistics found that alcohol, in particular, was frequently involved in violent offenses.[18] Relevant statistical findings therein included that nearly 4 in 10 violent victimizations involved the use of alcohol; 4 in 10 fatal motor vehicle accidents were alcohol-involved; and about 4 in 10 offenders, regardless of whether they were on probation, in local jail, or in state prison, self-reported that they were using alcohol at the time of the offense.[19]

Another study for the APA, this one related to Canadian officers and their perceptions of drunk driving laws, found that one of the top arrest-inhibiting

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16 Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 61–62 (2006).

17 Evans et al., *supra*, at f.n. 5.

18 Lawrence A. Greenfeld, Stat., *Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime* (1998), U.S. Dep't of Just., Bureau of Just., https://tinyurl.com/4d2caexk

19 *Id.*

factors for DUIs was "the difficult[y] of controlling intoxicated persons."[20] Similarly, in an unpublished report performed for the United States Department of Justice, researchers found that:

> "The suspect characteristic most consistently related to the results of stops was whether the suspect was under the influence of alcohol or drugs at the time of the stop. When this was the case, the suspect was significantly more likely to resist the officer, to be frisked, to have force used against him/her, to have their vehicle searched, and also to be arrested. More specifically, suspects under the influence of alcohol or drugs were approximately ten times more likely to resist (33%) than suspects not under the influence (3%). Further, suspects under the influence were about five times more likely to be patted down (75%) than other suspects (15%), and more than twelve times (25%) more likely to have force used against them during the encounter with the police than suspects not under the influence (2%). Police officers decided to search the vehicles of 50% of the suspects under the influence of alcohol or drugs, but only 5% of the vehicles of other suspects, a ten times greater likelihood. Finally, the suspects under the influence of alcohol or drugs were fourteen times

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[20] Evelyn Vingilis et al., *Police Enforcement Practices and Perceptions of Drinking-Driving Laws*, 28 CANADIAN J. OF CRIMINOLOGY 2, 147 (April 1986).

> more likely to be arrested (42%) than suspects not under the influence (3%)."[21]

A 2016 article for the Journal of Research in Crime and Delinquency examined three reasons why suspects may resist arrest, one of which being impairment due to mental illness or substance use;[22] the study found that resistance is positively related to illicit drug use and alcohol intoxication.[23] And, notably, this is not new information. As one study explains, the "linkage between alcohol and other drugs to acts of aggression is hardly a recent phenomenon, and is even evident in historical records of ancient Greece in the fourth and fifth centuries BC."[24]

II. Petitioner's Proposed "Officer-Created-Danger Rule" Improperly Puts the Fourth Amendment Analysis on the Suspect's Actions, Not the Officer's.

This information serves mainly to illustrate what most intuitively know: policing is dangerous. This is not least in part due to the type of individuals that officers routinely encounter and the inherent unpre-

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21 Geoffrey P. Alpert et al., *Police Officers' Decision Making and Discretion: Forming Suspicion and Making a Stop*, Report to the National Institute of Justice, at 10-11 (October 2004), https://tinyurl.com/5f8kdujm.

22 Corey Whichard et al., *Are Suspects Who Resist Arrest Defiant*, *Desperate*, *or Disoriented?*, 53 J. OF RSCH. IN CRIME AND DELINQUENCY 4, 564 (February 5, 2016).

23 *Id.*

24 Dominic J. Parrott et al., *Effects of Alcohol and Other Drugs on Human Aggression*, 19 CURRENT OPINION PSYCHOLOGY 67 (February 2018).

dictability they present. That uncertainty plays directly into the biggest problem with petitioner's officer-created-danger rule.

In *Graham v. Connor*, this Court held that all excessive force claims arising from the seizure of a free citizen fall under the Fourth Amendment and its "objective reasonableness" standard. *See* 490 U.S. 386, 395 (1989). *Graham* teaches that courts must examine a use of force through the eyes of a reasonable officer on the scene "at the moment" force is used. *Graham*, 490 U.S. at 396; *see also Saucier v. Katz*, 533 U.S. 194, 207 (2001) ("Excessive force claims . . . are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred"). In this analysis, the officer's subjective intent matters not because the Fourth Amendment almost always commands a purely objective inquiry. *Whren v. United States*, 517 U.S. 806, 814 (1996) (noting that the Court has "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers[.]"); *see also Graham*, 490 U.S. at 397. But even more so, the Fourth Amendment does not under any circumstance consider the state of mind of the *suspect*. *See Torres v. Madrid*, 592 U.S. 306, 318 (2021) (in discussing the Fourth Amendment seizure inquiry, noting that a seizure does not "depend on the subjective perceptions of the seized person"); *see also Nieves*, 139 S. Ct. at 1725 ("In the Fourth Amendment context . . . we have almost uniformly rejected invitations to probe subjective intent.") (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 737 (2011)).

The problem with the officer-created-danger rule, is that it forces the Fourth Amendment analysis into the exact form that *Graham* and its progeny say it

should not take. As petitioner frames it, the Fourth Amendment's assessment of objective reasonableness should include not only the officer's conduct at the moment he uses force, but the "role the officer[] played in bringing about the conditions said to necessitate deadly force." *See* Pet. Br. 32 (quoting *Barnes v. Felix*, 91 F.4th 393, 400 (5th Cir. 2024) (Higginbotham, J., concurring)). Though she takes great pains to avoid the obvious parallels between her rule and past doctrines of similar ilk (such as the provocation rule struck down by this Court in *County of Los Angeles v. Mendez*,[25] or the Tenth Circuit's pre-seizure regime articulated in cases like *City of Tahlequah v. Bond*[26] or *Estate of Ceballos v. Husk*[27]), petitioner here has the same functional aim as past plaintiffs in those cases. They all want the Fourth Amendment to ask whether an officer's pre-seizure act created the need to use force. While perhaps a way to avoid using the term "provocation," make no mistake: these rules are about provocation—or at the least, the creation of a need to further act. *See Estate of Ceballos v. Husk*, 919 F.3d 1204, 1218 (10th Cir. 2019) (discussing how a jury could find a reasonable officer would have considered the decedent's condition before "provoking" the need to use force).

Being this sort of rule, petitioner's officer-created-danger theory suffers from a unique problem. Black's Law Dictionary defines provocation as "the act of inciting another to do something[,]" or "something (such

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[25] 581 U.S. 420 (2017).

[26] 981 F.3d 808, 812 (10th Cir. 2020), *certiorari granted, judgment rev'd*, 595 U.S. 9 (2021).

[27] 919 F.3d 1204 (10th Cir. 2019).

as words or actions) that affects a person's reason and self-control[.]" Provocation, BLACK'S LAW DICTIONARY (11th ed. 2019). Implicit in this definition is that provocation requires the acts of two adverse parties. One must first act, but a provocation occurs only when the other responds. The same goes for need-creation; while the phrase escapes precise definition, a "need" or "danger" could only be "created" by an officer if the suspect involved has responded in an escalatory manner.

Applying these concepts to the Fourth Amendment context, the officer must act, but the suspect must escalate. If the suspect does not, then definitionally, a provocation, or a danger-creation, did not occur. Petitioner's officer-created-danger rule thus requires the fact-finder to assess not only the officer's act but the suspect's decision to respond to it; in short, the suspect's state of mind. As noted earlier, analysis of a non-governmental actor's state of mind is mostly foreign to the Fourth Amendment's application, which focuses wholly on government conduct. That of itself is a reason to reject petitioner's proposed rule.

But even worse, and truly why petitioner's rule is so deficient, is that it effectively allows the suspect to define the officer's conduct as reasonable or not. *Amici* has explained at length how individuals with an altered mental state are more susceptible to react aggressively to environmental triggers than the average person. *See* Section I, *supra*. If these individuals' states of mind and actions become an element of the Court's Fourth Amendment analysis, this would massively and atextually stretch civil liability under 42 U.S.C. § 1983 beyond all reasonable bounds. A motivated plaintiff could assert that they perceived routine behavior as a provocation and thereby "dress up" routine

behavior as constitutionally deficient. *See County of Los Angeles*, 581 U.S. at 431. As this Court recognized in *Torres*, the Fourth Amendment simply does not operate this way. *See* 592 U.S. at 318 (in discussing the Fourth Amendment seizure inquiry, noting that a seizure does not "depend on the subjective perceptions of the seized person").

The Court has already pointed out in the custodial context how an objective, at-the-moment test avoids this entire problem. In *J.D.B. v. North Carolina*, the Court affirmed that courts must conduct an objective analysis to determine whether a suspect was in custody and thus warranted a Miranda reading. *J.D.B.*, 564 U.S. 261, 271 (2011). The whole point of this "objective reasonableness" test was to "give clear guidance to the police." *Id.* The Court reasoned that an objective analysis "avoids burdening the police with the task of anticipating the idiosyncrasies of every individual subject and divining how those particular traits affect each person's subjective state of mind." *Id.* (citation omitted). In stark contrast to *Graham* and other objective-inquiry cases like *J.D.B.*, petitioner's officer-created-danger rule muddies the objective-reasonableness water in a way that will force officers and courts to assess the idiosyncrasies of each individual subject. This is a difficult request to judges sitting in chambers, but an almost impossible ask of officers in the midst of high-stress, fast-paced encounters. Petitioner's atextual officer-created-danger rule would make it more difficult, and therefore more dangerous, to engage with citizen-actors.

III. This Misdirected Emphasis Would Make Policing Nearly Impossible — As One Particular Case Makes Clear.

Lest one think that *amici*'s fear is unfounded, consider a recent case from the Tenth Circuit, where the officer-created-danger rule currently governs. The ludicrous result was corrected by this Court on qualified-immunity grounds,[28] but the opinion illustrates how policing can be almost impossible in danger-creation jurisdictions.

In *Bond v. City of Tahlequah*, Joy Rollice called the police to ask them to remove her drunk ex-husband — Dominic — from her garage. *See* 981 F.3d at 812. Joy told the officers Dominic was a registered sex-offender and did not live at the home, but that he still had some of his tools in the garage. *Id.* Officers Girdner and Reed arrived at the home shortly thereafter. Joy explained again why she had called 911, told the officers Dominic was in the garage, and led them to a side entrance where they first encountered Dominic. *Id.* The officers, at this time, were outside the door frame, with Dominic just inside the same.

The officers explained why they were present and dispelled Dominic's concern that they were there to take him (Dominic) to jail. Officer Girdner perceived Dominic to be "fidgety" and asked to pat him down, which Dominic refused. *Id.* Shortly thereafter, Officer Girdner took a step toward the door frame, which caused Dominic to step backward. *Id.* Officer Girdner

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[28] Since this Court is generally not a court of error-correction, it could hardly be expected to fix the flood of misguided judicial opinions that would surely flow from the wholesale adoption of petitioner's officer-created-danger rule.

continued walking toward Dominic, stepping through the door frame and into the garage. As Dominic continued walking to the back of the garage, Officer Reed and a third officer, Vick, walked into the garage behind Officer Girdner. *Id*.

When Dominic arrived at back of the garage, he briefly looked at the convened officers before pulling a hammer off the wall and grasping it with two hands. *Id*. The officers backed up and drew their guns as Dominic lowered his left hand but held the hammer aloft with his right. *Id*. The officers repeatedly ordered Dominic to drop the hammer to no avail. Dominic instead moved slowly toward the middle of the garage and out from behind some furniture, to the point that the officers were mere feet away from him. *Id*. at 814. Officer Reed then holstered his gun, drew his taser, and began to step toward Dominic, all the while continuing to tell him to drop the hammer *Id*. Dominic instead pulled the hammer back behind his head, as if to throw it. Officers Girdner and Vick opened fire, killing Dominic. *Id*. Dominic's estate sued, alleging a Fourth Amendment excessive-force violation.

In granting the officers summary judgment, the United States District Court for the Eastern District of Oklahoma, Judge Ronald A. White, expressly, and rightly, rejected the estate's theory that Officers Girdner and Vick had "inflamed the tensions" and "created the need to use such force." *See Burke v. City of Tahlequah*, No. CIV-18-257-RAW, 2019 WL 4674316, at *3 (E.D. Okla. Sept. 25, 2019), *rev'd sub nom*. Finding "no issue for a reasonable jury in [that] regard," the District Court granted summary judgment. *Id*. *6.

Then, in a holding that embodies the worst encapsulation of petitioner's officer-created-danger theory,

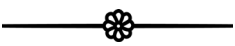
the Tenth Circuit reversed. While appearing to take limited issue with the officers' firing their guns in response to Dominic's raised and postured hammer, incredibly, the Tenth Circuit concluded that Officer Girdner's decision to step through the door frame into the garage, and Officers Reed and Vick's decision to follow Officer Girdner in, created a question as to whether the officers had "recklessly created the situation that led to the fatal shooting." *Bond*, 981 F.3d at 823. To be clear, it was Dominic who responded by running to the back of the garage; it was Dominic who picked up a hammer; it was Dominic who repeatedly defied the officers' orders to stop and to discard the hammer; and it was Dominic who raised the hammer above his head as if to throw it. The assembled officers had *nothing* to do with any of these decisions. Despite this, believing that a reasonable jury could find that "officers recklessly created a lethal situation by driving Dominic into the garage and cornering him with his tools in reach," the Tenth Circuit reversed and remanded the case. *Id*. at 826. That conduct, according to the Tenth Circuit, amounted to "deliberately or recklessly manufacturing the need to [use deadly force]." *Id*.

This, to put it mildly, was a shocking result. The Tenth Circuit functionally declared a reasonable use of force unreasonable because the involved officer took a step through the doorway and took up a position inside the garage — to which the intoxicated suspect reacted, against the officers' repeated commands, by running directly into the back of the garage, grabbing a hammer, placing himself feet away from the officers and threatening to throw it at them. This Court granted certiorari, vacated the ruling, and reversed on qualified immunity's "clearly established" prong, but it certainly

suggested skepticism that the Tenth Circuit's version of petitioner's officer-created-danger rule was correct. *See City of Tahlequah v. Bond*, 595 U.S. 9, 13 (2021) ("Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer").

And how could such a rule be correct? The facts showed that the officers did nothing wrong despite the undeniably tragic ending. But a simple thought exercise about an alternative outcome puts *Bond*'s infirmity on full display. Consider this: what if, after Officer Girdner steps into the garage, Dominic *doesn't* move to the back of the garage but stays put and then allows the officers to escort him off of Joy's property? Certainly neither Joy nor Dominic would have, or could have, turned around and sued Officer Girdner under any constitutional provision for merely stepping into the garage. So what made that act of any circumstance to the Tenth Circuit in reality? *Dominic's decision to respond to it*. The Tenth Circuit, in other words, let Dominic's responsive conduct define Officer Girdner's legal standing. This is something the text of the Fourth Amendment simply does not contemplate.

Fortunately, the Tenth Circuit's ruling did not stand. But *Bond* is a crystal-clear example of the inconceivable outcomes that would result if the Court adopts petitioner's officer-created-danger rule. This Court cannot fix every wayward opinion, and they would proliferate to a great degree should the Court side with petitioner. The more reasoned, textual position is respondents', which *amici* urges the Court to follow.



CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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