

No. 25-472

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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ANGELIC SALGADO, AS PERSONAL REPRESENTATIVE  
OF THE WRONGFUL DEATH ESTATE OF  
JONATHAN MOLINA,

*Petitioner,*

v.

KEVIN SMITH,

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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## INTRODUCTION

During the early morning hours of July 15, 2018, New Mexico State Police Officer Kevin Smith (“Officer Smith”) performed a traffic stop of a blue Honda driven by Brandon Smith (“Brandon”) - no relation - and his passenger, Jonathan Molina (“Molina”). Pet. App. 16a. The events were captured on Officer Smith’s dash camera. Officer Smith witnessed Brandon speeding approximately 35 mph over the speed limit. Dispatch informed Officer Smith that Brandon’s license plate belonged to a red Honda, not a blue one. During his investigation into whether the vehicle was stolen, Officer Smith asked Brandon to “hop out” of the car. Pet. App. 17a. After Officer Smith asked Brandon the name of his passenger, Brandon stuttered and refereed to his passenger as “Johnny.” Brandon stated that he could not recall “Johnny’s” last name despite knowing him for several months. Based on his experience and training as well as Brandon’s nervousness and memory lapse, Officer Smith believed Brandon to be concealing “Johnny’s” identity. Pet. App. 18.

Officer Smith approached the passenger window of the blue Honda where “Johnny” identified himself as Molina. After Molina informed Officer Smith that he had several outstanding warrants and was an “absconder,” Officer Molina asked Molina to “hop out” of the vehicle. Molina quickly shot out of the passenger seat. Pet. App. 19a. Officer Smith stated that Molina “clenched up his muscles and pulled his legs underneath him, as if to gain leverage.” Officer Smith pushed Molina back into the front seat of the blue Honda, where the two began to struggle against

each other. Pet. App. 20a. The fight inside the vehicle was not captured by the dashboard camera in Officer Smith's vehicle due to the Honda's dark tinted rear window and/or the fact that it was nighttime. Pet. App. 20a.

During the struggle, Officer Smith heard a "boom" and felt a sharp pain in his leg. Officer Smith saw the muzzle of a gun in Molina's hand and believed that Molina had shot him in the leg. Molina grabbed for Officer Smith's gun from its holster, leading to a struggle for both Molina's gun and Officer Smith's gun. Pet. App. 21a. Officer Smith faced two potential attackers as Molina called out for assistance from Brandon. During the struggle, both Officer Smith and Molina bit each other; Officer Smith's bite to Molina's arm caused Molina to lose his grip on Officer Smith's holstered gun. Pet. App. 6a. Officer Smith withdrew from the vehicle, drew his gun, and fired a single round at Molina. Petitioner does not claim that Officer Smith's use of force up to this point was excessive.

Officer Smith, believing that Molina still possessed the gun that Officer Smith had seen in Molina's hand, moved to the rear of the Honda and pointed his gun toward the Honda's rear windshield. Pet. App. 22a-23a. As Officer Smith commanded Molina to put his hands in the air, Molina's foot or leg extended out of the Honda's passenger door. Pet. App. 23a. Officer Smith fired seven shots into the Honda through the rear window. Approximately eight seconds elapsed between Officer Smith's first shot to the time he began firing the volley of seven shots.

Petitioner filed a complaint in the United States District Court for the District of New Mexico (“District Court”), alleging that Officer Smith used excessive force in violation of Molina’s Fourth Amendment rights by deploying a second volley of rounds. Pet. App. 38a. The District Court granted Officer Smith’s motion for summary judgment on the basis of qualified immunity, finding that Officer Smith did not violate Molina’s rights and that Molina’s rights were not clearly established. Pet. App. 2a. The District Court noted that, at the time of the second volley, Officer Smith knew that Molina: (1) had absconded from a warrant for his arrest, (2) had violently resisted arrest, (3) had shot him in the leg, (4) had tried to get control of Officer Smith’s gun, (5) still had a gun in the Honda, (6) did not visibly obey the command to put his hands in the air, and (7) had made a motion with his leg outside the car that appeared to Officer Smith as though Molina was trying to get out of the Honda. Pet. App. 23a. The Tenth Circuit affirmed the District Court, finding that Molina lacked a clearly established right. Petitioner now appeals.

The Petition makes several conflicting arguments. First, Petitioner asserts that the Tenth Circuit below created a circuit split by reviewing the totality of the circumstances with respect to Officer Smith’s second volley of shots. Petitioner asserts that a circuit split exists as to whether the “totality of the circumstances” analysis applies to a secondary use of force, or whether “later shots must be justified by current circumstances - not the dangerousness that existed prior to the initial use of force.” Pet. 10. Petitioner manufactures this circuit split, based on



“temporal segmentation” analysis where one does not exist, by cherry-picking certain sections of *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005), *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993), *Tan Lam v. City of Los Banos*, 976 F.3d 986 (9th Cir. 2020), and *Fancher v. Barrientos*, 723 F.3d 1191 (10th Cir. 2013). As discussed below, the respective circuit courts in each of these cases applied the totality of the circumstances analysis with respect to each use of force. Petitioners’ misrepresentation is so blatant that the *Fancher* court expressly stated that it lacked jurisdiction to review the “segmented analysis” that Petitioner claims the *Fancher* court endorsed. Accordingly, no circuit split exists.

In her second argument, Petitioner asserts that the lower courts violated *Plumhoff v. Rickard*, 572 U.S. 765 (2014) by finding a second volley of shots to be permissible where Molina was clearly incapacitated. Petitioner further argues that the Tenth Circuit improperly “credited pre-first-shot violence” when analyzing Officer Smith’s second volley of shots. Pet. 13. Petitioner’s assertions misrepresent the facts, as the district court below already explained that “due to the opaqueness of the Honda’s rear window, it is impossible for anyone including Officer Smith, to know whether or not... Molina had complied with Officer Smith’s order to place his hands in the air. What Officer Smith could see was that... Molina’s... lower leg emerged from the Honda in a way that under the circumstances reasonably appeared to Officer Smith as though... Molina was trying to get out of the car.” Pet. App. 29. The Tenth Circuit similarly agreed that Officer “Smith had reason to think that Molina was not

subdued. Video evidence shows... Molina quickly kicked his leg out of the passenger-side door just before the second round of shots.” Further, the totality of the circumstances analysis requires review of “pre-first-shot-violence.” Accordingly, Petitioner’s second argument fails.

Petitioner supports her third argument, that Molina had a clearly established right, with haphazard references to cases that are not squarely on point. Petitioner relies on *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Graham v. Connor*, 490 U.S. 386, 398 (1989); *Fancher*, 723 F.3d 1191; *Estate of Smart v. City of Wichita*, 951 F.3d 1161 (10th Cir. 2020); *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005); *Ellis*, 999 F.2d 243, and *Taylor v. Rojas*, 592 U.S. 7 (2020). Despite the fact that the lower courts already rejected several of these cases, Petitioner provided no analysis whatsoever. Indeed, Petitioner’s entire analysis as to how *Garner*, 471 U.S. at 11 created a clearly established right is the following sentence: “deadly force only when necessary to prevent escape and the suspect poses an immediate threat.” Without question, Petitioner fails to identify a case which created a clearly established right.

In her fourth and final argument, Petitioner boldly asserts that the Tenth Circuit violated this Court’s holding in *Barnes v. Felix*, 605 U.S. 73 (2025). In *Barnes*, the Court struck down a “moment-of-threat” used by the Circuit under which the excessive force “inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in his use of deadly force. Any prior events leading up to the shooting,... were simply not relevant.” *Id.* at 78

(internal quotes omitted). Petitioner loses all credibility as she also asserts the Tenth Circuit deviated from the required “temporal segmentation” analysis and analyzed the entire encounter between Molina and Officer Smith in “one continuous ‘dangerous’ episode.” Pet. 11-12. It is unclear how the Tenth Circuit managed to both focus its analysis on a single fact, while also focusing all the facts. In reality, it is clear that the lower courts properly performed the “totality of the circumstances” analysis.

As the District Court and Tenth Circuit properly upheld qualified immunity for Officer Smith, Respondent respectfully requests that the Court deny the Petition.

## **STATEMENT OF THE CASE**

### **I. Statement of Facts.**

#### **A. The Traffic Stop.**

At approximately 2:00 am on July 15, 2018, Officer Smith was on patrol along Interstate 25 in Albuquerque, New Mexico. Pet. App. 16a. Officer Smith saw a blue Honda driven by Brandon traveling at approximately 101 mph in a 65-mph zone. Officer Smith followed Brandon and radioed Brandon’s license plate number into dispatch. Dispatch informed Officer Smith that the license plate was registered to a red Honda, not a blue one. Officer Smith activated his emergency lights and initiated a traffic stop of Brandon’s vehicle. Pet. App. 17a. After Brandon pulled over, Officer Smith parked behind him.

Petitioner does not dispute that the traffic stop was justified at its inception.

Officer Smith approached the blue Honda from the driver side, noticing two men inside. Pet. App. 17a. Brandon, in the driver seat, stated that he did not have a registration or insurance for the Honda because he recently purchased it. Brandon further stated that the license plate belonged to a different red Honda that he owned. Officer Smith began an investigation as to whether the blue Honda was stolen. Officer Smith asked dispatch for the VIN number associated with the license plate currently attached to the blue Honda. Dispatch responded with a VIN number that did not match that of the blue Honda, increasing Officer Smith's suspicion that the car might be stolen. Pet. App. 17a.

Officer Smith asked Brandon to "hop out" of the blue Honda because he intended to issue Brandon citations for speeding and improper use of registration. Pet. App. 17a. Still concerned that the blue Honda might be stolen, Officer Smith asked Brandon for the name of his passenger. Brandon responded "Johnny... Jonathan," seeming nervous to Officer Smith. Brandon stated that he knew "Johnny" for a couple of months but could not remember his last name. Officer Smith's suspicions increased further as, in his experience, "when people have memory lapses, such as not knowing the name of the person that they say that they've known for months [and who] is inside their vehicle, in addition to them being nervous..., that could mean that a crime has been taken or that they're concealing somebody's identity, usually because of a warrant." Pet. App. 18a.

Officer Smith proceeded to the passenger window to speak with “Johnny” and determine whether Brandon was concealing his passenger’s identity. The passenger identified himself as Molina. After Molina handed Officer Smith his Social Security card, Officer Smith asked Molina if he had any outstanding warrants. Molina, who displayed a nervous demeanor, stated that he had a warrant and was an “absconder.” Officer Smith asked Molina to “hop out” of the blue Honda so that Officer Smith could confirm the warrant. Pet. App. 18a.

**B. Officer Smith’s first use of force.**

Molina quickly shot out of the passenger seat. Pet. App. 19a. Officer Smith stated that Molina “clenched up his muscles and pulled his legs underneath him, as if to gain leverage.” Officer Smith pushed him back inside. Officer Smith believed that Molina was preparing himself for a confrontation and an attempt to escape. A violent struggle began with Molina in the front seat and Officer Smith standing just outside the passenger side of the car. Pet. App. 19a.

As shown by Officer Smith’s dash camera, Officer Smith pulled out his handcuffs and tried to restrain Molina, who resisted. The action inside the car was not visible through the rear window the vehicle. Pet. App. 19a, n. 3. Officer Smith appeared to be trying to restrain Molina and then started punching in Molina’s direction. Pet. App. 20a. Officer Smith noted that Molina swung his arms and knocked the handcuffs out of Officer Smith’s hands. In

response, Officer Smith struck Molina on the head at least two times. Pet. App. 20a.

Officer Smith heard a “boom” and felt pain in his left leg. Thinking Molina tased him, Officer Smith tried to gain control over Molina’s hand. As he did so, Officer Smith saw the muzzle of a gun and believed that Molina shot him in the leg. Officer Smith did not see the gun go off or Molina pull the trigger. Pet. App. 20a-21a. The presence of a gun in the vehicle was later confirmed. Pet. App. 21a.

The struggle between the two men moved inside the vehicle. Although the video did not visually capture the fight due to the dark back window of the Honda, the sounds of a struggle can be heard. Pet. App. 21a. Officer Smith stated that Molina tried to grab his gun and remove it from its holster, leading to a struggle for both weapons. Molina then called for Brandon to return to the car, alerting Officer Smith to the potential danger of an attack from Brandon. Officer Smith bit Molina’s arm, causing Molina to release his grip on Officer Smith’s gun. Pet. App. 21a. Molina then bit Officer Smith in the left shoulder. Officer Smith retreated from the car, moving his right hip, where his gun was holstered, away from Molina. Molina continued to hold onto Officer Smith’s handgun for several moments, ultimately releasing his grip. Pet. App. 21a-22a.

Officer Smith released his grip on the hand Molina used to hold his gun. Pet. App. 22a. As Officer Smith drew his gun from its holster, Molina’s hand and wrist can be seen emerging from the car, reaching towards Officer Smith’s gun. Officer Smith aimed his

handgun and fired at Molina, who was still inside the car. Pet. App 22a.

Plaintiff does not claim that Officer Smith's use of force up to this point was excessive.

**C. Officer Smith's subsequent use of force.**

Officer Smith did not manage to take Molina's gun away from him, so Officer Smith assumed Molina was still in possession of his gun. Pet. App. 22a. Officer Smith moved away from the passenger door, which was ajar. Officer Smith stated that he was standing in Molina's line of fire. Officer Smith yelled at Molina to put his hands in the air. Officer Smith moved behind the Honda, with his back to his patrol car to escape Molina's line of fire, and pointed his gun toward the Honda's rear windshield. Pet. App. 22a-23a.

As Officer Smith moved behind the Honda and yelled for Molina to put his hands in the air. Instead, Molina's foot or leg extended out of the Honda's passenger door. Pet. App. 23a. Officer Smith fired seven shots into the Honda through the rear window. Approximately eight seconds elapsed between Officer Smith's first shot to the time he began firing the volley of seven shots.

At the time of he fired the volley of seven shots, Officer Smith knew or had a reasonable basis to believe that Molina: (1) had absconded from a warrant for his arrest, (2) had violently resisted arrest, (3) had shot the officer in the leg, (4) had tried to gain control

of Officer Smith's gun, (5) still had a gun in the Honda, (6) did not visibly obey the command to put his hands in the air, and (7) had made a motion with his leg outside the car that appeared to Officer Smith as though Molina was trying to exit of the Honda. Pet. App. 23a.

Officer Smith radioed dispatch to inform them that shots were fired, the suspect was down, and an ambulance was needed. Pet. App. 23a-24a.

## **II. Procedural History.**

### **A. United States District Court for the District of New Mexico.**

Following Molina's death, Petitioner brought three claims against Officer Smith and the New Mexico Department of Public Safety ("NMDPS"). Pet. App. 60a-62a. The first claim was a claim for unreasonable seizure under the Fourth Amendment. The second claim was for excessive force under the Fourth and Fourteenth Amendments. The third claim was for Officer Smith's alleged failure to render aid.

Petitioner dismissed all three claims against NMDPS. Pet. App. 38. As for the claims against Officer Smith, Petitioner dismissed her claim for failure to render aid and her Fourteenth Amendment excessive force claim. Pet. App. 38, 52. The District Court granted Officer Smith summary judgment as to Petitioner's unreasonable seizure claim, leaving only the Petitioner's Fourth Amendment excessive force claim against Officer Smith. Pet. App. 49a.



The District Court granted Officer Smith's motion for partial summary judgment as to Petitioner's excessive force claim on the basis of qualified immunity. Pet. App. 16a. Petitioner did not claim that Officer Smith's initial use of force violated the Fourth Amendment. Rather, Petitioner argued that "Officer Smith violated... Molina's right to be free from the excessive use of force when he shot... Molina seven additional times after shooting him the first time." Pet. App. 27a. Thus, the District Court stated that the question presented was whether Petitioner met her burden to show that Officer Smith violated Molina's right to be free from excessive force when he fired the second volley of shots, and if so, whether Officer Smith's conduct was prohibited by clearly established law.

As to the first prong of qualified immunity, the District Court applied the standard for excessive force claims as announced by this Court in *Garner*, 471 U.S. at 11, *Graham*, 490 U.S. at 398, and several other cases. The District Court stated, "[i]n *Graham*, 490 U.S. at 396-97, [this Court] listed three factors that affect whether force was excessive, including (1) severity of suspected crime, (2) whether the suspect posed an immediate threat to officers or others, and (3) whether the suspect resisted arrest or attempted to flee." Pet. App. 27a. Further, "[t]he Court must evaluate the objective reasonableness of the officer's actions based on 'whether the totality of the circumstances justified the use of force,' and 'pay careful attention to the facts and circumstances of the particular case.'" Pet. App. 28a (quoting *Estate of Larsen ex. rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260

(10th Cir. 2008) and *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995)).

The District Court concluded that, under the totality of the circumstances, Officer Smith did not violate Molina's Fourth Amendment right to be free from excessive force. First, Molina admitted to Officer Smith that he... absconded from a warrant for his arrest, and then resisted arrest. Molina so resisted by trying to get past Officer Smith and then by violently resisting the officer's efforts to handcuff him. Second, Molina grabbed for the officer's gun in its holster - an act that Officer Smith could reasonably interpret as an attempt to disarm him. Third, during the struggle, Officer Smith was shot in the leg, and soon after that he could see the barrel of a gun in Molina's hands. At that point, Molina also was still trying to gain control of Officer Smith's gun. Pet. App. 29a. Fourth, although Officer Smith shot Molina once, he had reasonable grounds to believe that Molina was still armed in the car, as he had not gotten Molina's gun away from him and had retreated from the car without it. Fifth, Officer Smith had reasonable concern that Brandon might join the struggle against the officer, as Molina had called out to Brandon. Sixth, due to the tinted, opaque rear window, Officer Smith could not determine whether Molina complied with the officer's orders to put his hands up. However, Officer Smith could see Molina's leg emerge from the Honda in way that reasonably appeared to Officer Smith as though Molina was trying to escape or continue using deadly force upon Officer Smith. Finally, Officer Smith could not be certain that Molina would not open fire at him through the back window of the Honda.

As to the second prong of qualified immunity, the District Court rejected Petitioner's argument that two Tenth Circuit cases clearly established that Officer Smith's second round of shots violated Molina's constitutional rights. Petitioner pointed to *Fancher*, 723 F.3d 1191, a case in which an officer shot a suspect as the suspect was trying to steal his patrol unit that held an unsecured gun. The officer saw the suspect slump, took a few steps away, felt "safer," then fired six more shots at the suspect. Pet. App. 30a. The District Court stated that the key difference between *Fancher* and this case is that here, after firing the first shot, Officer Smith could not see Molina or determine whether Molina continued to wield the weapon with which he had already shot Officer Smith. Pet. App. 31a. Further, Officer Smith reasonably believed that the emergence of Molina's leg was indicative of an attempt to escape or continue the fight. In contrast, the officer in *Fancher* had the time and ability to see the suspect and make the reasonable inference that deadly force was no longer needed.

The District Court also rejected Petitioner's reliance on *Smart*, 951 F.3d 1161 for largely the same reason. *Smart* involved an officer shooting an unarmed suspect who fell to the ground and was lying face down with arms stretched out and empty hands visible. The court differentiated *Smart* from this case, explaining that Molina was "not unarmed," and that Officer Smith did not have the time or opportunity to determine whether Molina was still able to use the gun with which Officer Smith had been shot. Pet. App. 32a. Accordingly, District Court correctly granted Officer Smith's motion for summary judgment based on qualified immunity.

Petitioner appealed to the Tenth Circuit. Pet. App. 2a.

**B. Tenth Circuit Court of Appeals.**

The Tenth Circuit proceeded directly to the second prong of qualified immunity, concluding that Officer Smith did not violate Molina's clearly established rights, and that accordingly, Officer Smith is entitled to qualified immunity. Pet. App. 8a.

The Tenth Circuit began its analysis by reciting the standard for a clearly established right. Pet. App. 9a. Specifically, the "clearly established standard requires that the law clearly prohibits the defendant's "conduct in the particular circumstances before him. Pet. App. 9a (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018)).

In support of her argument that Molina's rights were clearly established, Petitioner relied again on *Fancher*, 723 F.3d 1191, as well as *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018) and *Parea v. Baca*, 817 F.3d 1198 (10th Cir. 2016). In *McCoy*, officers continued beating a suspect and employing a carotid restraint after the suspect was rendered unconscious, handcuffed, and zip-tied, and was only just beginning to regain consciousness. Pet. App. 11a. Similarly, in *Parea*, officers continued tasing a suspect whom they had already effectively subdued by getting him on the ground on his stomach, with two officers on top of him. Pet. App. 12a.

The Tenth Circuit aptly differentiated *Fancher*, *McCoy*, and *Parea* from the case at hand, explaining that “[i]n those cases, the suspect had *clearly* been subdued, making continued use of deadly force plainly unjustifiable.” (emphasis original). The Tenth Circuit furthered this distinction, stating,

[H]ere, [Officer] Smith had reason to think that Molina was not subdued. Video evidence shows, and neither party disputes, that although [Officer] Smith had shot at Molina once already, Molina quickly kicked his leg out of the passenger-side door just before the second round of shots. And it is likewise undisputed that before he fired the second round of shots, [Officer] Smith could not see Molina’s body other than his feet. This additional, post-initial-restraint movement did not occur in the cases [Petitioner] cites.

For these reasons, the Tenth Circuit explained, Petitioner failed to meet her burden to supply a Supreme Court or Tenth Circuit case clearly establishing that Officer Smith’s conduct amounts to a constitutional violation. Pet. App. 13a. Accordingly, the Tenth Circuit affirmed.

## REASONS FOR DENYING THE PETITION

### I. **Petitioner Bases Her Claimed Circuit Split on Cherry-picked Passages from Various Cases That Do Not Support Her Argument.**

There is no genuine circuit split here. Petitioner's first argument is that "[t]he Fourth, Seventh, and Ninth Circuits - joined by the Tenth Circuit's own earlier decision in *Fancher* - require temporal segmentation" analysis for uses of force. Pet. 11. Despite the fact that this argument conflicts with her later argument, Petitioner further asserts that "the decision below rejects that approach by aggregating the eight-second pause and changed vantage into one continuous 'dangerous' episode..." Pet. 11. In support of this claim of a circuit split, Petitioner relies on *Waterman*, 393 F.3d 471; *Ellis*, 999 F.2d 243; *Tan Lam*, 976 F.3d 986, and *Fancher*, 723 F.3d 1191.

As discussed more fully below, Petitioner cherry-picked certain quotes from these cases and cited them out of context in an attempt to argue that some circuits require "temporal segmentation" analysis for uses of force. When reviewed in their entirety, these cases demonstrate that the circuits agree that a "totality of the circumstances" analysis cannot be limited to only certain facts. Rather, the totality of the circumstances includes all facts from the start of the encounter through the moment force is used. See *Waterman*, 393 F.3d at 481 ("[a]rtificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness."); *Ellis*, 999

F.3d at 247 (“[w]hen 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.”); *Tan Lam*, 976 F.3d at 999 (finding a constitutional violation where the officer fired a second round after the suspect no longer posed a threat.). Petitioner’s misrepresentation of the relevant case law is so egregious that she claims that, in *Fancher*, the Tenth Circuit approved the district court’s use of a “segmented analysis” when, in reality, the Tenth Circuit expressly stated that it lacked jurisdiction to review the issue. *See Fancher*, 723 F.3d at 1201 (“[a]ccording to the factual scenario..., which this court lacks authority to review...”).

In *Waterman*, 393 F.3d at 473, Waterman led several police officers on a pursuit. One officer announced over the radio that Waterman tried to “run him off the road.” *Id.* at 474. Another officer announced that Waterman reached under his seat, indicating the presence of a firearm. As Waterman neared a toll plaza at a normal speed, keeping a safe distance from the vehicle in front of him, five more officers approached Waterman’s vehicle from the front with their weapons drawn. Waterman accelerated, causing the officers to open fire. *Id.* at 475. The officers continued to fire as Waterman drove past. As Waterman passed through the toll lane, he ran over “stop sticks” that punctured his tires and stopped his vehicle. Waterman’s Estate brought a § 1983 claim for excessive force. After the district court denied the officers’ motion for summary judgment based on qualified immunity, the case reached the Fourth Circuit.

Based on the Estate's arguments, the Fourth Circuit bifurcated its analysis, looking first to the shots fired as Waterman approached the officers, then looking to the shots fired as Waterman passed the officers. After finding the first volley constitutional, the Fourth Circuit explained that the second volley cannot be justified solely based on a finding that the first volley was constitutional. Rather, "separate analysis is appropriate." *Id.* at 480. The court, citing *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), explained that "[t]he better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances." *Id.* at 481. The court elaborated, "To simply view all of the force employed in light of only the information possessed by the officer when he *began* to employ force would limit, for no good reason, the relevant circumstances to be considered in judging the constitutionality of the officer's actions." (emphasis original). *Id.* Thus, the Fourth Circuit agrees that a second volley must be justified by the totality of the circumstances, including the circumstances that existed from the start of the encounter through the use of force, not only those that existed between the first and second volleys. Accordingly, *Waterman* does not require "temporal segmentation" as Petitioner asserts.

In *Ellis*, 999 F.2d at 247, contrary to Petitioner's assertion, the Seventh Circuit similarly stated that the totality of the circumstances analysis applies to use of force cases. In *Ellis*, a suspect broke into a pharmacy, using a sledgehammer to break through the adjoining building's wall. *Id.* at 245. The suspect filled a bag with plastic vials, drug containers,



and paper currency. Officer Wynalda responded to the pharmacy's silent alarm. Through the hole in the wall, Officer Wynalda observed a pair of legs walking out the back door of the adjoining building. Officer Wynalda exited the pharmacy, and ordered the suspect to stop. The suspect tossed the lightweight bag at Officer Wynalda before running away. Officer Wynalda shouted for the suspect to stop then shot him once in the lower back.

The Seventh Circuit determined that Officer Wynalda was not entitled to qualified immunity, noting that the suspect only tossed a bag weighing four or five pounds toward Officer Wynalda. *Id.* at 247. "That conduct, while risky and startling, is not the equivalent of menacing an officer with a weapon." The court noted that if Officer Wynalda feared that the bag might be heavy and might knock the gun from his hand or provide an opportunity for Ellis to draw a concealed weapon, Officer Wynalda would have been justified in firing at that moment, but not after the lightweight bag fell to the ground without injuring him and the suspect had turned to run. Concluding that the proper analysis involves all facts from the entire encounter, the Seventh Circuit stated that Officer "Wynalda had no reasonable fear of Ellis after he backed away and ran." Thus, Petitioner's assertion that *Ellis* requires "temporal segmentation" is simply false.

In *Tan Lam*, 976 F.3d at 998,<sup>1</sup> the Ninth Circuit explained that in analyzing excessive force claims, it must “examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case.” In *Tan Lam*, a father called 911 as his son struck him. *Id.* at 991-92. Officer Acosta arrived and the father led him to the son’s bedroom door. *Id.* at 992. Officer Acosta entered the door to see the son sitting at his desk, unarmed. The son pushed Officer Acosta out of his room into the main hallway and retrieved a pair of scissors. Officer Acosta drew his firearm, took a step back, and told the son to drop the scissors. When the son stabbed Officer Acosta with scissors in the left forearm, Officer Acosta shot him in the right calf. Officer Acosta retreated down the hall, taking the time to clear his jammed handgun. When Officer Acosta neared a turn in the hallway, he fired a second shot at the son. The father brought a § 1983 claim for excessive force. *Id.* at 993.

After the case reached the Ninth Circuit, the court determined that “objective evidence supported the conclusion that [the son] was not a threat to [Officer] Acosta between the first and second shot.” *Id.* at 998. The Ninth Circuit rejected Petitioner’s concept

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<sup>1</sup> Petitioner asserts that in *Tam Lam* the Ninth Circuit “treats a second burst a separate use of force requiring renewed justification; continued fire against an incapacity or non-threatening suspect violates the Fourth Amendment.” Pet. 10. Petitioner cites to “976 F.3d at 1001-02.” However, this section of *Tan Lam* discusses the “clearly established” prong of qualified immunity, not the “constitutional violation” prong addressed in Petitioner’s first argument.

of “temporal segmentation,” instead using the continuing analysis of the totality of the circumstances used by the Fourth, Seventh, and Tenth Circuit Courts. The court stated,

[T]hough [Officer] Acosta’s first shot - fired after [the son] had stabbed him with scissors - was likely an objectively reasonable use of force, [Officer] Acosta’s second shot was not an objectively reasonable use of force. When [Officer] Acosta fired the second shot, [the son] no longer posed an immediate threat; [the son] was injured and was not approaching [Officer] Acosta with scissors, and Acosta was retreating [the son]. [Officer] Acosta could have retreated further, even out of the house, and waited for backup.

*Id.* at 999.

Finally, Petitioner again relies on *Fancher* despite both the District Court and Tenth Circuit’s agreement that *Fancher* is not applicable to the present case. As stated above, *Fancher*, 723 F.3d at 1196-97, involved an officer shooting a suspect as the suspect was trying to steal his patrol unit that held an unsecured gun. The officer saw the suspect slump, took a few steps away, felt “safer,” then fired six more shots at the suspect. *Id.* at 1197. A § 1983 claim ensued. *Id.* at 1198. When the officer moved for summary judgment on the basis of qualified immunity, the district court granted the motion as to

the officer's initial shot, but not the second volley. The officer appealed.

The officer first argued that the district court erred by performing a "segmented analysis," stating "when *the facts* of the incident are that [the officer] were placed in danger from the moment he was attacked by the decedent until the time that [the officer] was completely sure that the neither he nor the public were in further danger." *Id.* at 1199-1200 (emphasis original). The Tenth Circuit explained that it lacked jurisdiction to decide that issue, as the officer's argument "cannot reasonably be understood as anything other than an attack on the[] conclusions of the district court." *Id.* at 1200. Thus, Petitioner bases her argument that the Tenth Circuit uses "temporal segmentation" analysis solely on a case in which the Tenth Circuit lacked jurisdiction and cannot be found to have applied "temporal segmentation."

In sum, a basic review of the entire texts of *Waterman*, *Ellis*, *Tan Lam*, and *Fancher* show that there is no circuit split as to the analysis when an officer fires a second volley. Rather, the circuit courts are in harmony that the "totality of the circumstances" analysis requires all facts, from the start of the encounter through the end, to be considered. Accordingly, this Court should reject the Petition on the basis of a circuit split.

## **II. The Lower Courts Properly Applied This Court's Case Law.**

In her second argument, Petitioner cobbles together two separate arguments each of which is unavailing. First Petitioner incorrectly asserts that *Plumhoff*, 572 U.S. 765 prohibits subsequent force when a suspect has been incapacitated. Second, Petitioner takes the bold position that the “totality of the circumstances” does not apply to the use of force in this case. Petitioner states that the Tenth Circuit improperly “credited pre-first-shot violence” when analyzing Officer Smith’s second volley of shots. Pet. 13. In effect, Petitioner attempts to divide the totality of facts in this case into two “buckets” - one bucket being all facts that occurred prior to Officer Smith’s first shot and the other bucket being all facts that came after.

First, in *Plumhoff*, 572 U.S. at 774, this Court reaffirmed that the Fourth Amendment’s “reasonableness” standard “requires analyzing the totality of the circumstances.” *Plumhoff* involved a suspect’s vehicle “spinning out” during a pursuit. *Id.* at 769. After the suspect struck a police vehicle and continued to accelerate, one officer fired three rounds into the suspect’s car. *Id.* at 770. When the suspect escaped capture, officers fired twelve more shots as the suspect drove down the street, causing the suspect to crash. In the ensuing lawsuit, the suspect’s daughter argued that the officers used excessive force by firing so many shots. *Id.* at 777. This Court flatly rejected this argument, stating that “if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not

stop shooting until the threat has ended.” *Id.* The Court explained the limitation that, “[t]his would be a different case if [the officers] had initiated a second round of shots after an initial round had clearly incapacitated [the suspect].” *Id.* Here, however, the record does not contain any “clear” evidence of purported incapacity.

Petitioner’s reliance on *Plumhoff* appears to be an argument that the present case falls within this Court’s limitation that a second volley is unreasonable against a clearly incapacitated suspect. However, the District Court below already explained that “due to the opaqueness of the Honda’s rear window, it is impossible for anyone including Officer Smith, to know whether or not... Molina had complied with Officer Smith’s order to place his hands in the air. What Officer Smith could see was that... Molina’s... lower leg emerged from the Honda in a way that under the circumstances reasonably appeared to Officer Smith as though... Molina was trying to get out of the car.” Pet. App. 29. The Tenth Circuit similarly agreed that Officer “Smith had reason to think that Molina was not subdued. Video evidence shows... Molina quickly kicked his leg out of the passenger-side door just before the second round of shots.” Pet. App. 12a. Thus, Petitioner’s argument fails, as Molina was not incapacitated and still posed a threat to Officer Smith.

Second, Petitioner argues that the Tenth Circuit improperly “credited pre-first-shot violence” when analyzing Officer Smith’s second volley of shots. Again, Petitioner’s argument conflicts with her final argument that the Tenth Circuit violated this Court’s mandate that “the ‘totality of the circumstances’

inquiry has no time limit.” *Barnes*, 605 U.S. at 80. In *Barnes*, this Court struck down the “moment-of-threat” rule used by the Fifth Circuit to analyze excessive force claims. “Under that rule,... the inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in his use of deadly force. Any prior events leading up to the shooting,... were simply not relevant.” *Id.* at 78 (internal quotes omitted). This Court rejected the Fifth Circuit’s “moment of threat” test, stating that “[a] court deciding a use-of-force case cannot review the totality of the circumstances if it has put on chronological blinders.” *Id.* at 82. The Court explained that “earlier facts and circumstances may bear on how a reasonable officer would have understood and responded to later ones... ‘in-the-moment’ facts cannot be hermetically sealed off from the context in which they arose.” *Id.* at 80.

Based on this Court’s mandate against “chronological blinders,” the Tenth Circuit properly “credited pre-first-shot violence” when analyzing Officer Smith’s second volley of shots. As explained by this Court, Molina’s violent actions prior to Officer Smith’s first shot cannot be separated from his later actions. Petitioner cannot argue that the Tenth Circuit’s analysis was improper where that analysis followed this Court’s instructions.

### **III. Petitioner Fails to Identify Case Law That Provided Molina With a Clearly Established Right in This Case.**

For her argument related to the “clearly established” prong of qualified immunity, Petitioner

does not provide any analysis whatsoever. Petitioner instead opts to throw case names into her Petition in hopes that one carries the day - despite the fact that almost all of the cases were disregarded by the lower courts as not clearly establishing Molina's rights in this case. As discussed below, none of the cases upon which Petitioner relies provided a clearly established right.

**A. Petitioner failed to identify a clearly established right created by *Garner* and *Graham*.**

Petitioner throws out the names of *Garner*, 471 U.S. at 11 and *Graham*, 490 U.S. at 398, without explaining how these cases provided Molina with a clearly established right. As explained by the Court in *Mullenix v. Luna*, 577 U.S. 7, 12 (2015), “[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition” (emphasis original). *Id.* “Such specificity 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.” *Id.*

In *Mullenix*, the Court rejected a “clearly established rule” that “a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.” *Id.* Similarly, in *Brosseau v. Haugen*, 543 U.S. 194 (2004), the Court rejected a “clearly established rule” made by



the Ninth Circuit. *See Haugen v. Brosseau*, 339 F.3d 857, 873 (9th Cir. 2003) (establishing that “deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others.”). This Court explained that the formulation of this rule fails to address the actual question at issue: “[W]hether the circumstances with which [an officer] was confronted constituted probable cause and exigent circumstances.” *Mullenix*, 577 U.S. at 13 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987)).

Here, Petitioner seemingly concedes that *Garner* and *Graham* are not specific enough to provide Molina with a clearly established right, as she refers to these cases as “bedrock” without citing to any holding that would apply to the facts of the present case. Petitioner fails to identify a clearly established right, and instead provides only broad general propositions, stating:

Supreme Court bedrock: *Garner*, 471 U.S. at 11 (deadly force only when necessary to prevent escape and the suspect poses a significant immediate threat) and *Graham*, 490 U.S. at 396-97 (objective reasonableness under the totality).

Pet. 13.

**B. The lower courts correctly determined that *Fancher* and *Smart* did not create a clearly established right in this case.**

Petitioner again relies on *Fancher* and *Smart*, stating:

Tenth Circuit: *Fancher*, 723 F.3d 1191 (later shots unlawful where the officer had time to reassess) and *Smart*, 951 F.3d 1161 (continuing to shoot an incapacitated suspect violates the Fourth Amendment).

The Tenth Circuit expressly found that *Fancher* and *Smart* did not provide Molina with a clearly established right, reasoning that Officer Smith could not determine whether Molina was able to wield a weapon due to the opaque rear window of the vehicle Pet. App. 31a. Additionally, Officer Smith reasonably believed that the emergence of Molina's leg was indicative an attempt to escape or continue the fight. The Tenth Circuit further explained that *Smart* "is inapposite for the same reason." "Molina was not unarmed, and Officer Smith did not have the time or opportunity to observe... Molina to determine whether he was still able to use the gun with which Officer Smith had previously been shot." Pet. App. 32. Thus, Petitioner's reliance on *Fancher* and *Smart* fails, again.

**C. *Waterman* and *Ellis* do not create a clearly established right.**

Next, Petitioner throws out the names of *Waterman*, 393 F.3d 471 and *Ellis*, 999 F.2d 243 as cases that establish Molina’s rights. However, “[f]or a violation to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found law to be as the plaintiff maintains.” *Mocek v. City of Albuquerque*, 813 F.3d 912, 922 (10th Cir. 2015). *Waterman* and *Ellis* do not create “clearly established” rights, as they are neither Supreme Court cases nor Tenth Circuit cases. Further, a mere two cases do not represent “established authority from other courts.”

Moreover, *Waterman* and *Ellis* do not govern the facts of this case. As discussed above, *Waterman* and *Ellis* involved uses of force after the danger had clearly passed. *See Waterman*, 393 F.3d at 482 (“[O]nce *Waterman*’s vehicle passed the officers, the threat to their safety was eliminated and thus could not justify the subsequent shots.”); *Ellis*, 999 F.2d at 247 (finding a use of force to be excessive as the suspect “posed no immediate threat and was not apparently armed.”). Both the district court and Tenth Circuit agreed that Officer Smith reasonably believed that Molina still posed a threat. *See* Pet. App. 29a (district court concluding that “a reasonably officer could conclude that... Molina was still trying to either escape or use deadly force upon Officer Smith.”); Pet. App. 12a (Tenth Circuit stating that Officer “Smith had reason to think that Molina was not subdued.”). As the facts of *Waterman* and *Ellis* stand in stark

contrast to those of this case, they do not provide Molina with a clearly established right.

**D. *Taylor v. Rojas*, 592 U.S. 7, does not create a clearly established right.**

For her final case, Petitioner cites to *Taylor*, 592 U.S. 7 , an exceedingly preposterous case involving violations of the Eighth Amendment’s bar on cruel and unusual punishment. Petitioner cites *Taylor* in an effort to show that no case on “all-fours” is needed in “obvious case[s].” Pet. 14. In *Taylor*, the Court found that with “the particularly egregious facts of [the] case, any reasonable officer should have realized that [the prisoner’s] condition of confinement offended the Constitution.” 592 U.S. at 9. Those facts were as follows:

Taylor, [a prisoner], alleg[ed] that for six full days... correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in “‘massive amounts’ of feces”: all over the floor, the ceiling, the window, the walls, and even “‘packed inside the water faucet.” Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved [the prisoner] to a... cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes... Because the cell lacked a bunk, and because Taylor was confined

without clothing, he was left to sleep naked on the sewage.

*Id.* at 7-8.

“[T]here can be the *rare* ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” *Wesby*, 583 U.S. at 64 (emphasis added). However, the case at hand is not such a case. Whereas the conduct of the prison guards in *Taylor* was clearly wrongful, Officer Smith’s conduct was not. Officer Smith had a reasonable basis for firing his second volley of shots. At that time, he knew that: Molina absconded from a warrant and resisted arrest; Molina grabbed Officer Smith’s gun holster; Officer Smith was shot in the leg during his struggle with Molina; Molina was holding a gun; Molina called out to Brandon to help him fight Officer Smith; and Molina quickly pushed his leg out of the car door after having been instructed to put his hands in the air. It was further reasonable for Officer Smith to believe that Molina was still a mobile threat despite being shot, as Officer Smith himself was still mobile after being shot. Accordingly, this is not one of the rare obvious cases discussed in *Taylor* and *Wesby*.

Petitioner seemingly agrees that this is not one of the rare obvious cases, as she failed to raise this argument below (and thus failed to preserve it for review). As noted by the Tenth Circuit:

There can be the rare obvious case where the unlawfulness of the officer’s conduct is sufficiently clear even though existing

precedent does not address similar circumstances. [Petitioner] never argues that this is such a case, and we do not independently find it to be so.

Pet. App. 9a. n. 3.

As Molina lacked a clearly established right in the case at hand, the Court should deny the Petition.

**IV. The Lower Courts Considered the Totality of the Circumstances When Analyzing Officer Smith’s Use of Force.**

Petitioner’s argument based on *Barnes*, 605 U.S. 73, is the least credible of all her arguments. Petitioner properly states that, “This Court recently rejected the ‘moment-of-threat’ framing and held that courts must assess the totality of the circumstances in excessive-force cases.” Pet. 14. Petitioner proceeds to argue that the Tenth Circuit “emphasized a split-second involuntary leg movement<sup>2</sup> while disregarding the totality of the circumstances.” Pet. 14.

Petitioner loses all credibility by making this argument. As discussed above, Petitioner asserts that the Tenth Circuit deviated from the required “temporal segmentation” analysis and analyzed the entire encounter between Molina and Officer Smith in

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<sup>2</sup> It is unclear why Petitioner believes Molina moving his leg was involuntary and due to Officer Smith’s first shot. It is further unclear why the leg movement would not have occurred instantly, instead waiting several seconds to occur. The record is devoid of any such evidence or finding.

“one continuous ‘dangerous’ episode.” Pet. 11-12. It is unclear how the Tenth Circuit managed to both focus its analysis on a single fact, while also focusing all the facts. As outlined above, the lower courts analyzed the “totality of the circumstances.” This was the appropriate analysis, and the lower courts’ conclusions were correct.

Petitioner’s argument based on *Barnes* fails. Accordingly, the Court should deny the Petition.

**THIS CASE CANNOT SERVE AS A VEHICLE  
FOR THE QUESTIONS STATED IN THE  
PETITION**

Petitioner asserts that this case is an ideal vehicle to address her questions presented as “[o]fficers, plaintiffs, and courts need a uniform rule on reassessment between bursts of force, particularly where the suspect was hit the first time and enough time passes for the officer to reassess the need for force.” Pet. App. 15. According to Petitioner, “[t]he decision below perpetuates confusion and conflicts with circuits that require segmentation and reconsideration of the need for force in changed circumstances.”

Petitioner’s argument ultimately fails on all fronts. As discussed above, there is no circuit split and none of the cases cited by Petitioner utilize a “segmentation” analysis for uses of force. Rather, *Waterman*, *Ellis*, and *Tan Lam* all analyze the totality of the circumstances from the beginning of the encounter through the final use of force. As for *Fancher*, the Tenth Circuit expressly stated that it

lacked jurisdiction to create the holding that Petitioner bases her circuit split upon. As to the clearly established prong of qualified immunity, none of the cited cases provided Molina with a clearly established right. Finally, Petitioner was unable to identify how the Tenth Circuit deviated from this Court's ruling in *Barnes* - saying that the Tenth Circuit analyzed only one fact while also analyzing all the facts. Accordingly, this case is a poor vehicle for any questions presented by Petitioner.

### CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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