No. 24-287

IN THE

Supreme Court of the United States

JENNIFER ROOT BANNON,
AS THE SPECIAL PERSONAL REPRESENTATIVE OF
THE ESTATE OF JUSTON ROOT,
Petitioner,

v.

DAVID GODIN, BOSTON POLICE OFFICER;
JOSEPH MCMENAMY, BOSTON POLICE OFFICER;
LEROY FERNANDES, BOSTON POLICE OFFICER;
BRENDA FIGUEROA, BOSTON POLICE OFFICER;
COREY THOMAS, BOSTON POLICE OFFICER;
PAUL CONNEELY, MASSACHUSETTS STATE TROOPER;
THE CITY OF BOSTON,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT, PAUL CONNEELY, MASSACHUSETTS STATE TROOPER, IN OPPOSITION

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTRODUCTION

This case stems from the decision by Justin Root ("Root") to brandish a gun on a security officer at Brigham and Women's Hospital ("BHW"), shoot at an officer and lead the officers on a high-speed chase. Toward the end of the vehicle pursuit of Root, Respondent, Massachusetts State Trooper Paul Conneely ("Tpr. Conneely") joined the pursuit. Following the high-speed chase, which resulted in multiple vehicles being damaged and Root's vehicle becoming extensively damaged, Root began fleeing on foot. Root fell into a mulched area near the parking lot of a shopping center. Shelly McCarthy, a civilian with EMS training saw the scene and ran to Root's side. The officers, including Tpr. Conneely, arrived, telling Ms. McCarthy to get away from Root, and she did so.

The Officers then commanded Root to get on the ground and show his hands. Root tried to get up and Tpr. Conneely was going to tackle Root, but other officers told him Root had a gun. Root, ignoring the commands of the officers, while in a half laying half kneeling position, reached into his jacket for a gun and the officers shot, killing Root.

The District Court, when deciding whether this deadly force was excessive under the Fourth Amendment, reviewed the officers conduct under a "reasonableness" standard, also known as a "totality of the circumstances" review, rather than what the Petitioner describes as an "immediate threat" doctrine, also described as a "moment of threat" review, which is not recognized in the First Circuit.

Petitioner presents this writ as two claims: a changing of the summary judgment standard and a circuit split. Essentially, the Petitioner is asking this Court to require every circuit to use their preferred "moment of threat" review. The Petitioner attempts to substantiate its claim of a circuit split by citing *Graham v. Connor*, 490 U.S. 386 (1989) and multiple Fourth Circuit cases that use the "moment of the threat" review, rather than the "totality of the circumstances review" of *Graham*. The Petitioner argues that if this case had been brought in the Fourth Circuit, summary judgment would not have been granted, and the First Circuit would have ignored Root's shooting at an officer at BWH and the high-speed chase which ensued.

Second, the petitioner argues that the District Court erred in making factual findings upon the evidence and argues that it made credibility determinations on summary judgment proceedings.

However, certiorari should not be granted in this case. First, this Court just granted certiorari in a case with a similar question. In *Janice Hughes Barnes, Individually and as a Representative of the Estate of Ashtian Barnes, Deceased v. Roberto Felix Jr., et al.*, the Court is essentially being presented with the same question: whether courts should apply the moment of the threat doctrine when evaluating an excessive force claim under the Fourth Amendment. *See Janice Hughes Barnes, Individually and as a Representative of the Estate of Ashtian Barnes, Deceased v. Roberto Felix Jr., et al.*, cert granted, No. 23-1239 (October 4, 2024). Although the question is the same as this present case, the Petitioner in *Barnes*

is from the Fifth Circuit, where the Fifth Circuit uses the "moment of the threat" doctrine instead of the "totality of the circumstances" doctrine, which was used in determining this case. The Court should not grant certiorari in two separate cases asking for opposite doctrines in the assessment of the use of force under the Fourth Amendment.

Second, the summary judgment standard the District Court and the First Circuit used was proper as the Petitioner did not offer any credible evidence to rebut the Defendant's facts. If this Court were to agree that the District Court erred in making factual findings and credibility determinations, and remanded the case for further proceedings, the result would still be summary judgment under the qualified immunity doctrine.

Third, even if this Court were to decide that the moment of the threat doctrine was to become the binding doctrine when viewing excess force claims against law enforcement, the outcome would still be that Tpr. Conneely would be granted summary judgment. When looking at the facts of the case, the District Court and First Circuit concluded that officers believed Root was reaching for a gun in his jacket, posing an immediate threat to the officers.

JURISDICTION

Petitioner filed its Writ of Certiorari on September 9, 2024. The Court extended Tpr. Conneely's Brief in Opposition filing deadline up to and including November 15, 2024.

STATEMENT OF THE CASE

This Petition arises from a grant of summary judgment, and subsequent affirmation from the First Circuit for Respondent Conneely and the other officers. The District Court and the First Circuit concluded the officers' use of deadly force did not violate Root's Fourth Amendment rights and even if there had been a finding of a Fourth Amendment violation, the conduct of the officers was protected under the doctrine of qualified immunity

A. The Initial Incident and High-Speed Chase

At around 9:20 a.m. on February 7, 2020, Boston Police Department ("BPD") received a report of an individual, Juston Root, having a gun at BWH. Pet. App. at 3a. When BPD Officer Godin arrived, Officer Godin noticed Root, who had a firearm in his waistband. *Id.* Root told Officer Godin he was "law enforcement", which Officer Godin did not believe. Pet. App. at 4a. Officer Godin drew his firearm, and Root pulled his gun from his waistband and pointed it at Officer Godin. *Id.* Officer Godin saw Root start to pull the trigger and heard gunshot noises. *Id.* In response, Officer Godin and BPD Officer St. Peter, who had just arrived on the scene, shot at Root several times, both believing they shot Root. *Id.* Root carried the gun to his car and drove away. *Id.*

Officer Godin returned to his cruiser and began pursuing Root. *Id.* He reported over the radio that he had been involved in a shooting, that Root had shot at him, and that he believed he shot Root. *Id.* Other BPD

officers joined the pursuit, believing Root was armed with a gun. Pet. App. at 5a. During the pursuit, a PIT maneuver was done, which temporarily stopped Root's vehicle. *Id.* As one of the officers got out of the cruiser, commanding Root to show his hands, Root drove away at a high speed and used his vehicle to push the officer's cruiser out of the way. *Id.* Root continued to lead the officers down Huntington Avenue[1] and onto Route 9, reaching speeds of 90 miles per hour, dangerously weaving through traffic in crowded urban area. *Id.*

Respondent Trooper Paul Conneely joined the pursuit on Route 9 after hearing the initial report of a shooting at BWH and the ongoing high-speed pursuit.[2] Pet. App. at 6a.

Finally, at the intersection of Route 9 and Hammond Street, Root collided with three civilian vehicles, causing extensive damage to Root's vehicle. *Id.* The collision occurred right in front of a shopping center parking lot. *Id.*

B. The Shooting

Following the collision that disabled Root's vehicle, traffic camera footage shows Root exiting his vehicle and continuing to flee on foot, falling on the sidewalk, returning to his feet and falling again in a

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[1] "Huntington Avenue is a major, crowded urban artery used by cars, buses, MBTA trollies, and other forms of transportation, particularly so on a weekday morning." Pet. App. at 5a.

[2] Trooper Conneely also understood that Root had a firearm.

mulched area. Pet. App. at 7a. A civilian with EMS training, Shelly McCarthy ran to his side upon seeing Root fall into the mulched area. *Id.* The officers approached, ordering her to get away from Root, which prompted her to run away from the scene. *Id.* Body Worn Camera footage of Officer Figueroa shows that Officer Figueroa had ordered Root to get on the ground and show his hands and right before shots were fired, an officer ordered him to "drop…". *Id.* The officers shot Root, and following the shots, Trooper Conneely and Officer Figueroa approached Root, rolling his body over. Pet. App. at 8a. In the footage, Officer Figueroa stated that the firearm was underneath Root, and footage showed Trooper Conneely walking away with Root's gun. *Id.*

The Officers stories are very consistent in what happened after the collision.[3] Nearly all of them state that when they arrived on the scene, Root was in what is described as a crouch or half sitting half standing position. Pet. App. *Infra,* 10a-18a. It appeared to the officers that Root was attempting to get up. *Id.* Five of the officers testified that they saw Root reach into his jacket, appearing to reach for a gun, that the officers reasonably believed he had. Pet. App. at 33a. The sixth officer testified that he could not see Root's hands but that his movements were aggressive rather than surrendering. *Id.* An independent witness, Dr. Victor Gerbaudo also witnessed Root "taking his right

[3] While the Petitioner would like for this Court to believe that the officers' stories have major inconsistencies, the First Circuit noted the minor differences, stating, "Given that the officers arrived at different times, had different vantage points, and had only seconds to assess the scene under chaotic circumstances, these minor differences in testimony are perfectly consistent." Pet. App. at 37a.

hand under his coat" and the officers subsequently shooting. Pet. App. at 21a.

Specifically to Respondent Conneely, he testified that he saw Root fall into the mulch. Pet. App. at 12a. As he ran onto the sidewalk, he saw Root attempting to get up on one knee. Tpr. Conneely went to go tackle Root, but an officer yelled to him that Root had a gun and was reaching for it. *Id.* Tpr. Conneely then saw his hand reach into his chest and believed that he was pulling out a gun on the officers after seeing a black handle. *Id.* at 12a-13a. Tpr. Conneely, like the other officers, then fired shots at Root. *Id.* Following the shooting, as shown on body-worn camera, Tpr. Conneely and Officer Figueroa approached Root, Tpr. Conneely grabbed Root's left hand while Officer Figueroa grabbed his right hand, and the gun was in Root's right hand under his body. *Id.* Tpr. Conneely then reached underneath Root and took control of the gun. *Id.*

C. The District Court's Summary Judgment Order

The parties cross-moved for summary judgment and the District Court granted summary judgment for the Respondent and the other Defendants on December 5, 2022. The District Court first decided the constitutional question before addressing qualified immunity, because it "promotes clarity in the legal standards for official conduct…". Pet. App. at 96a citing *Wilson v. Layne,* 526 U.S. 603, 609 (1999). First, the Court found that the officers, including Respondent Conneely's, use of deadly force did not violate Root's Fourth Amendment rights

because no reasonable jury could conclude that the officers had acted unreasonable in their use of force, and so the officers had not violated the Fourth Amendment. Pet. App. at 97a. Further, the District Court found that in the alternative, qualified immunity attaches to the defendant officers' actions, under First Circuit precedent. Pet. App. at 107a.

The District Court observed that when there is a claim that law enforcement officers used excessive force, they are to be assessed under a standard of reasonableness and requires careful attention to the particular facts and circumstances of that case, citing *Graham v. Connor*, 490 U.S. 386, 395-396 (1989). Pet. App. at 97a. The District Court further noted that the "Supreme Court intended to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases." citing *Roy v. City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994). *Id.*

While viewing the facts in the light most favorable to the Petitioner, the District Court found that the Petitioner offered no evidence that could show a Fourth Amendment violation. The District Court concluded that the evidence clearly showed that under the circumstances before the shooting (Root pointing a firearm at Officer Godin at BWH and the high-speed chase when Root fled), the officers had reason to believe Root continued to pose an immediate threat to the officers and to the public. Pet. App. at 97a. The evidence also showed that the officers had reason to believe that Root had a firearm and his behavior "would lead almost anyone to believe that he was reaching for a weapon." *Id.* citing *Escalera-*

Salgado v. United States, 911 F.3d 38, 41 (1st Cir. 2018).

The District Court further concluded that the Petitioner offered no evidence to rebut the testimony from the officers and the independent witness that Root was reaching into his jacket before the officers opened fire.[4] Pet. App. at 99a. The District Court also went on to note that the Petitioners arguments regarding verbal commands and the number of shots being excessive were also unconvincing. Pet. App. at 100a-101a. These arguments are not before this Court.

The District Court then discussed the qualified immunity claims, even though the Court stated, "While the forceful outcome of the constitutional analysis is to my mind conclusive, for the sake of completeness, I will turn to the defendant officers' qualified immunity claims." Pet. App. at 101a. Under controlling Supreme Court and First Circuit precedent, the District Court found that the case for qualified immunity was compelling. Pet. App. at 101a-104a citing *City of Tahlequah, Oklahoma v.*

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[4] The Court dismisses the Petitioners expert witness, Dr. Jennifer Lipman's testimony that "had Mr. Root's hand been as close to the bb gun as the Individual Defendants contend, it is unlikely that the bb gun would have emerged unscathed while Mr. Root's hand suffered multiple gunshot wounds," as being relevant. Pet. App. at 100a. The District Court stated that "At most, Dr. Lipman's testimony creates a dispute of fact as to whether Root was reaching for the bb gun", but that it is irrelevant whether the bb gun was on his body, and it does not refute that the officers had reasonable belief that Root was reaching for a firearm. *Id.*

Bond, 142 S. Ct. 9 (2021) and *Estate of Rahim v. Doe*, 51 F.4th 402 (1st Cir. 2022).

D. First Circuit Appeal

The Petitioner appealed the District Court's summary judgment order to the First Circuit. The First Circuit agreed with the District Court that the officers acted reasonably under the circumstances and did not violate the Fourth Amendment, no reasonable jury could conclude that the officers engaged in excessive force, and independently held that the officers were entitled to qualified immunity. Pet. App. at 3a and 27a.

The First Circuit held that excessive force claims are governed by a reasonableness standard, citing that the inquiry into reasonableness requires analyzing the totality of the circumstances, citing *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014). The First Circuit noted that the Dissent attempted to separate the shooting from the context of the preceding events, but correctly stated that no precedent supported the Dissent's attempt of separation. Pet. App. at 31a. The First Circuit held that they considered eight factors on whether the use of force was reasonable. *See* Pet. App. at 28a-29a. citing *Rahim,* 51 F.4th at 414.

Following a de novo review, the First Circuit concluded that each of the eight factors weighed in favor of the officers' use of force. Pet. App. at 29a. The First Circuit concluded that the evidence clearly established that each of the officers reasonably believed that Root was armed with a gun, that he

posed a continuing and immediate threat, and that the officers all believed that Root reached or was reaching into his jacket, which was corroborated by an disinterested witness. Pet. App. at 30a.

Because of the overwhelming evidence from the officers and independent eyewitness statements, the First Circuit noted that the Petitioner "bears the burden of producing contrary evidence and not just hypothetical disputes, citing *Statchen v. Palmer*, 623 F.3d 15, 18 (1st Cir. 2010). Pet. App. at 35a. The Court noted that none of the evidence that was presented contradicts the officer's and independent witness' statements.[5]

Thus, the First Circuit stated, "Six officers operating under "tense, uncertain, and rapidly evolving" "circumstances," *Graham*, 490 U.S. at 397, all made identical and simultaneous "split-second judgments," *id.*, that deadly force was necessary to protect themselves and the nearby public from Root. No reasonable juror could conclude that all six of those officers unanimously, independently, and simultaneously reached an unreasonable conclusion." Pet. App. at 40a. Further, the Court concluded that the remaining factors also favored the officers

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[5] The First Circuit stated that evidence from Shelly McCarthy and the Petitioner's medical expert was not contrary to the officers' statements as McCarthy did not see what happened after she left Root. Her testimony could not create an inference that Root could not have stood up after she left the scene, as he had been moving in the preceding seconds to her arrival. Pet. App. at 35a. Further, the First Circuit noted that, while the medical expert's opinion that Root was physically impaired, it could not call into question all of the witness statements. Pet. App. at 36a.

because Root escalated the threat when he reached for a gun concealed in his jacket, and the speed at which the officers had to respond to Root points to the reasonableness of the officers, including Respondent Conneely. Pet. App. at 40a-41a.

The First Circuit also concluded that the officers were entitled to qualified immunity because an objectively reasonable officer would not have understood the actions to violate the law and that there was no singular precedent finding a Fourth Amendment violation under similar circumstances.[6] Pet. App. at 44a.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. This Court granted certiorari in a Fifth Circuit case wherein the Petitioner requests this Court to apply a "totality of the circumstances standard", the standard used in this case by the First Circuit.

This Court recently granted certiorari to *Janice Hughes Barnes, Individually and as a Representative of the Estate of Ashtian Barnes, Deceased v. Roberto*

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[6] The First Circuit explained that the cases which the Petitioner cites, *Woodcock v. City of Bowling Green*, 679 F. App'x 419 (6th Cir. 2017); *Est. of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020), are distinguishable and have factual scenarios too dissimilar. See Pet. App. at 36a. Further, *Franklin v. City of Charlotte*, 64 F.4th 519 (4th Cir. 2023), cited by the Petitioner was decided over three years after the shooting and should not be considered. Pet. App. at 44a citing *City of Tahlequah,* 595 U.S. at 13.

Felix Jr., et al., cert granted, No. 23-1239 (October 4, 2024). In that case, the question is similar: "The Fourth Amendment prohibits a police officer from using 'unreasonable' force. U.S. Const. amend. IV. In *Graham v. Connor*, this Court held that reasonableness depends on 'the totality of the circumstances.' 490 U.S. 386, 396 (1989) (quotation marks omitted). But four circuits-the Second, Fourth, Fifth, and Eighth-cabin Graham. Those circuits evaluate whether a Fourth Amendment violation occurred under the 'moment of the threat doctrine,' which evaluates the reasonableness of an officer's actions only in the narrow window when the officer's safety was threatened, and not based on events that precede the moment of the threat. In contrast, eight circuits-the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits-reject the moment of the threat doctrine and follow the totality of the circumstances approach, including evaluating the officer's actions leading up to the use of force. In the decision below, Judge Higginbotham concurred in his own majority opinion, explaining that the minority approach 'lessens the Fourth Amendment's protection of the American public' and calling on this Court 'to resolve the circuit divide over the application of a doctrine deployed daily across this country.' Pet. App. 10a-16a (Higginbotham, J., concurring). The question presented-which has divided twelve circuits-is: Whether courts should apply the moment of the threat doctrine when evaluating an excessive force claim under the Fourth Amendment." *Barnes,* cert. granted, No. 23-1239 (October 4, 2024).

Here, one of the two questions presented by the Petitioner is "Did the appeals court create a circuit

split as to the standards governing whether the totality of the circumstances justifies the use of deadly force?" Pet. App. at *i*.

It may appear that because the questions are similar, certiorari should be granted, and the cases should be grouped or linked. However, after review and consideration of *Barnes* and the present case, it is clear that the cases present the same issue, but in converse fashion. In *Barnes,* the Fifth Circuit decided that the officer's actions were reasonable under the "moment of the threat doctrine". *Barnes*, No. 23-1239 (October 4, 2024) Pet. App. at 9. The Petitioner in *Barnes* argues that the Fifth Circuit's use of the "moment of the harm" doctrine is "profoundly wrong". *Barnes* Pet. App. at 26. The Petitioner in *Barnes*, who is also claiming a Fourth Amendment violation by law enforcement, is asking this Court to answer the question creating the circuit split and to ensure that all Circuit Courts use the "totality of the circumstances" doctrine when deciding Fourth Amendment claims. The Petitioner in *Barnes* makes the case that the Fifth Circuit would have decided that the officers conduct was unreasonable if taken under the "totality of the circumstances" doctrine.

Meanwhile, in the present case, the Petitioner is arguing that the First Circuit should adopt the minority approach, which the Fifth Circuit has requested a re-assessment of. In this case, the Petitioner (and the Dissent from the First Circuit) argues that the circumstances from earlier in the day should not be taken into account when deciding whether the actions of the officers, including Respondent Conneely, were reasonable. While the

Petitioner does not explicitly state "moment of the threat" within her brief, the arguments clearly allude that this is the standard the Petitioner believes should be applied by the First Circuit. The Petitioner states that "It is well-established that, before using deadly force, police must consider whether it is justified by the totality of the circumstances, citing *Tennessee v. Garner,* 471 U.S. 1, 8–9 (1985), but the Petitioner relies on multiple cases from circuits that abandon the "totality of the circumstances" doctrine and uses the "moment of the threat" doctrine to make their argument that the First Circuit's understanding of "reasonableness" is faulty. Pet. App. at 27. Specifically, the Petitioner points out the difference between the First Circuit and recent Fourth Circuit precedent, citing *Estate of Jones by Jones v. City of Martinsburg*, *W. Va.*, 961 F.3d 661 (4th Cir. 2020), *Franklin v. City of Charlotte*. 64 F.4th 519 (4th Cir. 2023), and other precedent from circuit courts that use the "moment of the threat doctrine.[7] Pet. App. at 30-33.

Because both the Petitioner in this case and the Petitioner in *Barnes* are claiming Fourth Amendment violations from law enforcement but are arguing for the opposite doctrine when it comes to the courts' analysis of reasonableness, the Court should not take up both cases. If this Court agrees with the Petitioner in *Barnes*, the Petitioner's writ is moot because the First Circuit used the totality of the circumstances doctrine when affirming the entry of summary

[7] The Petitioner also cites *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015) and *Brockington v. Boykins*, 637 F.3d 503, 507 (4th Cir. 2011), both of which come from circuits that use the "moment of the threat" doctrine.

judgment for the Respondent. This Court should deny certiorari because certiorari has been granted in a similar case where the Petitioner argues for the doctrine that the First Circuit already adopts. In the alternative, this Court could deny certiorari, make a decision in *Barnes* and either order a GVR for this case if this Court deems that the standard of review should be "moment of the threat" rather than "totality of the circumstances"[8], or deny certiorari if this Court concludes "totality of the circumstances" is the proper standard of review.

II. The First Circuit properly granted summary judgment.

The Petitioner argues in its writ that the District Court and First Circuit Court created a new summary judgment standard because they made factual determinations, weighed evidence and drew inferences in the Respondent's favor. It is clear in the record that the First Circuit properly viewed the facts in light most favorable to the Petitioner.

"Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted). The Petitioner attempts to paint a picture of the First

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[8] See Stephen L. Wasby, *Case Consolidation and GVRs in the Supreme Court,* 53 U. PAC. L. REV. 83, 98 (2021) ("When faced with an issue, the Justices appeared to choose to focus on a single case in which it was raised and then to issue GVR (grant, vacate, and remand) orders, in light of a recent ruling, for the cert petitions waiting in line.").

Circuit making continuous factual determinations, and drawing inferences, stating that there is contradictory evidence that supports a denial of summary judgment. As the record reflects, there is no such controverted evidence. There must be more than colorable evidence, it must be controverted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 264 (1986) citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

First, the Petitioner points to the supposed inconsistencies with the officers' stories, stating that some officers stated that Root was kneeling, attempting to stand. Pet. App. at 19. Some officers said Root had his hand in his chest and some said he was reaching into his jacket. *Id.* While the Petitioner would like for this Court to believe that these "inconsistencies" are proof of controverted evidence and that the First Circuit improperly made factual determinations, the First Circuit rightfully pointed out that these inconsistencies are minor and were caused by the officers having different vantage points and having only seconds to process the scene. Pet. App. at 37a. The First Circuit also noted that these inconsistencies do not actually go to the issue of whether Root reached for what the officers believed was a gun. *Id.* While the officers' memory differed in the slightest detail, every officer gave the account that they believed Root was reaching for his gun. Again, the smallest inconsistencies do not turn an uncontroverted fact; that the officers believed Root reached into his jacket for a firearm,[9] presenting an

[9] This belief was based upon the knowledge that Root previously aimed a firearm at Officer Godin. This evidence is relevant for a Fourth Amendment analysis. See *Rahim,* F.4th

immediate threat, into a controverted fact. No evidence was produced by the Petitioner to show that the officers did not believe Root was posing an immediate threat.

Next, the Petitioner creates a conspiracy theory that the BPD officers created this story because they met together following the shooting. Pet. App. at 21. However, Respondent Conneely was not part of this meeting that the Petitioner describes, yet he presented evidence which was consistent to the other officers. The Petitioner does not explain or show how this meeting creates controverted evidence for the BPD officers, and specifically for Respondent Conneely. The First Circuit was correct that no material dispute arises that comes from officers talking about what they witnessed. Pet. App. at 37a. If the officers' conversation before their interviews had a material impact on their interviews, their accounts would likely have been nearly identical. The Petitioner cannot have it both ways. The Petitioner attempts to point out inconsistencies in their stories, while also alleging collusion in their stories. The First Circuit rightfully did not find this allegation credible.

The Petitioner also attempts to convince this Court that the First Circuit improperly gave weight to one independent witness over another and improperly made "unreasonable inferences" in the Respondent's favor. Pet. App. at 24. When looking at the record, it is evident that the decision to give greater weight to Dr. Victor Gerbaudo than to Shelly McCarthy was not only logical, but proper. It is clear

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402 at 18 ("[P]re-seizure conduct may be relevant in the reasonableness analysis.").

from the record that Dr. Gerbaudo saw the shooting, while Shelly McCarthy did not. The Petitioner argues that McCarthy's testimony was "wrote off … merely because she allegedly did not convey all of her observations to '"the officers at the time."' Pet. App. at 23. This is a misplaced argument as to why the First Circuit did not give greater weight to her testimony. Her testimony was irrelevant when it came to the question of whether the officers believed Root was an immediate threat, which is part of the analysis for summary judgment. In fact, the First Circuit addresses exactly why McCarthy's testimony does not create controverted evidence. The First Circuit noted that her evidence was actually consistent with the officers, in that she saw his right hand on his jacket the entire time; the same hand that the officers observed reach into the jacket. Pet. App. at 35a. Further, McCarthy's opinion that she believed that he would not have been able to stand does not contradict the officers' account because she is not aware of what happened once she ran away.[10] She only saw Root for a few seconds, in which Root had just been moving to the spot where McCarthy had observed him. *Id.* No reasonable jury could conclude that McCarthy's testimony could controvert the evidence, as she was not an actual witness of the shooting.

Meanwhile, Dr. Victor Gerbaudo, a disinterested witness, did actually see the shooting

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[10] The First Circuit notes that no reasonable jury could conclude that Root was unable to move his arm. Pet. App. at 36a citing *Colt Def. LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 709-10 (1st Cir. 2007) (explaining that "a 'mere scintilla' of evidence" is insufficient to create triable issue (quoting *Hochen v. Bobst Grp., Inc.*, 290 F.3d 446, 453 (1st Cir. 2002))).

and corroborated the officers' testimony. Again, the Petitioner tries to point out the most miniscule inconsistencies in Dr. Gerbaudo's statements, but just like the officers, a different vantage point explains the minor differences. Because only one of the two witnesses actually saw the events, and Dr. Gerbaudo corroborated the officers' testimony, it is completely proper for the First Circuit to view Dr. Gerbaudo's testimony as relevant to summary judgment and to not view McCarthy's as relevant.

As for the unreasonable inferences the Petitioner points out, none of them are impactful in the summary judgment decision and none of them are unreasonable inferences. Regardless of whether Root was continuing to attempt to flee, the officers and Dr. Gerbaudo saw Root reach into his jacket, a location where the officers reasonably believed there was a gun. And regardless of whether Root understood the officers' commands, the officers and the disinterested party saw Root reach into his jacket, in a location where the officers reasonably believed there was a gun.

As for the last attempt by the Petitioner to point out unreasonable inferences from the First Circuit, the Petitioner points out the lack of blood on the gun. However, the First Circuit responded that the expert who gave his opinion that the gun would have been damaged or bloody had it been in Root's hands at the time of the shooting, did not account for the rainy weather. Pet. App. at 25. The Petitioner even attempts to use pictures of blood in a road as proof that the First Circuit made an unreasonable inference. *Id.* However, roads and a bb gun are not

made of the same material. Some materials absorb blood, and some do not. Pictures of a road are not evidence that blood could not have washed away from the gun. With that being said, regardless of whether Root was actually holding the gun or just reaching for it at the time of the shooting, the officers and Dr. Gerbaudo saw Root reach into his jacket, in a location where the officers reasonably believed there was a gun.

Finally, the Petitioner argues that Courts may not act as a factfinder and accept police officers' testimony, despite contrary evidence. The Respondent agrees that a Circuit Court should not act as a factfinder, but the record reflects that there is no merit that the First Circuit did so. There was no contrary evidence to rebut the officers' testimony.[11] The First Circuit properly examined the direct and circumstantial evidence and noted that none of that evidence contradicted the officers' accounts. Pet. App. at 39a.

Thus, the First Circuit, even with viewing the evidence in the most favorable light to the Petitioner, properly granted Respondent Conneely summary judgment. None of the evidence the Petitioner offered or offers in its writ is controverted evidence. All of the officers' and the sole witness who viewed the shooting saw Root reaching into his jacket, to grab what the officers believed was a gun. The evidence the Petitioner offered did not contradict the witness's statements. As the First Circuit states, because the

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[11] This is unlike precedent the Petitioner previously cited to. See *Flythe v. District of Columbia*, 791 F.3d 13 (D.C. Cir. 2015) (Officers testimony conflicted with every other witness).

officers and witness' statements were not controverted, no reasonable jury could find for the Petitioner and summary judgment was properly granted.

III. Even if this Court were to deem the standard to be "moment of the harm" rather than "totality of the circumstances", Respondent would still be granted summary judgment on remand.

Petitioner's stated issue is that the First Circuit created a circuit split regarding Fourth Amendment analysis and that the First Circuit did not properly view the evidence in the light most favorable to the Petitioner. However, even if the First Circuit erred in not finding a constitutional violation, the First Circuit granted summary judgment on qualified immunity as well.

A. Tpr. Conneely's conduct did not violate Root's Fourth Amendment rights under a "moment of the threat" doctrine.

Even if Petitioner's arguments are to be believed that the First Circuit should have used a segmented approach or the moment of the threat doctrine used in the minority Circuits that the Petitioner cites, Respondent Conneely's conduct would still have not violated Root's Fourth Amendment rights.

Under both doctrines, "The court must adopt the perspective of a reasonable officer on the scene, rather than judge with the 20/20 vision of hindsight." *Bros. v. Zoss*, 837 F.3d 513, 518 (5th Cir. 2016). Even in a segmented approach, there was no evidence produced that a reasonable officer would not have understood Root to be grabbing for a gun, which the officers believed he had in his jacket. Under this segmented approach, as seen by the officers and the witness, Root reached inside his jacket, for what the officers believed was a gun. Even at the moment of the shooting, the officers believed Root was a threat and the First Circuit would have granted summary judgment under the moment of the threat doctrine.

The cases cited by the Petitioner to support its argument of a different outcome under the segmented or moment of the threat approach are not binding and easily distinguishable. In *Estate of Jones by Jones v. City of Martinsburg*, Jones clearly was incapacitated and could not pose a threat. 961 F.3d at 669. Jones was lying motionless on the ground, lying on his side, physically unable to reach for his knife. *Id.* at 670. While there is evidence on the record that Root was injured, there was no evidence that he was incapacitated. Just seconds prior to McCarthy approaching Root and seconds before the shooting, he was stumbling into the mulch. Next, the Petitioner cites *Franklin v. City of Charlotte*, where Franklin reached for a gun after the officers' ordered a myriad of orders, including to "drop the gun", clearly confusing Franklin. 64 F.4th at 526-527. While the Petitioner argues that the case is strikingly similar to this present case, here, the officers arrived knowing Root had already pulled a firearm on Officer Godin

and every officer testified that they ordered Root to stay on the ground and show them his hands. The record does not reflect they ever asked him to drop his gun. Unlike in *Franklin*, where Franklin grabbed his gun in order to drop it at the officers' orders, Root disobeyed orders to stay on the ground and show the officers his hands. Instead, Root reached into his jacket to grab a gun, even though there was no order to drop a gun.

It is clear from the record that no matter which doctrine the First Circuit applied in their analysis of a Fourth Amendment violation, the First Circuit would concur that Respondent Conneely did not violate Root's Fourth Amendment rights.

B. Even if there was a Fourth Amendment violation, Respondent Conneely would be granted summary judgment under qualified immunity.

"If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established ... in light of the specific context of the case.'" *Scott v. Harris*, 550 U.S. 372, 377 (2007) quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

While the Petitioner mentions qualified immunity, the Petitioner does not argue that the grant of qualified immunity was improper under the law. Because of that and the fact that the First Circuit clearly showed that the established law supported the

officers' decision to shoot Root, qualified immunity bars this suit.[12]

The Petitioner never presented any precedent and still cannot present any precedent that would put the officers on notice that their actions would have violated the law. *Rahim*, 51 F.4th at 413. The First Circuit properly granted summary judgment on the grounds they were entitled to summary judgment. Thus, even if this Court were to remand this case to the First Circuit, the First Circuit would still properly grant summary judgment to Respondent Conneely.

CONCLUSION

The Petition for a writ of Certiorari should be denied.

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[12] The First Circuit noted that the Petitioner failed to "identif[y] a single precedent finding a Fourth Amendment violation under similar circumstances." Pet. App. at 44a citing *City of Tahlequah v. Bond*, 595 U.S. at 14. Further, the First Circuit noted, as previously stated by Respondent, *Woodcock* and *Estate of Jones* are distinguishable, as the facts are too dissimilar to those in this present case. *Id.* Finally, as Petitioner also cited in its writ, *Franklin v. City of Charlotte* also cannot be considered for qualified immunity as was decided three years following the shooting of Root. *Id.* citing *City of Tahlequah*, 595 U.S. at 13 (explaining that a case "decided after the shooting at issue[] is of no use in the clearly established inquiry").

Respectfully submitted,

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