No. 11-1375

IN THE
Supreme Court of the United States

JOSE ELIZONDO AND ALICIA ELIZONDO,
INDIVIDUALLY AND AS REPRESENTATIVES OF THE
ESTATE OF RUDDY ELIZONDO,

Petitioners,

v.

THE CITY OF GARLAND,

Respondent.

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

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses the first question presented in the petition for a writ of certiorari:

When an officer precipitates a violent confrontation ending in his use of force, should his own conduct making that force necessary be considered among the totality of circumstances determining whether the force was constitutionally excessive?

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of four civil rights organizations as *amici curiae* in support of petitioner.[1] *Amici* believe that legal rules, such as that in the Fifth Circuit, which limit analysis of the reasonableness of an officer's use of force to the precise "moment" the force is employed, constrict Fourth Amendment rights, reduce police accountability and subject individuals to avoidable violence.

- **Bet Tzedek** is one of the nation's premier legal services organizations. Founded in 1974, each year Bet Tzedek provides free legal assistance to more than 17,000 people of every racial and religious background in the Los Angeles area. It is committed to pursuing equal justice for all, including the elderly and disabled, many of whom suffer from mental illness.

- **The Bill of Rights Defense Committee** is a national non-profit grassroots organization that defends rights and liberties undermined by public safety, law enforcement, and intelligence agencies. It encourages civic participation, educates people about the significance of rights, and cultivates grassroots networks for debate and action.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici* state that all counsel of record for all parties were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

- **The Justice Policy Institute** is a national non-profit organization that works for criminal justice reforms, including the appropriate use of policing and reductions in incarceration and racial disparities, through research, policy and advocacy.

- **The Texas Civil Rights Project** was founded in 1990 to promote racial, social and economic justice through litigation, education and social services for low- and moderate-income persons. It works to make structural changes in areas including disability rights and police and border patrol misconduct.

SUMMARY OF ARGUMENT

When Officer William Green entered the Elizondo home where seventeen-year-old Ruddy Elizondo was holding a small knife to his belly, talking on the phone and threatening suicide, practically every action Officer Green took escalated rather than defused the situation: he kicked open Ruddy's bedroom door, yelled at him, refused to allow Ruddy to close the door, aimed his firearm at the suicidal teenager and informed Ruddy that he was willing to shoot. Predictably, the encounter progressed within minutes to Ruddy's violent death.

This case presents a recurring issue of tremendous importance to the Fourth Amendment's protection against the use of excessive force: when an officer's own conduct prompts a violent confrontation, necessitating the use of force, should the officer's provocative conduct be among the totality of the circumstances considered in determining whether the officer's use of force was reasonable under the Fourth Amendment? As the petition details, U.S.

Courts of Appeals have divided on this issue. *Amici* believe the petition should be granted for three additional reasons.

First, use-of-force experts, police commissions, and police chiefs all recognize that the kind of provocative conduct employed by Officer Green increases the risk that a police encounter will culminate in violence. Despite this recognition, dating back years, the use of escalating tactics remains a widespread problem rooted in police training and acculturation. It presents a systemic threat to civil rights, particularly the rights of populations who are vulnerable or otherwise come into contact with police frequently: the mentally ill, the unstable, and racial and ethnic minorities. When the law focuses exclusively on the "moment" of seizure, and ignores unreasonable pre-seizure conduct by police, it fails to deter avoidable violence.

Second, rules in the Fifth and other circuits that preclude the consideration of pre-seizure conduct in excessive force cases are unfaithful to this Court's holding in *Tennessee v. Garner*, 471 U.S. 1 (1985), that determination of the "reasonableness" of force must take into account "the totality of the circumstances." *Id.* at 8-9. They curtail civil rights in ways not endorsed by this Court. Moreover, by abstracting the "moment" of seizure from the welter of circumstances in which it occurs, these rules deprive excessive force adjudications of a principled basis. The uncertainty of the law about police provocation makes redress of civil rights violations exceptionally difficult even in egregious cases.

Finally, a decisive pronouncement by the Court

on this issue will likely be incorporated into police department use-of-force policies and training. This practical outcome will help to address this problem at its root, reducing civil rights violations and the consequent litigation.

ARGUMENT

I. POLICE ESCALATION OF VOLATILE SITUATIONS IS A WIDESPREAD PROBLEM REQUIRING SYSTEMIC INTERVENTION.

A. Police Training and Acculturation Often Encourage Avoidable Violence.

The shooting of Ruddy Elizondo is far from an isolated tragedy. When law enforcement is called to a tense situation, police officers all too often exacerbate it, prompting by their own conduct a perceived need for dangerous force that could otherwise have been avoided. As police commissions, police training experts and even police chiefs attest, the tendency among police officers to employ aggressive tactics that provoke and escalate is widespread.

The dynamics of these encounters emerge starkly in many "excessive force" cases. The Ninth Circuit recently heard a case in which police officers had been dispatched to help Lukus, a distraught and intoxicated eighteen-year-old who was threatening suicide. *Glenn v. Wash. Cnty.*, 673 F.3d 864, 866 (9th Cir. 2011). Upon arriving at the scene, the officers pulled their firearms and began shouting and cursing at the boy. *Id.* at 868-69. Although Lukus did not present an immediate threat to anybody—he was

armed with just a small pocketknife and had threatened to harm only himself—the officers shot him eight times, killing him within four minutes of arriving. *Id.* at 869. By "immediately drawing their weapons and shouting commands and expletives," rather than attempting less intrusive tactics, plaintiff alleged, the officers "predictably escalated the situation instead of bringing it closer to peaceful resolution." *Id.* at 876.

Incidents of reckless escalation to violence are not limited to police encounters with the mentally ill. In *Bazan v. Hidalgo Cnty.*, 246 F.3d 481 (5th Cir. 2001), a trooper allegedly drew his firearm on a motorist stopped on suspicion of drunken driving, kicked him when the motorist lifted his shirt to show he was unarmed, unreasonably ordered him to lie on the ground, and threatened him with a baton. *Id.* at 484-85. When the motorist fled, the trooper gave chase, at which point the motorist allegedly grew violent, prompting the trooper to shoot and kill him. *Id.* at 485-86; *see also St. Hilaire v. City of Laconia,* 71 F.3d 20, 22-23 (1st Cir. 1995) (when plain clothed police allegedly served a search warrant on a man in his car, pointing a gun at him without identifying themselves, suspect reached for his own gun, prompting police to shoot him).

Investigations into police department practices and commentary by law enforcement experts demonstrate that this problem is entrenched. The Christopher Commission, formed to investigate the Los Angeles Police Department following the highly-publicized beating of Rodney King, traced some of the Department's problems to its expectation that officers were "to command and to confront, not to

communicate." Indep. Comm'n on the L.A. Police Dep't, *Report of the Independent Commission on the Los Angeles Police Department* 104 (1991). Over ten years later, in 2003, a consent decree between the U.S. Department of Justice and the Detroit Police Department, following allegations of excessive force, specifically required the department to revise its use-of-force policy to emphasize de-escalation techniques. *See* Consent Judgment: Use of Force and Arrest and Witness Detention at 7, *United States v. City of Detroit, Mich.*, No. 03-72258 (E.D. Mich. July 18, 2003). Recently, a 2011 investigation of the Seattle Police Department by the U.S. Department of Justice Civil Rights Division found that S.P.D. officers regularly "escalate situations and use unnecessary or excessive force when arresting individuals for minor offenses." U.S. Dep't of Justice Civ. Rights Div., Investigation of the Seattle Police Department 4, 10–11 (2011).

Experts note that police provocation and reckless escalation of volatile situations are a predictable consequence of police training and acculturation—not simply the work of "rogue cops." *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 456-64 (2004) ("few bad apples" theory fails to account for organizational causes of police violence). Charles Gruber, a federal police monitor and former President of the International Association of Chiefs of Police, explains: "For every hour we spend training our officers in the skills necessary to de-escalate conflict and to avoid the use of force, we spend many more hours teaching officers use-of-force tactics. The message is clear to our officers: use of force is not only appropri-

ate but it is the favored tool for controlling subjects and situations." Charles Gruber, *A Chief's Role in Prioritizing Civil Rights*, The Police Chief: The Professional Voice of Law Enforcement, Nov. 2004, *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch& article_id=448&issue_id=112004. Untrained in nonviolent methods of resolving conflicts or creating compliance, officers resort to force—too often, lethal force. *See* Geoffrey P. Alpert & Roger G. Dunham, *The Force Factor: Measuring and Assessing Police Use of Force and Suspect Resistance*, *in Use of Force by Police: Overview of National and Local Data* 45, 59 (National Institute of Justice Research Report) (1999), a*vailable at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=809 ("How successful an officer is at avoiding violence is a function, at least in part, of how well trained the officer is in defusing emotionally charged situations.").

James Fyfe, deputy commissioner for training in the New York Police Department and widely-acknowledged expert on the use of force,[2] posits that the training that prompts aggressive escalation is directly shaped by the legal doctrines used to evaluate use of force:

> The set of skills required to structure confrontations in the safest possible manner has been neglected by police administrators and

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[2] *See Garner,* 471 U.S. at 10 n.10 (citing James Fyfe, *Observations on Police Deadly Force*, 27 Crime & Delinquency 376, 378–81 (1981)).

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> trainers. Instead, and perhaps influenced by the legal test of justification for the use of force—*was the officer in danger at the* ***instant*** *he or she employed force*—police historically have focused on . . . the "final frame" of incidents that actually begin when officers become aware that they may confront potentially violent people or situations.

James Fyfe, *Training to Reduce Police-Civilian Violence*, *in And Justice for All: Understanding and Controlling Police Abuse of Force* 164, 169 (William A. Geller & Hans Toch eds. 1995) (citations omitted). The "final frame" focus, Fyfe concludes, "obscures the important question of whether officers' actions contributed to danger from which they subsequently had to forcibly extract themselves." *Id.*

B. Minority and Vulnerable Populations Are More Likely to Experience Unnecessary Escalation and Provocation.

Minority and vulnerable populations bear the brunt of aggressive police work. Racial and ethnic minorities, for example, are more likely to experience police force than whites. *See* U.S. Dep't of Justice, *Contacts Between Police and the Public* 12 (2008) (African Americans and Hispanics more likely than whites to experience use or threat of force); *see also* Nat'l Research Council, *Fairness and Effectiveness in Policing: The Evidence (2004)*, 67, 260 (2004) ("there is usually racial disparity in the use of nonlethal force, and often considerable disparity in the use of lethal force.").

Provocation and escalation are distressingly

common in police encounters with mentally ill or emotionally disturbed individuals. Police are frequently dispatched to assist such individuals, yet these incidents often "become confrontational and escalate to a violent conclusion." Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261, 331 (2003).

In its 2011 report on the Seattle Police Department, the Department of Justice found that escalation is especially "pronounced in encounters with mental illnesses or those under the influence of alcohol or drugs," which account for an astonishing 70 percent of S.P.D. use-of-force incidents. U.S. Dep't of Justice Civ. Rights Div., *supra*, at 4. A 2004 empirical study of more than 2,000 arrests made by a large southeastern police department reported that although persons with mental impairment are only "mildly problematic for police," "the odds that higher levels of force are used increases significantly when arrestees are judgmentally impaired." Robert J. Kaminski et al., *The Use of Force Between the Police and Persons with Impaired Judgment*, 7 Police Q. 311, 327, 329 (2004).

A 1999 study by the *Los Angeles Times* of L.A.P.D. shootings involving the mentally ill over a six-year period found that officers' actions frequently contributed to these encounters turning deadly. Josh Meyer & Steve Berry, *Lack of Training Blamed in Slayings of Mentally Ill*, L.A. Times, Nov. 8, 1999, at A1. "Those actions included aggressively confronting mentally ill people, shouting confusing or-

ders and moving in too close to armed suspects." *Id.*

Because the courts routinely hear excessive force cases involving the mentally ill, many now recognize that employing or threatening force against emotionally distraught persons tends to exacerbate rather than bring the disturbance to a close. *See, e.g.*, *Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2001); *Ali v. City of Louisville*, 395 F. Supp. 2d 527, 534 (W.D. Ky. 2005); *Buchanan v. City of Milwaukee,* 290 F. Supp. 2d 954, 961-62 (E.D. Wis. 2003). Until this problem is addressed at a national level, however, the mentally ill face the prospect of having their civil rights violated on a regular and systematic basis.

II. CURRENT LAW ON RECKLESS POLICE PROVOCATION IS INADEQUATE TO PROTECT CIVIL RIGHTS.

A. Circuits Are Divided About Whether to Consider Police Provocation in Determining if Force Was Reasonable.

Despite the prevalence of incidents in which police provocation or reckless escalation has led officers to use avoidable force, the courts of appeal are divided on whether such conduct may be considered in determining whether a use of force was "unreasonable" in violation of the Fourth Amendment.

As the petition details, the First, Ninth and Tenth Circuits have held that an officer's provocation or reckless creation of circumstances in which force is necessary should be considered in the reasonableness analysis. *See, e.g.*, *Young v. City of*

Providence, 404 F.3d 4, 22 (1st Cir. 2005) ("'[T]he court should examine the actions of the government officials leading up to the seizure.'") (quoting *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995)); *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002) ("[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force."); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995) ("The reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.").

By contrast, the Second, Fourth, Sixth and Eighth Circuits have promulgated rules similar to the Fifth Circuit rule relied on by the district court below: "The excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat*" that resulted in the use of deadly force. *Bazan,* 246 F.3d at 493; *see* Pet. App. 20a. Police provocation consequently has no role in the reasonableness calculation in these circuits. *See, e.g.*, *Schultz v. Long,* 44 F.3d 643, 645-49 (8th Cir. 1995).

This circuit split on the scope of a fundamental constitutional right at issue in cases nationwide is, by itself, compelling reason to grant the petition. But the Court should also grant *certiorari* to reaffirm and clarify its holdings in *Garner,* 471 U.S. at 8-9 and *Scott v. Harris,* 550 U.S. 372, 383 (2007), that

the reasonableness analysis in excessive force cases must consider the "totality of the circumstances." Clarification is needed to assure both a principled basis for excessive force adjudications and redress for those whose rights are violated.

B. The Rule of the Fifth and Other Circuits Is Unfaithful to This Court's Emphasis on the "Totality of the Circumstances."

This Court articulated standards for adjudicating excessive force cases in *Garner* and *Graham v. Connor*, 490 U.S. 386 (1989). In *Garner,* the Court held that the "reasonableness" of any seizure under the Fourth Amendment "depends on not only when a seizure is made, but also on *how* it is carried out." 471 U.S. at 8 (emphasis added) (citing *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968)). Under *Garner,* the core question in excessive force cases is "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 9. The resolution of this question requires a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against countervailing governmental interests. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

Four years later in *Graham*, the Court cautioned that the "'[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,'" holding that the particular circumstances of each case must be considered, "including the severity of the crime at issue, whether the suspect poses an immediate threat to

the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). *Graham* did not indicate that this list is exhaustive, and its rejection of "precise definition[s]" argues powerfully to the contrary. The Court instructed that the proper perspective in evaluating a use of force was that of "a reasonable officer on the scene"—what it called a "standard of reasonableness at the moment," in contrast to "the 20/20 vision of hindsight." *Id.*

The Court's emphasis on "the totality of the circumstances" comports with what policing experts say about how to evaluate the use of force, particularly unnecessary escalation. As early as 1980, policing specialist Albert Reiss argued that uses of force should be analyzed as sequences of behavior. Albert J. Reiss, *Controlling Police Use of Deadly Force,* 452 Annals Am. Acad. Pol. & Soc. Sci. 122, 127-33 (1980). Other experts concur: "It is important to look at events which transpired before the final act or acts of force to determine reasonableness in either an escape or threat situation. . . . In many police-citizen encounters, officers can escalate the probability of a serious threat by their demeanor or actions." Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force,* 85 J. Crim. L. & Criminology 481, 491 (1994).

Despite the Court's emphasis on "the totality of the circumstances" in both *Garner* and *Graham,* as well as *Graham*'s warning against "mechanical application[s]" of the reasonableness test, five circuits have formulated bright-line rules excluding preseizure police conduct from the circumstances to be

analyzed. They have continued down this path despite the Court's admonition in *Scott* that the *Garner* and *Graham* holdings ought not be reduced to an "easy-to-apply legal test" divorced from the pressing realities of individual cases. 550 U.S. at 383. As *Scott* put it, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Id.* The reasonableness tests employed in the Second, Fourth, Fifth, Sixth and Eighth Circuits are unfaithful to this Court's excessive force jurisprudence.

The Fifth Circuit cases relied upon by the courts below offer little rationale for limiting the reasonableness inquiry to the moment of seizure, except concern about assigning liability for "a negligently executed stop or arrest." *Young v. City of Killeen,* 775 F.2d 1349, 1353 (5th Cir. 1985); *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992); *Bazan,* 246 F.3d at 493. This cannot suffice to restrict so sharply the reasonableness determinations made by judges and juries—who are routinely charged with distinguishing between intentional, reckless and merely negligent conduct. As the petition points out, the circuits that consider pre-seizure police conduct deem it relevant only if reckless, intentional or in itself unconstitutional. *See, e.g., Billington*, 292 F.3d at 1189; *Sevier*, 60 F.3d at 699 & n.7.

Other circuits justify their refusal to consider police provocation by reference to *Graham*'s "standard of reasonableness at the moment." *See, e.g.*, *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995) (emphasis omitted) (quoting *Graham*, 490 U.S. at 396-97); *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir. 1991). But *Graham* cautioned against a retrospective

analysis ("the 20/20 vision of hindsight"); it did not restrict the timespan of events that, known to the officer on the scene, could be considered in assessing the reasonableness of the force. *See Graham,* 490 U.S. at 396-97.

The circuits excluding pre-seizure police conduct from the "totality of the circumstances" as a matter of law have embarked on a dangerous course. They have inappropriately limited the reach and scope of this Court's civil rights holdings in the face of the Court's express rejection of the reduction of those holdings to bright-line rules. The Court should grant the petition to correct this course and ensure that the objective reasonableness standard is not divorced from the reality of what occurred in the police-civilian encounter. The realities of those encounters, in all their difficult variability, must be the touchstone of constitutional reasonableness.

Police departments themselves have begun to understand this. Courts routinely accept a suspect's failure to comply as justification for use of force. *See MacLeod v. Town of Brattleboro*, No. 5:10-cv-286, 2012 WL 1928656 at *7 n.5 (D. Vt. May 25, 2012) ("Courts have held that failure to comply with a lawful police order can constitute a 'serious infraction' and may justify not only a show of force but the use of force." (citing cases)). But the Denver Police Department now cautions officers from assuming as much:

> It is important for officers to bear in mind that there are many reasons a suspect may be resisting arrest or may be unresponsive. The person in question may not be capable of

> understanding the gravity of the situation. The person's reasoning ability may be dramatically affected by a number of factors, including but not limited to a medical condition, mental impairment, developmental disability, physical limitation, language, drug interaction, or emotional crisis. . . . In such circumstances, the person's lack of compliance may not be a deliberate attempt to resist the officer. . . . Officers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the level of force necessary in a given situation.

Denver Police Operations Manual, § 105.01(1)(a) (Use of Force Policy), *available at* http://www.denvergov.org/Portals/720/documents/OperationsManual/105.pdf. The law should reinforce rather than work against such police efforts.

C. The Rule of the Fifth and Other Circuits Deprives Excessive Force Adjudications of a Principled Basis.

Isolating the circumstances existing precisely at the moment of seizure leaves courts with little if any principled basis for their excessive force rulings. Where does the relevant "moment" of seizure even begin? Under *California v. Hodari D.,* 499 U.S. 621, 625-27 (1991), a subject is not seized until she or he submits to the police's show of authority or is subjected to actual physical force. In some contexts, aiming a firearm at an individual has been held an unconstitutional use of force. *See, e.g., McDonald v. Haskins,* 966 F.2d 292, 295 (7th Cir. 1992) (training

a gun on a nine-year-old and threatening to pull the trigger was an objectively unreasonable use of force given that the child was not a suspect and was not fleeing or posing a threat to any officer); *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1015 (9th Cir. 2002) ("pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment."). An exclusive focus on the decision to fire a weapon therefore may serve to immunize otherwise unconstitutional conduct. Conversely, as the Third Circuit noted, if *all* pre-seizure conduct were excluded as irrelevant, "then virtually every shooting would appear unjustified, for we would be unable to supply any rationale for the officer's conduct." *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

It does not solve the problem to examine only the pre-seizure conduct of the person who is seized, as evidence of the knowledge possessed by a reasonable officer at the moment of seizure. *See, e.g.*, *Waller v. City of Danville,* No. 4:03CV00039, 2005 WL 1594405, at *5 (W.D. Va. July 5, 2005) (refusing to consider police escalation prior to seizure, including use of battering ram and flash-bang devices, but citing suspect's "history of mental problems" as contributing to the perceived threat). In many cases, including that of Ruddy Elizondo, the reasonable inferences from a subject's behavior can be determined only by examining police conduct during the encounter. Confining the jury and the court to a "final frame" analysis creates an illogical and prejudicial evidentiary bottleneck irreconcilable with *Scott*'s admonition that the "morass" of facts must not be circumvented. 550 U.S. at 383.

D. The Court Should Grant the Petition to Clearly Establish the Law on Officer Provocation.

Even apart from the circuit split, the law on alleged police provocation in excessive force cases is unsettled and frequently *ad hoc*. And two circuits—the Third and the Eleventh—have yet to squarely address the issue. The Court should grant the petition to bring to this area the predictability and coherence crucial to protecting civil rights under 42 U.S.C. § 1983.

Tellingly, even the courts that have promulgated the "final frame" analysis sometimes abandon it in provocation cases where the facts press for a different analysis. For example, the Fourth Circuit nominally limits its reasonableness inquiry to the moment when the decision is made to use the force at issue. *See, e.g.*, *Greenidge*, 927 F.2d at 791-92 (affirming exclusion of evidence that police officer, by failing to comply with procedures for nighttime prostitution arrests, recklessly created the dangerous condition prompting him to shoot plaintiff). Yet in a case where a police officer permanently injured a developmentally disabled man who retained a five-dollar bill dropped by another person, the Fourth Circuit refused to limit its analysis to the officer's "segmented view of the sequence of events," which separated the plaintiff's resistance "from the rest of the story," such that the officer's force arguably appeared reasonable. *Rowland v. Perry*, 41 F.3d 167, 173-74 (4th Cir. 1994). Citing *Garner* and *Graham*, the court acknowledged that "[a]rtificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness." *Id.* at 173. Yet the

Fourth Circuit's general rule, pronounced in cases like *Greenidge*, creates precisely such divisions.

Seventh Circuit case law reveals even more inconsistency. The Seventh Circuit has held that this Court's precedent focuses the reasonableness inquiry on "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances." *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992). But it has also held that "[p]olice officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force." *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (police officer could not be granted qualified immunity after fatally shooting driver suspected of auto theft because, on plaintiff's version of the facts, he stepped in front of the driver's vehicle after it was moving, thereby creating the danger he faced); *see also Catlin v. City of Wheaton*, 574 F.3d 361, 369 n.7 (7th Cir. 2009) (noting that *Starks* holding likely would apply in a case involving non-lethal force).

Similarly, the Seventh Circuit lacks consistent doctrine on the relevance of pre-seizure police conduct to the reasonableness test. It has both rejected the exclusion of pre-seizure conduct and conversely insisted that the "legally relevant time period" in an excessive force analysis is very short. *Cf. Deering v. Reich*, 183 F.3d 645, 649-52 (7th Cir. 1999) (suggesting there may be no clear line between pre-seizure and seizure conduct) *and Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th 1994) (proper analytic course is to "carve up the incident into segments and

judge each on its own terms").

Because the law on police provocation is so underdeveloped and conflicted, case outcomes are unpredictable. This unpredictability has tremendous consequences for federal civil rights litigation under section 1983. The doctrine of qualified immunity protects officers from civil liability unless their conduct violates "clearly established" statutory or constitutional rights "of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Given the unsettled state of the law on pre-seizure police conduct, even if a court does hold that provocation renders a subsequent use of force unreasonable, a plaintiff will likely be unable to show the Fourth Amendment violation was clearly established. *See Neuburger v. Thompson,* 305 F. Supp. 2d 521, 532-34 (W.D. Pa. 2004). And because, under *Pearson,* courts ruling on qualified immunity may decide whether a right is clearly established before concluding whether the facts alleged do constitute a constitutional violation, 555 U.S. at 236, courts have little incentive to develop this area of the law.

The consequent potential for patently unjust outcomes has significant social costs. The public cares deeply about police violence. The lack of redress in cases where police have provoked the need for deadly force undermines respect for the law and, in extreme cases, has repeatedly spurred riots against police misconduct. Colin Loftin et al., *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976-1998*, 93 Am. J. Pub. Health 1117, 1117 (2003); *see also* Abraham N. Ten-

nenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force,* 85 J. Crim. L. & Criminology 241, 259 (1994).

III. GRANTING THE PETITION WILL HAVE FAR-REACHING PRACTICAL IMPLICATIONS.

A. A Ruling On Pre-Seizure Conduct Would Provide Essential Guidance to Police Officers and Departments.

A decision by this Court on the relevance of pre-seizure police conduct to the reasonableness test in excessive force cases will not only not only promote justice in individual cases, but enhance civil rights law's deterrent effect.

Even more than individual lawsuits or large judgments, decisive Supreme Court pronouncements have unique deterrent force. Studies show that the use of deadly force by police officers decreased markedly after *Garner* limited the circumstances in which it was objectively reasonable, 471 U.S. at 11-12, with one study finding a reduction of fatal police shootings in the United States of about 60 per year (more than 16%). Tennenbaum, *supra,* at 257; *see also* Nat'l Research Council, *supra*, at 67, 259. As the Court itself has recognized, the power of the Court's Fourth Amendment jurisprudence comes in large part from its influence on police policy and training. *See United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) ("The key to the [exclusionary] rule's effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate with-

in those limits" (quoting Jerold Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1412-13 (1977))).

Almost all police officers receive training on the legal boundaries of use of force. Rachel A. Harmon, *When is Police Violence Justified?*, 102 Nw. U.L. Rev. 1119, 1143 (2008). But often that training merely recites the current law: police must act reasonably in light of the facts and circumstances that confront them. *Id.* at 1143-44. Many police departments' use-of-force policies fail to articulate any clear standards beyond those set forth in *Garner* and *Graham*. *See, e.g.*, Manual of the Los Angeles Police Department § 556.10 (Policy on the Use of Force), *available at* http://www.lapdonline.org/lapd_manual/; Austin Police Dep't Policy Manual § 200.2.1, (2012), *available at* http://www.lbjfireacademy.org/sites/default/files/files/Police_Monitor/policy-manual-release-20111129.pdf. This scant guidance contrasts with the detailed legal instruction police receive in areas in which the law is better developed, such as when police may search or seize a vehicle. Harmon, *supra*, at 1143-44. Officers thus have little to go on in one of the most crucial and consequential aspects of their job.

The need for better training in addressing the mentally ill, in particular, has long been recognized. Experts responding to the 1999 *Los Angeles Times* report on L.A.P.D. shootings of mentally ill persons attributed officers' tendency to "confront," then "escalate," and finally, "react with deadly force," to a paucity of training. *See* Meyer & Berry, *supra*. In 2002, a Memorandum of Agreement between the Cincinnati Police Department and the Department

of Justice, following an investigation of excessive force allegations against members of the C.P.D., required the C.P.D. to train a cadre of officers, with emphasis on de-escalation techniques, as designated responders to incidents involving the mentally ill. Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and Cincinnati Police Department § III, ¶ 10 (April 12, 2002), *available at* http://www.cincinnati-oh.gov/police/downloads/police pdf5112.pdf.

As the Department of Justice investigation of the Seattle Police Department shows, law enforcement officers in major cities still systematically escalate rather than defuse encounters with the mentally ill. A ruling clarifying the relevance of officers' pre-seizure provocation to excessive force determinations will provide impetus for more comprehensive police education, training, and policies for addressing the mentally ill and other vulnerable populations.

B. A Ruling On Pre-Seizure Conduct Would Promote Police Responsibility and Accountability.

Turning a blind eye to "the circumstances leading up to the fatal shooting," the district court and Fifth Circuit held that Officer Green's actions were not unreasonable at the moment he pulled the trigger. Pet. App. 8a, 20a. An exclusive focus on the instant when force is applied gives law enforcement little incentive to avoid its use. As Judge Harold R. DeMoss wrote in a special concurrence, "Deadly force should have been Officer Green's very last resort rather than his first reaction." *Id.* at 10a. If police know

that their conduct leading up to an application of force will be among the "totality of the circumstances" considered in an excessive force adjudication, they are more likely to adopt "de-escalation" techniques as a first-line strategy for resolving conflict. *See* Armacost, *supra,* at 470-71 ("As long as the focus is on whether the circumstances justified the use of force at the moment it was applied, officers have no legal incentive to step back and ask themselves whether they could have avoided the entire situation without a violent confrontation.").

Such strategies are especially important in encounters with the mentally ill. Randy Borum, *Improving High Risk Encounters Between People with Mental Illness and the Police*, 28 J. Am. Acad. Psychiatry & L. 332, 335 (2000). Some police departments have developed specialized responses to people with mental illnesses, and research shows that in departments utilizing such programs, injuries to police officers are less frequent, law enforcement more often transport mentally ill persons to mental health facilities for treatment, and individuals referred to mental health treatment by law enforcement experience fewer subsequent run-ins with the criminal justice system. Melissa Reuland et al., *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* 9, 11-12 (2009). Recognizing the relevance of preseizure police provocation and escalation to Fourth Amendment reasonableness inquiries would promote wider adoption of such programs.

In the interest of promoting police accountability and responsibility, the Court should grant the peti-

tion and reject the "final frame" rule applied by the Fifth and other circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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