No. 16-369

IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, CALIFORNIA, ET AL.,

Petitioners,

—v.—

ANGEL MENDEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTHERN CALIFORNIA, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI* CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately one million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In furtherance of those principles, the ACLU has appeared in numerous cases before this Court involving the meaning and scope of the Fourth Amendment, both as direct counsel and as *amicus*. Because this case directly implicates those issues, its proper resolution is a matter of concern to the ACLU and its members. The ACLU of Southern California is an affiliate of the ACLU.

SUMMARY OF ARGUMENT

The bedrock of this Court's Fourth Amendment jurisprudence provides that whether a search or seizure is reasonable, and therefore constitutional, depends on the "totality of the circumstances." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The rule applies to all searches and seizures, from brief investigatory stops to the use of deadly force. In repeatedly directing courts to consider the "totality of the circumstances," the Court has refused to artificially rule out any relevant facts or circumstances. Instead, it has insisted that

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[1] Pursuant to rule 37.6, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party's counsel authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel have paid for the preparation or submission of this brief.

reasonableness "is not capable of precise definition or mechanical application," and therefore the analysis "requires careful attention to the facts and circumstances of each particular case." *Id.* (internal citations omitted). To assess the reasonableness of an officer's search or seizure, courts must consider *all* the circumstances that give rise to the encounter.

Petitioners propose a radical departure from this longstanding approach, suggesting that courts should blind themselves to any conduct of an officer that precedes the moment that he or she pulls the trigger or otherwise uses lethal force. But this Court has repeatedly reaffirmed that "totality of the circumstances" means what it says, and that the inquiry must consider all the surrounding circumstances. Never before has the Court ruled out any consideration of an officer's conduct preceding a search or seizure. To the contrary, the Court has refused proposals to privilege certain factual aspects to the exclusion of others, rejecting even "admirable" "attempt[s] to craft an easy-to-apply legal test in the Fourth Amendment context." *Scott v. Harris*, 550 U.S. 372, 383 (2007). Instead, this Court has insisted on the need to "slosh [its] way through the factbound morass of 'reasonableness.'" *Id.*

Petitioners' argument that the Ninth Circuit's "provocation rule" conflicts with *Graham v. Connor* rests on a misinterpretation of that case that is directly at odds with the Court's foundational "totality of the circumstances" approach. Taking a single phrase from *Graham* completely out of context, Petitioners argue that the Court's reference to a "standard of reasonableness at the moment" precludes any consideration of an officer's actions

preceding the precise moment that he uses lethal force. They go so far as to argue that even "the seconds immediately before the seizure . . . are not relevant to the reasonableness of the seizure." Pet. Br. at 30. On this view, if a plainclothes officer broke into a home in the middle of the night unannounced bearing a weapon and confronted a homeowner who sought to defend himself, he would be constitutionally permitted to shoot the homeowner if, at the moment the owner sought to act in self-defense, the officer feared for his own life. So, too, an officer who leapt into the path of an oncoming car could shoot to kill the driver, so long as, at the "moment" the officer shot, he feared for his own life. Such actions would plainly be "unreasonable," precisely because of the officer's antecedent conduct. Yet under Petitioner's blindered approach, they would be immune from any liability.

Petitioners' argument rests on an artificial separation of analysis into two distinct times. Focusing solely on the precise moment of the shooting, and ignoring anything the officers did to create the threat that in turn led them to shoot. Petitioners argue that the officers' use of force here was reasonable because at the moment they shot, they saw a man with a gun and reasonably feared for their lives. They portray the Ninth Circuit's consideration of the officers' unreasonable and unconstitutional entry into the Mendez's home, which created the danger to which the officers then responded and proximately caused the shooting, as improperly "rolling the clock back to before that critical moment." Pet. Br. at 3.

Petitioners' time-limited approach is at odds with this Court's use of force jurisprudence as well as its interpretation by lower courts. *Graham*'s reference to "reasonableness at the moment," read in context, merely cautions courts to judge force from the perspective of the officer in the field rather than applying 20/20 hindsight. 490 U.S. at 396. It does not suggest that courts must close their eyes to an officer's actions, no matter how unreasonable or provocative, that may have led to a shooting.

Both this Court and courts of appeals have regularly considered all the events preceding a shooting as part of the totality of the circumstances necessary to evaluate reasonableness. As a suspect's conduct prior to the shooting is plainly relevant, Petitioners' suggestion that the courts blind themselves to the officer's conduct is not only limited, but one-sidedly so. Several courts of appeals have directly rejected Petitioners' interpretation of *Graham*, holding that the "totality of the circumstances" encompasses the conduct of officers prior to their use of force. Those courts have recognized that officers may be liable for excessive force when their actions directly create the justification for force, as the Ninth Circuit in essence held here. Even when they have acknowledged the presence of a threat to the officer at the moment of the shooting, several courts of appeals have held force unreasonable where officers unreasonably gave rise to that threat in the first place through their own unreasonable conduct—such as leaping into the path of an oncoming car or breaking into homes without announcing themselves.

To preclude consideration of an officer's precipitating conduct in assessing the reasonableness of his use of deadly force would also contradict police training and best practices on the use of force, at a time when police shootings are a matter of grave public concern. Officer-involved shootings in recent years have sparked widespread protest and police departments have sought to respond to the ongoing problem by training their officers in how to de-escalate confrontations before they rise to the level of lethal force. Police chiefs and experts agree that best practices on use of force must emphasize not merely the decision to shoot, but how the officer handles the situation and avoids force by slowing down, creating space, and using de-escalation tactics. A "totality of the circumstances" test that includes consideration of the officer's conduct leading up to the use of force is consonant with those policies and training. Petitioner's time-limited approach, by contrast, sends the message that the Fourth Amendment wholly disregards the police officer's own contribution to a lethal force situation.

Finally, reaffirming the totality approach does not mean expanding liability for officers. Officers remain protected by the doctrine of proximate cause from liability for the superseding actions of others, and by qualified immunity for conduct that was not clearly unconstitutional at the time.

However this Court views the Ninth Circuit's provocation rule, it should reject Petitioners' attempt to limit *Graham* to consideration of the officer's conduct only at the precise moment force was applied. Instead, this Court should reaffirm adherence to a "totality of the circumstances"

approach that determines the reasonableness of an officer's use of force based on any relevant facts, including the officer's conduct in the moments before that proximately causes the use of force.

ARGUMENT

I. PETITIONERS' TIME-LIMITED APPROACH TO USE OF FORCE IS INCONSISTENT WITH THE BEDROCK PRINCIPLE THAT COURTS EVALUATE FORCE BASED ON THE "TOTALITY OF THE CIRCUMSTANCES."

Petitioners argue that a court assessing the reasonableness of a use of force must consider the officer's actions only at the very moment that he or she pulls the trigger, wholly disregarding any conduct of the officer that may have given rise to the confrontation "even seconds before" shots are fired. Pet. Br. at 30. This approach, based on a strained misreading of a single phrase in *Graham v. Connor*, is contrary to this Court's longstanding insistence that the reasonableness of any search or seizure depends on the "totality of the circumstances," that is, *all* the circumstances. To artificially carve out the officer's own action from the "totality" inquiry leads to absurd results, and is contrary to this Court's consistent approach to searches and seizures.

A. This Court Has Consistently Repudiated Attempts To Narrow The Fourth Amendment's Reasonableness Inquiry.

The Fourth Amendment mandates that all searches and seizures be "reasonable," and this Court

has long held that this determination requires consideration of the "totality of the circumstances." That standard applies to all searches and seizures, including the use of deadly force. *Graham v. Connor*, 490 U.S. 386, 396 (1989). "Totality" means "totality." One cannot assess the reasonableness of any search or seizure without considering all the circumstances that led to the police action in question, and this Court has never ruled out consideration of any category of conduct in the determination of what is reasonable. The "totality of the circumstances" standard is "in the nature of a test which must accommodate limitless factual circumstances." *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

The Court first applied the "totality of circumstances" standard to police use of force under the Fourth Amendment in *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). There, the Court examined "the nature and quality of the intrusion" and the "importance of the governmental interests alleged" to ask "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 8-9. The Court reaffirmed that standard four years later in *Graham*, holding that that the Fourth Amendment inquiry set forth in *Garner* provided the exclusive framework for assessing the constitutionality of police use of force, and rejecting the lower court's application of an independent due process analysis. The Court emphasized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," and restated that the "question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.'" *Graham*, 490 U.S. at 396 (citations and alterations omitted).

In *Scott v. Harris*, 550 U.S. 372 (2007), the Court left no doubt that the Fourth Amendment analysis of uses of force must remain flexible and consider all circumstances. There, the Court rejected the argument that *Garner* had created a bright-line rule, and instead embraced a factual inquiry based on all relevant circumstances: "Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Id.* at 383.

B. Petitioners' Approach Relies On A Distorted Reading Of *Graham*.

Petitioners' argument that the Ninth Circuit's "provocation rule" conflicts with *Graham* rests on a strained misinterpretation of *Graham* at odds with this foundational "totality of the circumstances" approach. Relying on a passing reference in *Graham* to "standard of reasonableness at the moment," Petitioners argue that courts evaluating the use of force can consider only the officer's decision to pull the trigger, and that the officer's own conduct, even "the seconds immediately before the seizure . . . are not relevant to the reasonableness of the seizure." Pet. Br. at 30.

Petitioners' defense rests on ignoring the circumstances precipitating the shooting. Looking only at the moment of the shooting, Petitioners maintain that the deputies' use of force was reasonable because they saw a man with a gun and reasonably feared for their lives. Having concluded that the shooting was reasonable based on this artificially blindered examination of a single "moment" of the officers' conduct, they portray the

Ninth Circuit's consideration of the officers' unreasonable—and unconstitutional—entry into the Mendez home, which proximately caused the shooting, as improperly "rolling the clock back to before that critical moment." Pet. Br. at 3.

Graham imposes no temporal bar against considering the conduct of officers leading up to a use of force. Read in context, *Graham*'s use of the word "moment" merely requires courts to put themselves in the shoes of the officer on the scene, rather than evaluating his or her actions with the omniscience of hindsight:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about

> the amount of force that is necessary in a particular situation.

Graham, 490 U.S. 396–97 (quotations and citations omitted). Nothing in this passage—which contains *Graham*'s only use of the word "moment"—suggests that courts should exclude any consideration of the officers' own conduct other than the use of force itself, or that courts cannot consider an officer's actions in the period leading up to a use of force in evaluating its reasonableness.

Contrary to Petitioner's description of "[t]his Court's repeated emphasis on the 'moment' of the seizure in its excessive-force cases," Pet. Br. at 17, subsequent decisions of this Court either use the word "moment" in the same way *Graham* did, or do not use it at all. *See, e.g., Saucier*, 533 U.S. at 206-07 (quoting *Graham*'s "reasonableness at the moment" language and explaining that "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred"). And while *Graham* acknowledged that it was not adopting a new constitutional rule, but only making "explicit what was implicit" in *Garner*, 490 U.S. at 395, *Garner* never used the word "moment," never suggested a limited time-frame for the circumstances relevant to the "reasonableness" analysis, and framed the inquiry as "whether the totality of the circumstances justified a particular sort of search or seizure." 471 U.S. at 8-9.

Petitioners conflate *Graham*'s prohibition on "armchair quarterbacking," Pet. Br. at 34, with an inquiry artificially limited to officers' conduct at the moment force was used. But the latter does not

follow from the former. It is true that the "reasonableness" inquiry is only triggered by the seizure itself –the use of force– but that does not mean that assessing whether the seizure was reasonable ignores facts that led up the seizure. Indeed, one cannot assess the reasonableness of any search or seizure without considering the facts that gave rise to the encounter. And nothing in the *Graham* Court's warning against hindsight supports blinding the Court to *all* the facts that make up the "totality of circumstances." Courts can, and do, assess officers' actions based on the information available to the officers at the time, with allowance for split-second decisions, without ignoring an officer's own conduct before the officer pulls the trigger.

II. THIS COURT HAS CONSISTENTLY CONSIDERED THE CONDUCT OF OFFICERS LEADING UP TO THE USE OF FORCE.

In every use of force case that this Court has considered, it has examined the conduct of officers leading up to the use of force as part of the "totality of the circumstances" that determine the reasonableness of the use of force.

In *Garner* itself, this Court considered whether an officer gave a warning—conduct clearly preceding the use of force—as one factor relevant to the Fourth Amendment's reasonableness analysis. 471 U.S. at 11-12 (use of force against a "fleeing felon" may be reasonable "if the suspect threatens the officer with a weapon … *and if, where feasible, some warning has been given*") (emphasis added).

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), this Court held that the estate of a driver killed in a collision with a police roadblock could pursue a claim based on "the unreasonableness … of setting up the roadblock in such manner as to be likely to kill him." *Brower* illustrates that the unreasonableness of a seizure may be established by the dangerous manner in which it is "set[] up" or "set in motion" by officers, before the moment the seizure occurs. *Id.*; *see also St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995) ("*Brower* held that once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.").

Similarly, in *Scott*, the Court pointed to officers' efforts to give warning and opportunity for compliance before the use of force, noting, in the course of finding one officer's conduct reasonable, that police officers had been warning plaintiff to stop "with blue lights flashing and sirens blaring . . . for nearly 10 miles" before the officer rammed plaintiff's vehicle. 550 U.S. at 384. In concurring, Justice Ginsburg identified as a "relevant consideration" whether "there [was] a safer way, given the time, place and circumstances" for the officer "to stop the fleeing vehicle." *Id.* at 387 (Ginsburg, J., concurring).

In analyzing other uses of force following pursuits, like *Scott*, this Court has similarly examined the entire course of the chase to assess the reasonableness of the shootings. *See, e.g., Plumhoff v. Rickard*, 134 S.Ct. 2012, 2021-22 (2014) (analyzing minutes before officers fired shots to determine the reasonableness of their use of force); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (considering events of

eighteen-minute chase preceding officer's shooting of car to determine whether officer was entitled to qualified immunity).[2]

Most recently, in *White v. Pauly*, 580 U.S. ____, 137 S. Ct. 548 (2017), the Court examined the officer's conduct leading up to the shooting to grant qualified immunity to an officer who shot an armed individual without first giving a warning by — specifically noting that the officer in question had arrived late to the ongoing police action and had already witnessed shots being fired at other officers. 137 S. Ct. at 552. The Court did *not* hold that an officer's failure to warn before using deadly force is always irrelevant to the excessive force analysis, much less that *Graham* precluded it from considering the officers' conduct prior to the "moment" of the shooting. To the contrary, the Court not only looked closely at the question of warning, but also took care to "express[] no position" on whether the shooting would be unreasonable if the officer had fired shots knowing that the other officers had not identified themselves as police, and without first taking corrective action. *Id.* The Court based its holding on the officer's reasonable assumption that such procedures had been followed. *Id.* at 552-53. Justice

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[2] Contrary to Petitioners' suggestion, Pet. Br. at 31, the Court in *Plumhoff* did not reject—or even mention—the provocation rule. And the Court did not fault the district court for considering the officers' conduct leading up to the moment of the shooting, but instead conducted its own evaluation of that conduct and concluded that the officer's conduct was reasonable. *Plumhoff*, 134 S.Ct. at 2021 n.3 (affirming reasonableness of officer's decision to chase suspects who were "driv[ing] so recklessly that they put other people's lives in danger").

Ginsburg wrote a separate concurrence, emphasizing that the Court's opinion did not foreclose excessive force claims against the other officers, who may have precipitated a violent confrontation by threatening to enter the house without adequately identifying themselves as police, or even against the officer at issue if there were factual disputes over "when [he] arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order [the subject] to drop his weapon." *Id.* at 553 (Ginsburg, J., concurring). Yet under Petitioners' approach, no such caveats would have been necessary, because whatever the officers did prior to the shooting would be per se irrelevant.

This Court's consideration of officer conduct before the use of force goes beyond warnings and demands. In *Tolan v. Cotton*, 134 S.Ct. 1861 (2014), this Court considered evidence of an officer's pre-shooting conduct to reverse the lower court's summary judgment ruling in favor of the officer. The officer claimed that Tolan verbally threatened him "in the moments before the shooting," justifying the use of force. *Id.* at 1867. But before Tolan uttered the verbal exclamation that the officer took as a threat, the officer grabbed Tolan's mother by the arm and slammed her against a garage door with enough force to cause bruising that lasted for days. *Id.* The Court looked to this conduct by the officer, before the shooting, to conclude that a jury "could well have concluded that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother." *Id.* And in granting qualified immunity to officers who shot a woman in her private room of a group home in *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct.

1765 (2015), the Court carefully analyzed the officers' decision to reopen the door to her room after she had threatened them with a knife — conduct that preceded their actual use of force. *Id.* at 1777. [3]

The principle that the "totality of the circumstances" means "totality," and does not preclude consideration of an officer's own conduct, is also established outside the use of force setting. In *Kentucky v. King*, 563 U.S. 452 (2011), the Court addressed an analogous question regarding "police-created exigency": whether officers could invoke the exigent circumstances exception to the warrant requirement when the officers' own conduct had created the exigency. The Court held that courts must consider the reasonableness not only of the exigency itself, but of the police officers' own conduct "preceding the exigency":

> [T]he answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. . . . [W]arrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that

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[3]Although the Court in *Sheehan* made clear it was neither approving or disapproving of the Ninth Circuit's provocation rule, 135 S. Ct. at 1776 n.4, it could easily have resolved the case by adopting the time-limited view of *Graham* that Petitioners' urge is governing law, but did not do so.

> the exigent circumstances rule justifies a warrantless search when the conduct of the police *preceding the exigency* is reasonable in the same sense.

Id. at 462 (emphasis added).

So too, here, the Court should reject Petitioners' omission of the officers' conduct in the moments prior to the use of force and hold that an officer's use of force is reasonable under the Fourth Amendment where the officer's conduct that proximately causes that use of force—including conduct prior to the moment force is applied—is reasonable.[4]

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[4]The appropriateness of the "totality of the circumstances" approach is reinforced by reference to the reasonableness analysis under tort law, which similarly requires the factfinder to consider "all the attendant circumstances" relevant to a defendant's actions. *The Nitro-Glycerin Case*, 82 U.S. 524, 536 (1872). Fourth Amendment law developed out of the common law tort action against officers, and therefore tort principles help guide the Court's understanding of the Fourth Amendment. Tort law evaluates an actor's entire course of conduct when assessing the reasonableness of his or her actions. *See* Restatement (Second) of Torts: § 292, cmt. on clause (c) (reasonableness considers "whether an actor has acted reasonably in pursuing a particular course of conduct rather than another and less dangerous course. . . ."). The likely consequences set in motion by his conduct—including the intentional and non-volitional responses of others—necessarily affect the reasonableness determination. Restatement (Second) of Torts § 303 ("An act is negligent if the actor intends it to affect, . . . or should realize that it is likely to affect, the conduct of another . . . in such a manner as to create an unreasonable risk of harm to the other."). Relevant circumstances may include quickly evolving, emergency situations, but "[w]here the emergency itself has been created by the actor's own . . .

III. COURTS OF APPEALS CONSIDER THE CONDUCT OF OFFICERS LEADING UP TO THE USE OF FORCE.

Given the number of officer-involved shootings and uses of lethal force, the lower courts have frequently applied the Fourth Amendment in such settings. They have been guided by this Court's mandate to consider the "totality of the circumstances" and have regularly considered, in that inquiry, the officer's own conduct preceding the use of force itself. The experience of the lower courts is instructive because it demonstrates both that the "totality" approach is workable, and that there is no need to adopt the artificially blindered approach that Petitioners urge here.[5]

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tortious conduct, the fact that he has then behaved in a manner entirely reasonable in light of the situation with which he is confronted does not insulate his liability for his prior conduct." Restatement (Second) of Torts § 296 (1975); *see also Chritton v. Nat'l Transp. Safety Bd.*, 888 F.2d 854, 861 (D.C. Cir. 1989) ("It is a basic principle of tort law that the 'emergency doctrine' . . . obviously cannot serve to excuse the actor when the emergency has been created through his own negligence'" (internal citation omitted)). These principles align with *Graham's* "totality of the circumstances" test and compel consideration of an officer's course of conduct when determining whether his or her actions were constitutionally reasonable.

[5]Petitioners assert that the "vast majority" of circuits have rejected the provocation rule, but only one of the cases they cite in support of this claim even addresses the rule. *See* Pet. Br. at 25 n.3 (citing *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007)). Moreover, some of the cases Petitioners cite *did* consider the officers' conduct leading up to the moment force was applied to determine whether the use of force was reasonable, *see, e.g.*, *Menuel v. City of Atlanta*, 25 F.3d 990, 996-997 (11th Cir. 1994), and others provide no reasoned discussion of how refusal to

Several courts of appeals have expressly held that *Graham* encompasses officer conduct prior to the use of force. *See, e.g., Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) ("[P]olice officers' actions for [excessive force cases] need not be examined solely at the 'moment of the shooting.' [Citation omitted.] This rule is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'"); *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1189 (10th Cir. 2001) ("the 'totality of the circumstances' surrounding a seizure embraces conduct 'immediately connected with the seizure'"); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) ("[W]e do not see how [we] can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished.").

Other circuit courts have not expressly rejected a time-limited approach under *Graham* but nonetheless have considered the conduct of officers leading up to the use of force in evaluating Fourth Amendment claims. *See, e.g., Williams v. Indiana State Police Dept.*, 797 F.3d 468, 483 (7th Cir. 2015), *cert. denied sub nom. Blanchard v. Brown*, 136 S.Ct. 1712 (2016) ("the circumstances known by [the

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consider the officer's conduct leading up to the moment of force can be reconciled with this Court's "totality of the circumstances" approach, *see Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995).

officer], or even created by him, inform the determination as to whether the lethal response was an objectively reasonable one"); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (considering officer's conduct leading up to leg-twisting maneuver that seriously injured plaintiff, because "[t]he better way to assess the objective reasonableness of force is to view it in full context").[6]

In *Weinmann v. McClone*, 787 F.3d 444 (7th Cir. 2015), for example, an officer shot a suicidal man sequestered in his garage, immediately after breaking in and encountering the man with a gun in his lap. The Seventh Circuit noted that the officer did not try to talk to the man before making an unannounced entry "within three minutes of arriving at the scene." *Id.* at 451. Assessing the totality of the circumstances, including the officer's knowledge and conduct preceding the shooting, the court concluded that there was a material dispute of fact as to

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[6] Based on such reasoning, several circuit courts have held that the decision to deploy a SWAT team, if unreasonable in light of the totality of the circumstances, can be the basis for an excessive force claim—even though such a decision precedes the moment that force is applied. *See Terebesi v. Torreso*, 764 F.3d 217, 225, 234 (2d Cir. 2014); *Estate of Smith v. Marasco,* 430 F.3d 140, 149–50 (3d Cir. 2005); *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1190 (10th Cir. 2001). Similarly, "[t]here is widespread agreement among the circuits that have addressed the issue that a claim is stated under the Fourth Amendment for objectively unreasonable conduct during the effectuation of a seizure that results in the unintentional discharge of an officer's firearm." *Stamps v. Town of Framingham*, 813 F.3d 27, 37 (1st Cir. 2016); *see also Watson v. Bryant*, 532 Fed. Appx. 453, 457-58 (5th Cir. 2013); *Leber v. Smith*, 773 F.2d 101, 105 (6th Cir. 1985).

whether the officer's actions were "objectively unreasonable." *Id.* ("[K]icking down a door and immediately shooting a suicidal person who is neither resisting arrest nor threatening anyone save himself is an excessive use of force.").

In *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the Seventh Circuit denied qualified immunity to an officer who shot a suspect after leaping directly into the path of the suspect's car. The court held a jury could conclude the officer "unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him, because the decedent would have been unable to react in order to avoid presenting a deadly threat to [the officer]." *Id.* at 234; *accord Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (citing *Enyart* as an example of excessive force); *see also Edmond v. City of New Orleans*, 20 F.3d 1170 (5th Cir. 1994).

Weinmann and *Starks* are consistent with a long line of cases in which circuit courts have recognized that officers may be liable for excessive force when their own actions directly create their justification for force. Thus, in *Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005), the court held that an officer could not order a suspect to get out of his hiding place and then rely on the suspect's movement to justify the use of lethal force. In *Ribbey v. Cox*, 222 F.3d 1040, 1042 (8th Cir. 2000), the court held that an officer could not unreasonably break a car window and then rely upon the suspect's "reflex[ive] [movement] to protect himself from the breaking glass" to justify the use of lethal force. And in *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991), the court ruled that an officer could not deploy an

attack dog and then rely upon the suspect's inability to put his hands up as the dog attacked him to justify a subsequent use of force. *See also Smith v. Ray*, 781 F.3d 95, 104 (4th Cir. 2015) (officer liable for "taking an unreasonably aggressive tack that quickly escalated . . . to a violent exchange when the suspect instinctively attempted to defend h[er]self") (citing *Rowland*, 41 F.3d at 174); *cf. Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1502 (11th Cir. 1985) (shooting directly resulting from decedent's efforts to escape officers' unwarranted physical abuse "g[a]ve grounds for relief under the fourth amendment"), *cert. denied, Bailey v. Pennsylvania*, 476 U.S. 1115 (1986).

Other courts of appeals have held that officers may violate the Fourth Amendment by unreasonably entering private homes, unannounced and in the dark of night, and then shooting residents who react to their presence. *Sledd v. Lindsay,* 102 F.3d 282, 286 (7th Cir. 1996) (officers acted unreasonably by shooting resident of a home who was carrying a gun, where they broke into the house at night without identifying themselves as police or announcing their purpose); *Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir. 1991) ("It was not 'objectively reasonable'" for officer to enter a dark hallway of residence at night without identifying himself and shoot occupant of home who perceived him to be an intruder). The Ninth Circuit's provocation rule is another iteration of this same principle, and allows that "where 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." *Billington v. Smith*, 292 F.3d 1177,

1189 (9th Cir. 2002). In *Alexander v. City and Cty. of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994), the court of appeals held that summary judgment was not appropriate where seven officers, without an arrest warrant, entered the home of "a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered[,]" and shot him upon entry.

In each of these cases, circuit courts held that officers violated the Fourth Amendment by injuring civilians who posed a perceived risk only because of the officers' own unreasonable conduct preceding the moment that force was used.

Petitioners' approach would lead to the opposite result in virtually all of these cases. It would preclude consideration of the officers' conduct, and impose a one-sided inquiry that upends the "careful balancing" required by the Fourth Amendment, *Graham*, 490 U.S. at 396, giving weight to events leading up to the use of force that speak to the government's interests, while disregarding officers' conduct from the same timeframe relevant to the "nature and quality" of the intrusion. Under Petitioners' approach, a court weighing the "relative culpability" of the persons at risk in a situation, pursuant to *Scott*, 550 U.S. at 384, could consider whether a person "intentionally placed himself and the public in danger," *unless that person was the officer who used force.* Thus, Petitioners' proposed standard is not only time-constrained, but also inequitably so. *See Abraham*, 183 F.3d at 291 ("[E]ven apart from the problematic justification for such a [rule], there are considerable practical problems with trying to wrest from a complex series

of events all and only the evidence that hurts the plaintiff.")

In each of the circuit cases discussed above, a narrow "at the moment" analysis considering only the officers' perceptions of the civilian's conduct would have required the courts to find that the officers acted reasonably. But circuit courts have refused to sanction such absurd results. The real-life scenarios they have considered make clear that the "totality of the circumstances" test must include consideration of both parties' conduct prior to the use of force in order to accurately evaluate whether an officer's use of force was objectively reasonable.

IV. BEST PRACTICES IN POLICE USE OF FORCE TAKE A "TOTALITY" APPROACH.

Petitioners' proposed Fourth Amendment standard contradicts not only precedent from this Court and the courts of appeals, but the collective wisdom of policing experts and law enforcement agencies themselves. The Court has previously looked to existing police practice to guide its analysis of excessive force. *See Garner*, 471 U.S. at 10-11, 18 (citing polices on use of deadly force against nonviolent suspects in holding shooting of fleeing suspect unreasonable). This is particularly appropriate because the Fourth Amendment examines a use of force from the perspective of a "reasonable officer," which necessarily accounts for the policies and training to which officers are subject. *See Graham*, 490 U.S. at 396. Here, those practices reinforce a rule that considers not only the officer's action at the moment he pulls the trigger, but also

any conduct that may have unreasonably provoked the threat in the first place.

Best police practices, reflected in recommendations of police organizations and the policies of leading agencies, establish that police departments cannot adequately address use of force simply by training officers to fire a gun at the moment a threat arises. Rather, an officer's best chance of performing his duties safely is to behave reasonably during all phases of an incident, deploying sound, considered tactics that de-escalate the situation and avoid the need for force when possible. For an agency to ignore all preceding officer conduct that gives rise to threats to the safety of officers or others would be neither reasonable nor safe.

Law enforcement experts thus urge police departments to consider an officer's tactics when evaluating the reasonableness of the officer's use of force. Specifically, best practices encourage officers to "slow down," "create space," and employ "de-escalation" techniques, because such tactics provide officers an opportunity to consider alternative courses of conduct that are safer for both the officers and the subjects with whom they engage. For the same reasons, experts urge supervising officers to hold their subordinates accountable for failing to consider these tactics in any situation involving potential use of force.

A consensus report recently issued by eleven of the most significant law enforcement leadership and labor organizations in the nation recommends that officers "shall use de-escalation techniques and other alternatives to higher levels of force . . . whenever

possible and appropriate before resorting to force and to reduce the need for force," and calls for regular training on de-escalation.[7] As the Police Executive Research Forum ("PERF") explains, policies that prioritize de-escalation, sound tactics, and the sanctity of human life—and hold officers accountable for adhering to these tenets—"are designed to keep officers out of harm's way. . . . Teaching officers to 'slow down' some situations can help them avoid reaching a point where they or members of the public become endangered and officers have no choice but to use deadly force."[8]

The President's Task Force on 21st Century Policing also encourages agencies to provide use of force training that emphasizes that "sometimes the best tactic . . . is to step back, call for assistance, de-escalate, and perhaps plan a different enforcement action that can be taken more safely later."[9]

PERF has characterized this "comprehensive evaluation by the officer of the *need* for force" as consistent with the "totality" standard articulated by

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[7] *National Consensus Policy on Use of Force* 3 (Jan. 2017), available at http://www.theiacp.org/Portals/0/documents/pdfs/National_Consensus_Policy_On_Use_Of_Force.pdf.

[8] Police Executive Research Forum, *Critical Issues in Policing Series: Guiding Principles on Use of Force* 22 (March 2016), *available at* http://www.policeforum.org/assets/guidingprinciples1.pdf.

[9] *Final Report of the President's Task Force on 21st Century Policing*, Department of Justice Office of Community Oriented Policing Services 20-21 (May 2015) (internal quotation omitted), *available at* https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

this Court in *Graham*.[10] In addition, based on feedback at a series of national policing conferences, PERF observed that police agencies assessing whether a use of force complies with policy should look not just to the moment of the shooting, but to the officer's conduct that led up to the use of force:

> [T]here is a growing recognition in the policing profession that a review of an officer's use of force should not focus solely on the moment that the officer fired a gun or otherwise used force. Instead, leading police chiefs are saying that the review should cover what led up to the incident, and officers should be held accountable if they failed to de-escalate the situation in order to prevent it from ever reaching the point where the use of force was necessary.

Id. at 9.

Accordingly, law enforcement agencies increasingly emphasize avoiding the need to use force, training on de-escalation, and considering tactics leading up to a use of force in evaluating shootings and other incidents. For example, departmental policies in Albuquerque, Baltimore, Cincinnati, Cleveland, Dallas, Los Angeles, New Orleans, New York City, Newark, and Seattle—to name just a few—direct officers to avoid creating

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[10] *See* PERF, *Critical Issues in Policing Series: Re-engineering Training on Police Use of Force* 9-10 (Aug. 2015) (emphasis added), *available at* http://www.policeforum.org/assets/reengineeringtraining1.pdf.

danger and consider alternatives before introducing force into a situation, and likewise direct supervisors to evaluate whether officers adhered to these policies.[11]

The language used in several of these policies illustrates the "totality" perspective officers are expected to employ when evaluating a potential use

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[11] *See* Albuquerque Police Department, Procedural Order 2-52 at 4, 6, 7, 12–13 (Apr. 2016), *available at* https://sflinks.cabq.gov/THyzJgCi2vU/2-52%20-%20Use%20of%20Force.pdf; Baltimore Police Department, Policy 1115 at 1, 4, 10, 13 (July 2016), *available at* http://www.baltimorepolice.org/sites/default/files/policies-and-procedures/1115_Use_Of_Force.pdf; Cincinnati Police Department, Policy 12.545 at 7, 8, 17 (Feb. 2017), *available at* http://cincinnati-oh.gov/police/assets/File/Procedures/12545.pdf; Cleveland Police Department, Policy 2.1.02 at 4–5 (Aug. 2014), *available at* http://www.city.cleveland.oh.us/sites/default/files/forms_publications/GPO_Book 11-24-15.pdf; Dallas Police Department, General Order 906 (June 2015), *available at* http://www.dallaspolice.net/reports/Shared%20Documents/General-Order-906.pdf; Los Angeles Police Department Manual, Vol. 1, Section 556.10, "Use of Force" (2015), *available at* http://www.lapdonline.org/lapd_manual/volume_1.htm; New Orleans Police Department Operations Manual, Chapter 1.3: Use of Force, at 5, 8 (Dec. 2015), *available at* http://www.nola.gov/getattachment/NOPD/ NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf/; New York City Police Department, Force Guidelines at 1–2 (June 2016), *available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-01-force-guidelines.pdf; Newark Police Department, General Order 63-2, "Use of Force By Police Officers" 1, 4, 8, 11–12 (Mar. 2013), *available at* http://ow.ly/LkoQ309eKuK; Seattle Police Department Manual, Policies 8.000, 8.100, 8.500 (Sept. 2015), *available at* http://www.seattle.gov/police-manual/title-8.

of force situation, as well as the officer safety rationale. The Seattle Police Department, for instance, instructs:

> Officers should recognize that their conduct prior to the use of force, including the display of a weapon, may be a factor which can influence the level of force necessary in a given situation. . . . Officers should take reasonable care that their actions do not precipitate an unnecessary, unreasonable, or disproportionate use of force, by placing themselves or others in jeopardy, or by not following policy or training.

Seattle Police Department Manual, Policy 8.000, *supra* note 10.

Similarly, the New Orleans Police Department requires that:

> Officers shall perform their work in a manner that avoids unduly jeopardizing their own safety or the safety of others through the use of poor tactical decisions. … When feasible based on the circumstances, officers will use de-escalation techniques, disengagement; area containment; surveillance; waiting out a subject; summoning reinforcements; and/or calling in specialized units such as mental health and crisis resources, in order to reduce the need for force, and increase officer and civilian safety.

New Orleans Police Department Operations Manual, Ch. 1.3: Use of Force, *supra* note 10, at 5.

As these best practices and policies illustrate, the police themselves recognize that the best opportunity to avoid and minimize use of force arises in the officers' conduct before force is used, through tools including de-escalation, containment, and use of time and space. Petitioners' rule would prohibit courts from considering these tools—tools that police themselves recognize as vital—when evaluating the reasonableness of officers' actions. The Court's "totality of the circumstances" approach is consistent with that teaching; Petitioners' cramped approach is not.[12]

V. CONSIDERING AN OFFICER'S CONDUCT LEADING UP TO A USE OF FORCE WOULD NEITHER OPEN FLOODGATES OF OFFICER LIABILITY NOR EXPOSE OFFICERS TO HEIGHTENED SAFETY RISKS.

Under the "totality" analysis, an officer may incur liability only when his unreasonable conduct

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[12]Notably, the *amicus* brief of California State Sheriff's Association, California Police Chiefs' Association and California Peace Officers' Association does not argue that courts assessing a use of force should never consider officers' conduct in the preceding moments. Instead, their brief emphasizes that officers should not be held liable for reasonable uses of force, that a suspect's actions may be an intervening cause that negates liability, and that liability should be based on an officer's reckless or intentional conduct rather than mere negligence — all arguments that are consistent with the Court's "totality" analysis.

directly causes the need to use force that would have been avoided. Such an approach does not expose officers to undue financial risk, as a number of safeguards continue to protect against unwarranted findings of liability.

A. Under Applicable Tort Principles, The Doctrine Of Proximate Cause Precludes Far-Reaching Liability.

A comprehensive use of force analysis is consistent with tort law principles undergirding this Court's analysis of constitutional torts. This Court has recognized "claims brought pursuant to § 1983 sound in tort. . . . and [has] interpreted the statute in light of the 'background of tort liability.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 709-10 (1999) (internal citations omitted). Central to this background is the recognition that "tort liability . . . makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

The foundational tort requirement of proximate causation protects an officer against liability for tactics that may be unreasonable but do not proximately cause the ultimate use of force. *See, e.g.,* Restatement (Second) of Torts §§ 431 (2016). Even if an officer engages in unreasonable conduct, he is not automatically liable for all the harm that his actions may have caused in the "but for" sense. *Id.* Rather, a subject's own conduct can break the chain of causation–and thereby liability–if it constitutes a superseding act that creates the justification for an officer's use of force. *See, e.g.,* Restatement (Second) of Torts §§ 440-453 (2016); *Brower*, 489 U.S. at 599.

Courts recognize that when a subject's own conduct breaks the chain of causation, becoming a superseding cause of the need for force, that fact is a critical part of the "totality" analysis that precludes liability. In *Herbert v. Wilbur*, 34 F. App'x 828, 830 (3d Cir. 2002), for example, the Third Circuit considered the actions of an officer who approached a stolen car stopped at an intersection, tried to pull a passenger out of the backseat, got stuck in the door, was dragged at high speed, and subsequently killed an occupant when he used deadly force to stop the car. *Id.* at 830-31. The court concluded that "even if [the officer] violated the Fourth Amendment when he struggled to pull [the decedent] out of the backseat" the driver's act of "dragging him along the pavement at speeds up to 70 miles per hour, . . . was a superseding cause that appropriately cuts off [his] liability with respect to his use of deadly force in self-defense." *Id.* at 830. *See also Lamont v. New Jersey*, 637 F.3d 177, 185-186 (3d Cir. 2011) (even if officer's pursuit of a subject into the woods was unreasonable, subject's "noncompliant, threatening conduct in the woods was a superseding cause that served to break the chain of causation" prior to the shooting); *James v. Chavez*, 2013 WL 600227, 511 Fed. Appx. 742, 750-751 (10th Cir. 2013) (subject's attempt to stab an officer was superseding cause of his shooting, even if officer's decision to send in SWAT team was unreasonable); *Troupe v. Sarasota County, Fla.*, 419 F.3d 1160, 1164-66 (11th Cir. 2005) (subject's decision to drive off the road at high speed to avoid capture was an intervening cause of crash injuries, even though officer shot at the fleeing car); *Hundley v. District of Columbia*, 494 F.3d 1097, 1104-05 (D.C. Cir. 2007) (off-duty officer's negligent vehicle stop did

not proximately cause his shooting of subject, when subject lunged at officer after he identified himself as police).

The hypothetical Petitioners offer to argue that permitting proximate cause liability puts officers' lives in danger, however "spine-tingling," is ultimately unpersuasive. *See* Pet. Br. at 35-36. In the hypothetical, originally crafted by then-Judge Alito in *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995), three officers fail to knock and announce themselves prior to entering a residence, but they have a warrant, show that warrant to the resident, and identify themselves as police before the suspect draws a gun, shoots two of them, and turns the gun on the third. *Id.* Petitioners contend that, under the provocation rule, the third officer would be forbidden, upon pain of liability, from using force to protect his own life due to their failure to knock and announce themselves.

This conclusion rings false, as the necessity to shoot the subject is clearly not precipitated by the officers' failure to knock and announce—which they cured by identifying themselves—but by the subject's superseding act of attacking the officers. The subject's conduct in attacking individuals he knows to be police officers acting pursuant to a warrant breaks the chain of causation between the unreasonable tactic of entering unannounced and the need to use force in self-defense. Indeed, the Third Circuit concluded as much in a sentence omitted by Petitioners, explaining that on such facts "the suspect's conduct would constitute a 'superseding' cause that would limit the officer's liability." *Bodine*, 72 F.3d at 400 (internal citation omitted).

Accordingly, the concept of proximate cause would ensure that neither the provocation rule nor a "totality" analysis would permit liability in such a situation.

B. Qualified Immunity Protects Officers On A "Totality" Approach.

Under a "totality" approach that includes consideration of an officer's conduct leading up to the use of force, officers also remain protected by the shield of qualified immunity. If an officer engages in an unreasonably reckless course of conduct that prompts an avoidable application of force, and it is deemed excessive force, qualified immunity ensures he will be held liable only if it was clearly established at the time that his course of conduct was unreasonable under the totality of the circumstances. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (calling qualified immunity "objective (albeit fact-specific)"). The very purpose of qualified immunity is to ensure that officers will not incur liability for reasonable mistakes—or be forced to second-guess themselves in a dangerous situation for financial reasons. Qualified immunity still operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" *Brosseau*, 543 U.S. at 201; *see also White*, 137 S. Ct. at 552 (officer entitled to qualified immunity for firing without warning after late arrival to shooting scene).

C. A "Totality" Rule Holds Officers Liable Only for Unreasonable Conduct.

Petitioners distort the meaning of the totality approach when they argue that it will lead courts to "hold[ ] officers liable for reasonable use of force" and claim that such an approach "forc[es] [officers] to hesitate and reassess all their conduct while making split-second life-or-death decisions, and, worse, compel[s] them to make the wrong decision on threat of crushing liability[.]" *See* Pet. Br. at 36. Nothing in the totality approach alters the limitation, inherent in the Fourth Amendment itself, that only *unreasonable* seizures violate the Constitution. U.S. Const. amend IV; *see Graham*, 490 U.S. at 394. An analysis that considers the full course of an officer's conduct prior to the moment of force does not use a different standard. Even under the totality analysis, officers cannot be held liable for simply making mistakes, sub-optimal choices, or even negligent decisions, but only for those uses of force that—in light of the totality of the circumstances, including the officers' own prior conduct—are judged to be unconstitutionally unreasonable.

CONCLUSION

For the reasons stated above, this Court should reject Petitioners' attempt to limit the analysis of use of force under the Fourth Amendment to consideration of the officer's conduct only at the precise moment force was applied, and should reaffirm that the governing "totality of the circumstances" approach determines the reasonableness of an officer's use of force based on

any relevant facts, including the officer's conduct in the moments before that proximately causes the use of force.

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