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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

INTRODUCTION

Many § 1983 excessive force cases involve police encounters with mentally ill or emotionally disturbed people. Because of their attendant violence and publicity, such incidents strongly influence the public's perception of law enforcement and society's treatment of those suffering from mental illness. Yet lower courts treat the cases inconsistently because of two entrenched circuit splits set forth in the petition.

The City of Garland does not contest any of this, but argues instead that the facts do not support relief regardless of which legal standards govern. If a factfinder could consider Green's conduct giving rise to his shooting of Ruddy, however, the Elizondos would likely be entitled to relief. Judge DeMoss's concurrence illustrates as much. Garland also argues that granting the petition would give birth to a new rule subjecting police to improper second-guessing. But the courts that permit factfinders to consider pre-seizure conduct among the totality of circumstances have strong safeguards in place precluding excessive or unjustified liability. In the end, Garland offers no persuasive reason to avoid bringing clarity and uniformity to this important area of Fourth Amendment law.

ARGUMENT

I. Garland Ignores the Important Circuit Splits Raised by Petitioners

The petition centers on two circuit splits at the heart of how lower courts resolve excessive force cases involving mentally ill or suicidal people.

First, three circuits permit factfinders deciding the reasonableness of an officer's use of force to take into account his immediately preceding conduct if that conduct is what created his need to use force. *See* Petition at 13-16. Another circuit would likely do the same, based on its existing precedent. *See id.* at 16-17. "This rule is most consistent with the Supreme Court's mandate that we consider these cases in the totality of the circumstances." *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005) (quotation omitted). By contrast, five courts of appeals, including the Fifth Circuit, exclude evidence of police conduct precipitating the use of force and permit factfinders to examine only whether the officer was reasonably threatened at the exact moment he pulled the trigger. *See* Petition at 17-19.

Hence, in this case, the district court refused to consider the Elizondos' considerable evidence that Green provoked the encounter that caused Ruddy's death. This included powerful testimony from a former Dallas Assistant Chief of Police that "Green did exactly what no reasonable officer should ever do with a mentally unstable, suicidal person" – he "yell[ed] and ma[de] threats with a semi-automatic pistol against a teenager in his own bedroom," though Ruddy posed "a minimal to a moderate threat to only himself with a

kitchen knife." App. 38a. Applying Fifth Circuit precedent, the trial court refused to consider this evidence or "look to the circumstances leading up to the fatal shooting." App. 31a. It asked only whether Green "was in danger *at the moment of the threat*." App. 30a (quotation omitted, emphasis in original). The Fifth Circuit affirmed, focusing exclusively on "the time Green discharged his weapon." App. 8a. The majority believed Ruddy "seemed intent on provoking Green" but completely ignored Green's actions toward Ruddy before Green shot him. *Id.* Had a federal court in, say, Kansas or California decided this case, proof of Green's pre-shooting conduct would not have been categorically disregarded, and the outcome would likely have been different.

Second, the circuits give varying treatment to the fact of a claimant's mental illness. *See* Petition, Point II. The Ninth, Tenth, and Sixth Circuits hold that, "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed." *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). These courts also analyze whether other, less confrontational law enforcement tactics were available to address someone exhibiting emotional distress, rather than escalation leading inevitably to violence. *See* Petition at 21-23. The Fifth and other circuits take the contrasting view that mental illness likely makes a subject more dangerous, not less, and that courts

should ignore the existence of basic, well-established ways to defuse the encounter. *See id.* at 23-25.[1]

Garland's opposition makes no attempt to deny or rationalize the existence of these divisions among the circuit courts. Indeed, lower courts and commentators have repeatedly lamented the lack of uniformity. *See* Petition at 19-21. And as amici supporting the petition persuasively demonstrate, the long-running failure to address this incoherence has taken its toll on those challenged by mental illness and others who routinely come into contact with police.

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[1] Garland notes that Petitioners did not argue this point below, *see* Garland Brief at 8, but Petitioners have consistently pressed their claim that Green and Garland violated Ruddy's Fourth Amendment rights. New arguments in support of that claim, such as the lower courts' failure to properly account for Ruddy's emotional distress, may therefore be considered by this Court. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The Fifth Circuit's decision also adequately reflects the issue. *See id.* The majority clearly understood Ruddy was suicidal but gave that fact no weight when assessing Green's conduct, and the concurrence directly concerns that subject. App. 2a-11a.

II. Garland's Slanted Factual Description of Ruddy's Shooting Does Not Warrant Denying Certiorari

Rather than contest the existence of the circuit splits or explain more broadly why the issues are unworthy of review, Garland's main response to the petition is to sketch a one-sided portrait of the facts and argue that they could never support an excessive force claim. This response falls short for two reasons.

First and most important, deciding the merits of the Elizondos' claim is unnecessary at this juncture. The case was resolved on summary judgment, and the Elizondos seek only the opportunity to put the full totality of the circumstances, including Green's actions immediately preceding the shooting, before a factfinder. As it stands, Fifth Circuit precedent precludes that. The Court need not decide that consideration of Green's pre-seizure conduct requires a finding of excessiveness. *See* Petition at 32. The petition simply asks the antecedent question of what a factfinder should be allowed to consider when evaluating reasonableness. Providing a uniform answer would greatly promote the development of constitutional precedent even if a judge or jury in this case, with the benefit of all the facts, later weighs the circumstances and finds Green acted reasonably. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Second, the city is wrong in asserting that the facts establish the reasonableness of Green's conduct as a matter of law. Perhaps the best indication of that is Judge DeMoss's impassioned concurrence. Although he felt current Fifth Circuit law required affirmance, he delivered an eloquent plea for that law to "evolve if

we are to ensure that more avoidable deaths do not occur." App. 10a. In his view of the facts:

> Officer Green had only been on the scene for a few seconds, backup was on the way, and emergency medical personnel was waiting outside when the shooting occurred. Deadly force should have been Officer Green's very last resort rather than his first reaction....
>
> Forcing Ruddy's bedroom door open, yelling orders at him, and immediately drawing a firearm and threatening to shoot was a very poor way to confront the drunk, distraught teenager who was contemplating suicide with a knife.

Id. Judge DeMoss's opinion illustrates, at a minimum, that reasonable people can reach differing conclusions about the facts of this case once Green's pre-shooting conduct is considered, and that the case is therefore unsuitable for summary judgment under the law of many circuits. The expert testimony of the former second-in-command of the Dallas Police Department also demonstrates this. App. 36a-38a.

The city's more specific factual points are also unavailing. Garland makes much of the fact that Green arrived believing Ruddy had already stabbed himself, but actually found him on the phone with his girlfriend and holding the small knife to his stomach. Garland Brief at 1, 5, 7, 9. This may have surprised Green but it does not somehow require a factfinder to conclude that everything Green did thereafter was reasonable. Green agreed Ruddy had not "made any threats" before Green decided to escalate the

encounter by yelling commands, drawing his pistol, threatening to shoot, and kicking Ruddy's bedroom door back open when Ruddy tried to close it. App. 42a-43a.

The city tries to portray Ruddy as menacing by stating: "Ruddy, just shy of his eighteenth birthday, was 5'6" tall, 240 pounds in weight, and a gang member with a violent past." Garland Brief at 1. As Judge DeMoss implied, though, it is unlikely factfinders would think Ruddy had the upper hand in the confrontation Green instigated. App. 9a-10a. Ruddy was seventeen, short, found by the coroner to be "morbidly obese," and was holding a small kitchen knife; Green is 6'5", has a black belt in jujitsu, and carried a baton, a Taser, pepper spray, and a flash light in addition to his handgun. *See id.* As for the claim Ruddy was a "gang member with a violent past," this hyperbolic description of Ruddy's adolescence has no bearing on the reasonableness of Green's actions since Green knew nothing of Ruddy's personal history before he shot Ruddy (including Ruddy's suicide attempt weeks earlier). Nor had Green been called to investigate a crime of any kind, let alone one involving violence or gangs.[2]

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[2] In the district court, Green filed Garland police records containing hearsay allegations that Ruddy joined a gang, shoved his father once during a domestic disturbance, was intoxicated in public, and was present at a neighborhood fight. The record contains no proof Ruddy was ever adjudicated to have committed any offense – violent, gang-related or otherwise.

Garland also distorts the events immediately preceding the shooting in order to cast Ruddy as the aggressor. The city accuses Ruddy of committing "violent behavior," contends Green had to "defend himself from the attack," and calls Ruddy a "violent, knife-wielding assailant." Garland Brief at 8-10. But it is agreed, and is plain from the Fifth Circuit decision, that Ruddy did not strike anyone, assault anyone, perpetrate some sort of "attack," or commit violence of any kind before Green shot him. App. 3a. Green also testified he did not see Ruddy threatening anyone else in his room (there was no one there) or in the house. App. 45a.

Garland claims Ruddy "closed the distance between himself and Officer Green until they were a mere three to five feet apart," and asserts that Green "was forced, in a split second, to protect himself." Garland Brief at 5-6. This implies Ruddy rapidly pursued and cornered Green, compelling Green to shoot. In fact, Ruddy took *no more than two steps* in Green's direction, with the pair conversing in the meantime, before Green killed him. *See* Petition at 5-6. Ruddy never crossed the threshold of his own bedroom, and Green refused to allow distance or barriers to be put between them, as when he kicked Ruddy's door open after Ruddy tried to close it and refused to simply step back into the Elizondos' kitchen away from Ruddy.

Moreover, even if Ruddy's act of taking a second step forward and raising his small knife is viewed as an "attack" on Green, the precise question Petitioners raise is whether the factfinder should also have been allowed to consider what Green did to precipitate that behavior by Ruddy, rather than only whether Green was threatened at the exact moment he fired. *See, e.g.*,

Glenn v. Washington County, 673 F.3d 864, 879 (9th Cir. 2011) (denying summary judgment because of officers' conduct provoking suspect's threat, even if subsequent shooting was reasonable).

Garland also maintains Green could have no way of knowing Ruddy suffered from mental illness "as opposed to the common effects of anger, drugs and alcohol." Garland Brief at 8. Yet Green fully appreciated Ruddy was suicidal. He testified that he understood he was responding to an attempted suicide. Ruddy's behavior on the scene was also suicidal; after Green drew his gun and kicked Ruddy's door back open, Ruddy stepped toward him and said "fucking shoot me." App. 40a. Green explained that he assumed Ruddy was in a "very fragile and agitated state of mind" and was "mentally going through any sort of episode, be it, you know, psychiatric crises, anything." There is ample evidence for a factfinder to conclude – as Judge DeMoss did – that Ruddy exhibited clear signs of illness or distress.[3]

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[3] There is no evidence, on the other hand, that because Ruddy was suicidal, he might or must also have been homicidal. *See* Garland Brief at 7. Again, Green testified that Ruddy never threatened anyone else in the house. App. 45a. To the degree Garland invokes unspecified "news stories" that suicidal people are also homicidal, Garland Brief at 7 n. 5, amici comprehensively show that people with mental illnesses are not uncommonly predisposed toward violence, though they are disproportionately likely to suffer violence during police encounters. *See* Amicus Curiae Brief of Mental Health Organizations in Support of Petition for Writ of Certiorari, Points IIA, IIB.

In the final analysis, this case is remarkably similar to many others described in the petition where officers confront suicidal people holding knives or guns, provoke confrontations, create their own need to use force, and shoot people someone called 911 to help. *See* Petition at 13-16, 21-23. In these cases, courts of appeals have held that factfinders should be permitted to decide whether the persons involved were exhibiting signs of illness or distress and whether the officers' own conduct gave rise to their later need to use force. These courts take all the facts of the incident into account instead of arbitrarily freezing the analysis at the last frame: the moment the officers fired. The same would have occurred here if Fifth Circuit precedent did not mandate otherwise. Contrary to Garland's claims, the facts of this case present an ideal vehicle for deciding which approach more faithfully adheres to the framework established in *Garner*, *Graham* and *Scott*.

III. Petitioners Do Not Advocate Second-Guessing Police Decisions

The only legal argument Garland offers as a reason to deny the petition is its claim that the Elizondos propose a "new rule" discounting the threats officers face and substituting impermissible hindsight. Garland Brief at 6-7. But the courts that allow factfinders to consider pre-seizure events carefully guard against this by applying time-honored rules of causation and by closely scrutinizing the facts for an immediate connection between the use of force and preceding conduct. "Our precedents do not forbid *any* consideration of events leading up to a shooting," the Ninth Circuit has observed, "[b]ut neither do they permit a plaintiff to establish a Fourth Amendment

violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (emphasis in original). There is no contradiction between precluding liability for the failure to use milder tactics and recognizing that "available lesser alternatives are, however, relevant to ascertaining th[e] reasonable range of conduct." *Glenn*, 673 F.3d at 878.

Likewise, the Tenth Circuit will only "consider an officer's conduct prior to the suspect's threat of force if the conduct is immediately connected to the suspect's threat of force." *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (quotation omitted), *cert. denied*, 522 U.S. 1148 (1998). Events too remote in time or not clearly linked to the use of force are disregarded. Here, for example, Green shot Ruddy within minutes of getting the dispatcher's message and arriving at the Elizondos' home. As the Third Circuit recognizes: "We are not saying, of course, that all preceding events are equally important, or even of any importance. Some events may have too attenuated a connection to the officer's use of force. But what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred." *Abraham v. Rasso*, 183 F.3d 279, 292 (3d Cir. 1999). Moreover, this approach necessarily protects officers as well:

> How is the reasonableness of a bullet striking someone to be assessed if not by examining preceding events?... If we accept... the rule that pre-seizure conduct is irrelevant, then virtually

> every shooting would appear unjustified, for we would be unable to supply any rationale for the officer's conduct.

Id. at 291.

Garland additionally claims officers cannot be expected to "distinguish the mentally ill from those who are simply drunk, high, or angrily lovelorn," or the suicidal from the homicidal. Garland Brief at 7. Actually, officers throughout the country are widely trained in recognizing mental illness, and Garland's practices and omissions in this regard underlie Petitioners' municipal liability claims. More importantly, the city offers no reason why factfinders would have special difficulty weighing legitimate uncertainty about why a suspect acted as he did – and consequently the reasonableness of an officer's response – along with all the other circumstances of the incident. Petitioners agree, as all circuits hold, that police may respond with force to people acting threateningly, whatever the cause of their behavior, when the response is reasonable under all the circumstances.

Of course, any judicial inquiry into an officer's use of force can be faulted as a "reflective dissection" of decisions made more hurriedly in real time. *Id.* at 6. But this Court has mandated a broad, fact-intensive analysis of the totality of the circumstances, not one artificially constrained by "rigid preconditions." *Scott v. Harris*, 550 U.S. 372, 382 (2007). Plaintiffs in § 1983 cases face high hurdles in cases like this – and justly so, to avoid chilling law enforcement. Petitioners merely seek the opportunity to put *all* facts

and circumstances relevant to their claims before the decision-maker.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No.11-1375

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v.

THE CITY OF GARLAND,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the Reply Brief of Petitioners contains 2,971 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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Sworn to and subscribed before me by said Affiant on the date designated below.

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CERTIFICATE OF SERVICE

I, Mary Elizabeth Egbers, hereby certify that 40 copies of the foregoing Reply Brief of Petitioners in No. 11-1375, *Elizondo v. The City of Garland*, were sent via Next Day Service to The U.S. Supreme Court, and 3 copies were sent via Next Day Service to the following parties listed below, this 28th day of June, 2012:

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All parties required to be served have been served.

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