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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner submits this reply to respond to a substantial mischaracterization of Petitioner's argument in Defendant Conneely's opposition and to correct a factual error in the BPD Defendants' opposition.[1]

The facts of this case—where the court below forged a new summary judgment standard that overlooked multiple material disputes of fact in favor of the police officers who shot a man dead when he was already on the ground, covered in blood, nonverbal, gurgling blood, with his eyes ping ponging in his head—coupled with the circuit split over the impact of a change in circumstances on the totality of the circumstances analysis, warrant certiorari.

ARGUMENT

A. Contrary to Defendant Conneely's Argument, the Circuit Split Here Is Not the Same as the Circuit Split in *Barnes*.

The circuit split at issue here is over whether police officers must assess if a change in circumstances decreases the immediacy of a prior threat when analyzing

1. As explained in footnote 1 of the petition, the officers who killed Juston Root are Boston police officers David Godin, Joseph McMenamy, Leroy Fernandes, Brenda Figueroa, and Corey Thomas plus Trooper Paul Conneely. Each is a defendant in this case. This reply refers to the defendant officers individually as "Defendant [Last Name]" and collectively as "Defendants." The City of Boston, also a defendant, is referred to as the "City." This reply refers to the Boston police officer defendants and the City collectively as the "BPD Defendants."

whether the totality of the circumstances justifies the use of deadly force. In its totality of the circumstances analysis, the majority below considered the events at Brigham & Women's Hospital ("BWH") earlier in the morning before the fatal shooting of Juston Root, as well as the vehicle pursuit, and concluded that "[t]he officers also had every reason to believe Root posed a continuing and immediate threat to them and the public." Pet. App. 30a. But the majority completely omitted from its assessment the massive car accident and its impact on Root's physical and mental condition. *Id.* The petition (at 27–34) explains how the majority broke from well-established precedent by holding that police officers and courts need not consider a break in the series of events when assessing whether the totality of the circumstances continues to justify the use of deadly force.

Defendant Conneely mischaracterizes Petitioner's argument about this new circuit split by claiming that the split here is the same as that in *Barnes v. Felix*, No. 23-1239, in which this Court recently granted certiorari. *Barnes* concerns the split of authority over the "moment of threat" doctrine and whether courts must "identify the specific instant in which an officer faced a threat and ignore everything that occurred prior to that moment." *Barnes*, Pet. Br. at 2. In that case, the interaction between Ashtian Barnes and the police lasted less than 10 seconds before the officer shot Barnes, and the district court and the Fifth Circuit held that the moment of threat was the two seconds before the shooting, during which the officer could reasonably believe his life was at risk. *See Barnes v. Felix*, 91 F.4th 393, 395, 397–98 (5th Cir. 2024).

The facts of *Barnes* are not similar to the facts here, and neither is the legal analysis. The present case involves

an earlier shooting at BWH, followed by a vehicle pursuit that proceeded "as slow as molasses" until Defendant Joseph McMenamy rammed his car into Root's in an unsanctioned PIT maneuver, and a catastrophic car accident that totaled Root's car before he got out of it, collapsed twice, and landed in a small, mulched area where he remained in a near-dead state. The question here is whether the majority below created a circuit split by erroneously holding that the change in circumstances caused by the car accident and Root's resulting physical and mental condition are irrelevant to the totality of the circumstances. *Barnes*, in contrast, does not involve the same type of change in circumstances. Instead, in the two seconds that constituted the moment of the threat in *Barnes*, the officer "was still hanging on to the moving vehicle when he shot Barnes." *Id.* at 398.

Contrary to Defendant Conneely's assertion, Petitioner is not advocating for the adoption of the moment of threat doctrine. Rather, Petitioner cited numerous cases holding that a prior threat does not justify the use of deadly force when the circumstances have changed such that the suspect no longer poses an imminent threat. *See* Pet. 27, 30–34 (citing *Franklin v. City of Charlotte*, 64 F.4th 519, 525 (4th Cir. 2023) (at the time of the shooting, "Franklin was no longer inside the restaurant, nor was he aggressive or outwardly threatening when Officer Kerl approached him. He also made no attempt to resist the officers or flee the area. One restaurant employee felt comfortable enough to walk up to Franklin during the confrontation before the officers ordered her to step back."); *Lachance v. Town of Charlton*, 990 F.3d 14, 25–26 (1st Cir. 2021) (affirming use of "segmented approach" in analyzing applicability of qualified immunity to uses of force separated by "a change

in circumstances"); *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017) ("[W]e have fashioned a fairly wide zone of protection for the police in borderline cases. But that zone of protection has shifting boundaries. Everything depends on context, and the use of deadly force, even if reasonable at one moment, may become unreasonable in the next if the justification for the use of force has ceased. Put another way, a passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect." (cleaned up)); *Estate of Jones by Jones v. City of Martinsburg, W. Va.*, 961 F.3d 661, 669 (4th Cir. 2020) (before the shooting, Jones "had been tased four times, hit in the brachial plexus, kicked, and placed in a choke hold, at which point gurgling can be heard in the video [footage]. A jury could reasonably infer that Jones was struggling to breathe."); *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 277 (5th Cir. 2015) ("We have explained that an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased. Although the record reflects that there was a break between the first five and last two shots that struck Mr. Mason, and that Mr. Mason lay on the ground when the final two shots were fired, the district court did not expressly address whether [Officer] Faul's use of his firearm was justified throughout the encounter. We conclude that genuine issues of material fact arise regarding the final two shots that struck Mr. Mason. . . ." (cleaned up))[2]; *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (officer had "enough time . . . to recognize and react to the changed circumstances and cease firing his gun" (internal quotation marks omitted));

2. While *Mason* references the moment of threat doctrine, Petitioner did not cite or rely on that portion of the opinion.

Brockington v. Boykins, 637 F.3d 503, 507 (4th Cir. 2011) ("[I]t is possible to parse the sequence of events as they occur; while a totality of circumstances analysis still remains good law, if events occur in a series they may be analyzed as such.")).

Even circuits that have not adopted the moment of threat doctrine still require officers to take changing circumstances into consideration because a prior threat does not automatically justify a subsequent use of deadly force. *See*, *e.g.*, *Flythe v. District of Columbia*, 791 F.3d 13, 22 (D.C. Cir. 2015) ("That an individual at one point posed a threat does not grant officers an irrevocable license to kill. Justification for deadly force exists only for the life of the threat. . . . Accordingly, whether Eagan acted reasonably *does* turn on whether, as he alleges, Flythe attacked him with a knife. And given all of the evidence discussed above—the inconsistencies between Eagan's testimony and the testimony of other witnesses, the physical evidence, and the evidence raising questions about Eagan's personal credibility—and drawing all inferences in Ms. Flythe's favor, we believe that a reasonable jury could conclude that Tremayne Flythe never threatened Officer Eagan with a knife." (emphasis in original)); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("Even assuming Raso was in front of the car and was in danger at some point, a jury could find, notwithstanding her testimony, that she did not fire until it was no longer objectively reasonable for her to believe she was in peril. A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with

impunity. Although Wynalda could have shot Ellis during their physical encounter, since a reasonable officer may have felt threatened, Wynalda had no reasonable fear of Ellis after he backed away and ran.").

Here, the First Circuit walked away from its prior precedent—which was in line with its sister circuits—and created a new split, gutting the "totality" part of the totality of the circumstances by allowing police to focus on some circumstances while ignoring others. There now is a unique standard within the First Circuit under which officers may use deadly force in situations where it would be unconstitutional in the rest of the country. This new and uneven application of the Fourth Amendment warrants this Court's review.

B. The BPD Defendants Incorrectly Suggest that 10 Seconds Passed After Shelly McCarthy Left Root's Side.

The majority below found that approximately 10 seconds elapsed between when EMS-certified bystander Shelly McCarthy reached Root's side while he was in the mulch and when the Defendants opened fire on Root, killing him. Pet. App. 8a ("From the time McCarthy reached Root (and then left) to the time of the shooting, approximately ten seconds elapsed."). This finding is supported by the evidence: a cell phone video recorded by a bystander shows McCarthy run to Root while he is falling in the mulch, and approximately 10 or 11 seconds later, the police began shooting. The following images taken from the cell phone video show McCarthy approaching Root from the left as he collapsed in the mulch mere seconds before the fatal shooting:

Still images taken from the cell phone video at 00:28 and 00:29, respectively, showing McCarthy approaching Root from the left as he collapsed and lay on the ground. *See* Petitioner's Summary Judgment Exhibit 25 (District Court Dkt. No. 89-25).

In addition, Defendant Figueroa's body worn camera establishes that approximately seven seconds elapsed between when Defendant Figueroa ran onto the mulch to join the other officers surrounding Root—Defendant Figueroa was not the first officer to arrive, and other officers had already ordered McCarthy to leave Root—and when police began shooting.

Despite the plain language used by the First Circuit majority and the undisputed evidence, the BPD

Defendants' opposition incorrectly suggests 10 seconds elapsed between the time McCarthy left Root's side and the time the police opened fire. BPD Defendants' Opp. at 6 ("[McCarthy] was there less than ten seconds, when multiple approaching officers, including Officers Godin and McMenemy, ordered her to get away from Root, which she did. In the subsequent ten seconds that elapsed prior to the shooting, McCarthy did not see him again, including at the time of the shooting." (citing Pet. App. 7a–8a, 10a–11a)). This description misstates the majority opinion and the evidence, and it misleadingly implies that the Defendants observed and interacted with Root for three or four times as long as they actually did after McCarthy ran from Root.

The timing here matters: the undisputed evidence establishes that no more than three or four seconds passed between when McCarthy left Root's side and when the Defendants shot and killed him. As explained in the petition at 5–6, 19–20, 24–26, the majority below created a new summary judgment standard by drawing an inference in the moving Defendants' favor that during those three to four seconds after McCarthy left, Root had the ability to get up and reach into his jacket, despite (1) McCarthy's testimony that he was "gurgling blood," appeared to be covered in blood, had "[l]ights on[,] no one home," and that his eyes were "bouncing around like ping-pong balls" until they rolled to the back of his head; (2) the "significant" blood loss Root experienced due to the shooting at BWH; (3) Petitioner's expert's testimony that the blood loss would have rendered him "physically and mentally impaired"; and (4) the impact of the massive car accident on Root's physical and mental condition, his ability to understand and respond to police commands, and his ability to reach.

CONCLUSION

For the foregoing reasons, and those in the petition, certiorari should be granted.

Respectfully submitted,

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