No. 23-1239

In the Supreme Court of the United States

JANICE HUGHES BARNES, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ASHTIAN BARNES, DECEASED,

Petitioner,

v.

ROBERTO FELIX, JR.; COUNTY OF HARRIS, TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE TEXAS CIVIL RIGHTS PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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The Texas Civil Rights Project ("TCRP") is a non-profit organization made up of Texas lawyers and advocates who strive to protect and promote the civil rights of all Texans.[1] For more than thirty years, TCRP has sought to advance the rights of the state's most vulnerable populations through advocacy in and out of the courtroom. For instance, TCRP has examined the racial and economic disparities that make traffic stops—like the traffic stop that killed Ashtian Barnes—"more deadly, harmful, and impactful on Black and Brown drivers." The Texas Civil Rights Project, *Safe Passage: Traffic Safety & Civil Rights,* at 1 (hereinafter, "*Safe Passage* Report"). TCRP also previously represented Petitioner and Respondent Tommy Duane Barnes before the district court below, but it does not represent any party on appeal.

TCRP submits this brief in support of the Petition because the issue it presents—whether courts should apply the moment-of-threat doctrine when evaluating an excessive force claim under the Fourth Amendment—is of the utmost importance to TCRP's work. The moment-of-threat doctrine arises frequently in civil rights litigation undermining the rights of Texans

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from TCRP, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have received timely notice of TCRP's intent to file an *amicus curiae* brief in support of the Petition in this matter.

for whom TCRP advocates. TCRP hopes that its perspective on the doctrine's consequences will help the Court decide whether to grant the Petition.

SUMMARY OF ARGUMENT

Deadly force violates the Fourth Amendment unless an officer has probable cause to believe a suspect poses a significant threat of death or serious physical injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Under that standard, "the totality of the circumstances" must justify the use of deadly force. *See id.* at 9; *see also Graham v. Connor*, 490 U.S. 386, 396 (1989).

The moment-of-threat doctrine rejects those basic principles. In a minority of federal circuits—including the Fifth Circuit, which encompasses all the diverse communities across Texas that TCRP serves—the doctrine requires courts to ***ignore*** the totality of the circumstances and fixate instead on the split-second when the officer used deadly force. That doctrine is wrong, for all the reasons Judge Higginbotham recognized in his concurrence below: It "starves the reasonableness analysis by ignoring relevant facts to the expense of life" and, in so doing, contradicts this Court's mandate in *Garner*. *Barnes v. Felix*, 91 F.4th 393, 400–01 (5th Cir. 2024) (Higginbotham, J., concurring). Eight circuits rightly reject the doctrine. *See id.* at 400 n.13 (collecting cases). Yet the Second, Fourth, Fifth, and Eighth Circuits continue to adhere to it, even though it "is an impermissible gloss on *Garner* that stifles a robust examination of the Fourth Amendment's protections for the American public." *Id.* at 401

(calling on this Court to resolve the ongoing circuit split).

So, in states like Texas, it does not matter whether an officer escalated an encounter or put himself in harm's way before using deadly force. Under the moment-of-threat doctrine, an officer can escape liability so long as he was "in danger" at the precise instant he shot his gun.

Unless this Court intervenes, the moment-of-threat doctrine will continue to sanction the deaths of countless more individuals like Ashtian Barnes. TRCP hopes to underscore just three of the doctrine's unintended consequences for Texans seeking redress — and, in turn, explain why the issue presented is worthy of this Court's consideration.

First, the moment-of-threat doctrine allows officers to escalate routine traffic stops into deadly confrontations without liability. Indeed, that is the exact result of the doctrine here: "A routine traffic stop has again ended in the death of an unarmed black man" with no liability for the officer who used deadly force. *Barnes*, 91 F.4th at 398 (Higginbotham, J., concurring). Every year, police across the county stop ***millions*** of drivers for traffic violations. Susannah N. Tapp & Elizabeth J. Davis, *Contacts Between Police and the Public, 2020,* U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, 4 (2022). These routine stops disproportionately involve—and disproportionately turn deadly for—Black and Latino drivers. *Id.* at 11. Unless this Court intervenes, the moment-of-threat doctrine will continue to shield officers from liability for their unjustified use of force in many of those deadly situations—a result that undermines the

purpose of Section 1983. *See Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (concluding that in enacting Section 1983, "Congress intended to provide a remedy for the wrongs being perpetrated" on people denied their civil rights).

Second, the moment-of-threat doctrine extends beyond traffic stops. Every day, police respond to calls to help citizens experiencing mental health crises. But the moment-of-threat doctrine allows police to ***escalate*** these welfare checks to the point of violence and then escape liability by arguing that in the seconds before they fired, their violence was justified. Unless this Court intervenes, the moment-of-threat doctrine will continue to sanction the deaths of those within this vulnerable population.

Third, the moment-of-threat doctrine seriously circumscribes municipal liability for deadly shootings. Under the moment-of-threat doctrine, a municipality cannot be liable for policies causing a deadly shooting unless a policy affected an officer's decision-making in the ***seconds*** he used deadly force. Taken literally, that reasoning all but eliminates municipal liability for deadly force; no matter how unreasonable a municipality's policies were or how directly they led to the use of force, few would shape an officer's split-second decision to fire.

This Court should grant the Petition and reverse the decision below to make clear the moment-of-threat doctrine has no place under the Fourth Amendment, in the Fifth Circuit or anywhere else.

ARGUMENT

I. THE MOMENT-OF-THREAT DOCTRINE ALLOWS POLICE TO TRANSFORM ROUTINE TRAFFIC STOPS INTO DEADLY ENCOUNTERS.

Traffic stops are one of the most common interactions people have with the police each year. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUM. BEHAV. 736, 736 (2020). As Judge Higginbotham recognized in his concurrence below, however, the existing Fourth Amendment jurisprudence on the use of pretext in traffic stops has already "brought fuel to a surge of deadly encounters between the police and civilians." *Barnes*, 91 F.4th at 398–99 (Higginbotham, J., concurring). Indeed, "traffic stops and the use of deadly force are too often one and the same—with Black and Latino drivers overrepresented among those killed . . . ." *Id.* at n.5.

The moment-of-threat doctrine only furthers that disturbing pattern. By "blinding [courts to] an officer's role in bringing about the 'threat' precipitating the use of deadly force," *id.* at 398, the doctrine sanctions irresponsible and dangerous police behavior, to the detriment of the Black and Hispanic drivers impacted the most.

A. The application of the moment-of-threat doctrine in the traffic-stop context contravenes this Court's existing Fourth Amendment jurisprudence.

Under the Fourth Amendment, courts must consider the nature of a suspect's underlying crime in

determining whether an officer's use of force was constitutional. Indeed, *Graham*, 490 U.S. at 396, instructs courts to consider "the severity of the crime at issue" when determining whether the force used to effect a particular seizure is reasonable, while *Garner*, 471 U.S. at 11, directs courts to look to whether there was probable cause to believe that the suspect committed a crime involving the infliction of serious physical harm when analyzing the constitutionality of the use of deadly force against a fleeing suspect.

For courts bound by the moment-of-threat doctrine, however, "the moment of threat is the ***sole determinative factor***" in the reasonableness analysis. *See Barnes*, 91 F.4th at 401 (Higginbotham, J., concurring) (emphasis added). This means that it is of no matter whether the crime for which the suspect was stopped was innocuous (or even manufactured)—so long as the officer was in danger at the moment of the threat resulting in the use of force, the officer will be permitted to use whatever force necessary in response to the threat. *But see Garner*, 471 U.S. at 15 (recognizing that the common-law rule "forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe").

Below, Judge Higginbotham recognized that the foregoing framework "starves the reasonableness analysis by ignoring relevant facts to the expense of life." *Id.* at 400. Indeed, he continued, Petitioner's case is paradigmatic of the doctrine's shortcomings. *See id.* Specifically, instead of considering Officer Roberto Felix Jr.'s decision to (1) jump onto the door sill of a moving vehicle and (2) in the span of two seconds, begin shooting inside of the vehicle, the district court could

only consider whether Officer Felix was in danger at the moment of the threat that caused him to use deadly force. *See Barnes v. Felix*, 532 F. Supp. 3d 463, 471 (S.D. Tex. 2021), *aff'd*, 91 F.4th 393 (5th Cir. 2024). Because "the moment of the threat" occurred after Officer Felix had jumped onto the door and while he was "still hanging onto the moving vehicle" he believed "would run him over," the district court concluded that his use of deadly force against Ashtian Barnes was not excessive. *Id.* at 471.

Absent from that analysis is any consideration of the fact that Officer Felix had originally stopped Mr. Barnes due to outstanding toll tag violations—which, under the Texas Transportation Code, is a misdemeanor punishable by a fine not to exceed $250. *See Barnes*, 91 F.4th at 399 & n.6 (Higginbotham, J., concurring) (citing TEX. TRANSP. CODE ANN. § 370.177).

Based on the foregoing, a court's application of the moment-of-threat doctrine in the context of traffic stops, specifically, appears to be plainly inconsistent with this Court's precedent. Unfortunately, in practice, this means that individuals like Mr. Barnes who are stopped for innocuous traffic offenses in states where the moment-of-doctrine applies are entitled to fewer protections against the use of unreasonable force during a traffic stop than those stopped for the very same conduct across state lines.

B. The moment-of-threat doctrine denies recourse to those already disproportionately affected by police violence during traffic stops.

By permitting police to escalate everyday traffic stops into deadly situations without liability, the moment-of-threat doctrine has a greater effect on those already disproportionately affected by police violence.

Social scientific research on traffic stop data suggests that traffic stops are "more deadly, harmful, and impactful on Black and Brown drivers." *Safe Passage* Report, *supra*, at 1. For example, in a 2020 analysis of approximately 100 million traffic stops conducted by state patrol agencies and municipal police departments over a ten-year span, researchers found "that decisions about whom to stop and, subsequently, whom to search are biased against black and Hispanic drivers." Pierson et al., *supra*, at 740–41. In support, researchers noted that "among state patrol stops, the annual per-capita stop rate for black drivers was 0.10 compared to 0.07 for white drivers; and among municipal police stops, the annual per-capita stop rate for black drivers was 0.20 compared to 0.14 for white drivers."

Race also impacts the outcomes of traffic stops. In studies analyzing nationwide traffic stop and survey data, researchers found that Black and Hispanic drivers are (1) more likely to be searched than their white counterparts, *see id.* at 737–38; (2) more likely to experience some type of police action during traffic stops, Tapp & Davis, *supra*, at 11; (3) more likely to experience police misconduct during contact with the police,

id. at 10; and (4) more likely than white drivers to experience the threat or use of force, *id.* at 11.

These patterns are borne out at the local level, as well. For example, across the approximately 250,000 traffic stops the Houston Police Department conducted in 2022, Black drivers were three times more likely than white drivers to be stopped for a non-moving violation; six times more likely to be arrested; and seven times more likely to have their vehicles searched. *Safe Passage* Report, *supra*, at 3 (analyzing data from Traffic Stops, City of Houston Police Transparency Hub, https://mycity.maps.arcgis.com/apps/dashboards/8e62e67b8855477b993cfdc48a94ca14ca17 (last visited June 11, 2024)). What's more, according to the Houston Police Department's own data, Black drivers accounted for 58% of the 2022 traffic stops where the department self-reported that "use of force" had taken place, despite accounting for only 23% of Houston's population. *Id.* at 4 (analyzing data from Use of Force, City of Houston Police Transparency Hub, https://mycity.maps.arcgis.com/apps/dashboards/21eac904178c4d12a7dd8e29c0ee238e (last visited June 11, 2024)).

For Texans of color, who already suffer a disproportionate risk of being stopped for a traffic violation and having that stop turn deadly, the application of the moment-of-threat doctrine means they are afforded fewer constitutional protections than their white counterparts. *See, e.g.*, *Barnes*, 91 F.4th at 398 (Higginbotham, J., concurring) (recognizing that the moment-of-threat doctrine again cloaked an officer with immunity following a routine traffic stop ending in the death of an unarmed Black man).

C. By shielding officers for their use of force during routine traffic stops, the moment-of-threat doctrine thwarts the Congressional intent behind Section 1983 suits.

Lastly, the moment-of-threat doctrine, and its disproportionate effect on Black and Brown Americans, is also squarely in tension with the underlying purpose of Section 1983.

As is well-known today, Section 1983 imposes liability for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" caused by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983. Less well known is that the law—formally named the Ku Klux Klan Act of 1871—was originally enacted in the 19th Century as a means to "provide a remedy for the wrongs being perpetrated" on Black Americans at the hands of groups like the Ku Klux Klan. *See Green v. Thomas*, __ F. Supp. 3d __, No. 3:23-CV-126-CWR-ASH, 2024 WL 2269133, at *4 (S.D. Miss. May 20, 2024) (quoting *Pierson*, 386 U.S. at 559). Indeed, the very purpose of the Ku Klux Klan Act of 1871 was "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Id.* (quoting *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 700–01 (1978)).

The moment-of-threat doctrine, however, creates barriers to redress and justice for those most in need. Indeed, as Judge Higginbotham suggested, the moment-of-threat doctrine routinely shields police officers from liability for the use of excessive force against

unarmed Black men. *See generally Barnes*, 91 F.4th at 398 (Higginbotham, J., concurring). That outcome plainly thwarts the very purpose of Section 1983, which is "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (citing *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

II. THE MOMENT-OF-THREAT DOCTRINE LESSENS THE PROTECTIONS AFFORDED TO INDIVIDUALS EXPERIENCING MENTAL HEALTH CRISES.

A. Mental health crises lead to one in five legal intervention deaths.

In Texas and nationwide, police serve as front line responders to persons experiencing mental health crises. *See* Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM. J. PREVENTATIVE MED. S173, S179 (2016); *see also* Ashley Abramson, *Building Mental Health into Emergency Responses*, 52 MONITOR ON PSYCH. 30, 30–32 (2021) (discussing the role of police in responding to mental health crises in Texas and elsewhere). Indeed, up to 20% of all calls for police intervention involve a mental health or substance abuse crisis. Abramson, *supra*, at 30. Often, these calls are initiated by someone who is concerned about the safety of the person in crisis and only wants police to help that person. *See* DeGue et al., *supra*, at S180.

Yet a substantial number of encounters between police and persons experiencing a mental health crisis

end in the use of deadly force. A study of legal intervention deaths between 2009 and 2012 found that ***21.7%*** of the surveyed deaths "were directly related to issues with the victim's mental health or substance-induced disruptive behaviors." DeGue et al., *supra*, at S180. That percentage remains high today: Between 2015 and June 2024, ***20%*** of fatal police shootings nationwide involved a person experiencing a mental health crisis. *Police Shootings Database*, THE WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_manual_3 (last visited June 7, 2024) (choose "Mental illness crisis" from the dropdown menu).

So far in 2024, police nationwide have killed 55 persons experiencing a mental health crisis. *Id.* (choose "Mental illness crisis" and "2024" from the dropdown menu). At the time of writing, Texas police alone have killed five such persons since the turn of the year. *Id.* (choose "Mental illness crisis," "2024," and "Texas" from the dropdown menu).

The Fourth Amendment should provide all these persons the same fundamental protection: Police cannot use deadly force when responding to a mental health crisis unless, under the totality of the circumstances, the suspect poses a significant threat of death or serious physical injury to the officers or others. *See Garner*, 471 U.S. at 9, 11. And if an officer breaches that protection, Section 1983 should provide the victim's family with recourse. But in Texas and other states within moment-of-threat doctrine Circuits, that is not the case.

B. The moment-of-threat doctrine absolves officers who unreasonably escalate mental health crises.

Contrary to the Fourth Amendment's mandate, the moment-of-threat doctrine allows Texas officers to use deadly force when responding to mental health crises even in some circumstances where, under the totality of the circumstances, deadly force is unjustified.

Harris v. Serpas, 745 F.3d 767 (5th Cir. 2014), is paradigmatic. There, Brian Harris's wife called the police because Mr. Harris had taken an overdose of sleeping pills and locked himself in their room. *Id.* at 770. Mr. Harris committed no crime, and Ms. Harris was in no danger. *Id.* She simply feared for her husband's life and "called 911 for help." *Id.*

Five officers responded. *Id.* Ms. Harris told them that her husband did not have a gun, that he sometimes carried a folding knife for work, and that he was overdosing in the locked room. *Id.* The officers' equipment took a series of videos capturing their actions. *Id.*

First, the officers lined up outside the bedroom door with weapons drawn, with a sergeant ordering, "I want one gun and one taser right here." *Id.* The officers then breached the door and found Mr. Harris lying on the bed, covered with a blanket and completely still. *Id.* They yelled his name, and he did not respond. *Id.* They ordered him to show his hands, and he did not respond. *Id.* An officer then pulled on the blanket, revealing a folding knife in Mr. Harris's hand. *Id.* The officers began shouting at Mr. Harris to put the knife down. *Id.* He remained lying on the bed and,

apparently disoriented, crossed his arms and said, "It's not coming down." *Id.* Within seconds, an officer fired a taser at Mr. Harris. *Id.*

In the next video, which only lasted six seconds, Mr. Harris had stood up. *Id.* Another officer was actively tasing him. *Id.* At this point, Mr. Harris became agitated and flailed his arms at the taser wires; in the process, he raised the knife above his shoulder. *Id.* An officer yelled at him to drop the knife, and when Mr. Harris responded "I'm not dropping nothing," an officer killed him with gunfire. *Id.*

Mr. Harris's family sued, arguing the officers knew that he had not threatened anyone, he had not committed any crime, and his wife had called the officers to ***save*** him. *Id.* at 772. Although Mr. Harris became agitated, this was due to the officers' actions—he was sleeping and disoriented when, in a matter of seconds, the officers breached his door, shouted commands at him, and fired multiple tasers at him. *Id.*

The Fifth Circuit acknowledged that this Court "has long held that courts must look at the 'totality of the circumstances' when assessing the reasonableness of a police officer's use of force." *Id.* (quoting *Graham*, 490 U.S. at 396). But the Fifth Circuit asserted it had "narrowed that test" and "confined" the excessive force inquiry to the moment of the threat that resulted in the officer's shooting. *Id.* (quoting *Bazan ex rel. Brazen v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir. 2001)).

Applying its narrowed test (*i.e.*, the moment-of-threat doctrine), the Fifth Circuit ignored all the officers' unreasonable actions preceding the shooting—it

did not matter that the officers breached the door with their guns drawn, shouted at Mr. Harris, and tasered him while he lay on the bed. *See id.* at 773. All that mattered was that Mr. Harris "was holding a knife above his head at the moment [the officer] fired his weapon." *Id.* And in that isolated moment, deadly force was justified. *Id.*

That approach disregards the totality of the circumstances, contrary to this Court's directives. The Fifth Circuit is not permitted to "narrow" this Court's Fourth Amendment tests, but it purported to do exactly that, limiting its analysis to the ***six seconds*** when officers fired their guns. By "eliding the reality of the role the officers played in bringing about the conditions said to necessitate deadly force," *Barnes*, 91 F.4th at 399 (Higginbotham, J., concurring), the Fifth Circuit in *Harris* effectively ensured that the officers' actions appeared reasonable.

C. The moment-of-threat doctrine will absolve more officers of liability for the deaths of people experiencing mental health crises.

Mr. Harris's case is not an anomaly—the Fifth Circuit and its district courts have applied the moment-of-threat doctrine in several similar cases.

In so doing, those courts all held that police killings of mentally ill or suicidal Texans were reasonable, but failed to conduct the full inquiry the Fourth Amendment demands. *See, e.g.*, *Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011) (ignoring whether it was reasonable for police to breach locked door into room of decedent experiencing a mental health crisis

in the moments before fatal shooting); *Grigsby v. Lawing*, No. 5:16CV16-RWS-CMC, 2017 WL 9806927, at *18 (E.D. Tex. Aug. 21, 2017) (ruling there was no Fourth Amendment violation when officer killed mentally ill decedent who ran at officer holding a spoon, but declining to consider whether the officer's conduct "leading up to the moment of the threat" resulted in the shooting); *see also Sanchez v. Gomez*, No. EP-17-CV-133-PRM, 2020 WL 1036046, at *18 (W.D. Tex. Mar. 3, 2020) ("In the context of mental illness, the Court is precluded from considering whether an officer's inadequate response to a mental health crisis provoked the victim into acting aggressively.").

And there is no indication that the Fifth Circuit will correct its own course. Indeed, Judge DeMoss wrote separately in some of the above cases to ***acknowledge*** that officers had provoked the victim. *See Rockwell*, 664 F.3d at 996–97 (DeMoss, J., specially concurring) ("As I see it, they provoked a man they knew to be mentally ill into a violent reaction. They did not allow for any time to defuse the situation or implement the safest procedures possible to take him into custody. Preventing a possible suicide is a worthy goal, but an armed entry that heightens the risk to the potential victim's life certainly is not the best way to accomplish that goal."); *see also Elizondo v. Green*, 671 F.3d 506, 511 (5th Cir. 2012) (DeMoss, J., specially concurring) ("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."). Still, under the Fifth Circuit's precedent, an officer's unreasonable actions in the moments before

the use of deadly force are "not legally actionable." *Rockwell*, 664 F.3d at 997 (DeMoss, J., specially concurring).

Until this Court repudiates the moment-of-threat doctrine, the families of more mentally ill and suicidal Texans—like the decedents in *Harris*, *Grigsby*, *Rockwell*, *Elizondo*, and others—will not have access to full recourse under Section 1983 and the Fourth Amendment. Those families are entitled to an analysis of whether their loved-ones' deaths were justified under the totality of the circumstances, but the moment-of-threat doctrine starves that analysis. The Court should grant certiorari to ensure that when an officer kills an individual undergoing a mental health crisis, the Fourth Amendment's full protections apply.

III. THE MOMENT-OF-THREAT DOCTRINE'S INCURSION INTO *MONELL* PROSCRIBES MUNICIPAL LIABILITY FOR EXCESSIVE FORCE.

By improperly truncating the deadly force analysis, the moment-of-threat doctrine makes it more difficult for a plaintiff to hold an individual officer liable for the unreasonable use of deadly force. But Texas-based courts have also expanded the doctrine to municipal liability under *Monell*. And in that context, the moment-of-threat doctrine makes recovery all but impossible.

A. The moment-of-threat doctrine has expanded into *Monell*'s progeny.

A plaintiff can sue a municipality under Section 1983 if the municipality adopted a policy, ordinance, regulation, or custom that deprived the plaintiff of his

or her rights. *Monell,* 436 U.S. at 690–91. Under the Fifth Circuit's formulation of *Monell*, a plaintiff must show that an official municipal policy "was the moving force behind, or actual cause of, the constitutional injury." *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009). "In other words, a plaintiff must show direct causation, *i.e.*, that there was a 'direct causal link' between the policy and the violation." *Id.* (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 580 (5th Cir. 2001)).

Invoking the moment-of-threat doctrine, the Northern District of Texas recently added another requirement: A municipality is only liable for the use of deadly force if its policies impacted an officer's subjective decision-making ***in the seconds he shot***. *Waller v. City of Fort Worth*, 515 F. Supp. 3d 577, 586 (N.D. Tex. 2021) ("*Waller*"), *aff'd sub nom. Waller v. Hoeppner*, No. 21-10129, 2022 WL 4494111, at *1 (5th Cir. Sep. 27, 2022) ("*Hoeppner*").

In *Waller*, two rookie officers responded to a burglary alarm, but went to the wrong house. *Id.* at 581. They began to shine their flashlights into the wrong home's windows and garage, waking 72-year-old homeowner Jerry Waller. *Id.* Seeing the lights, Mr. Waller grabbed a gun to defend himself from intruders and went to the garage. *Id.* The rookies drew their guns and ordered Mr. Waller to drop his weapon. *Id.* Mr. Waller immediately complied, raised his hands into the air, and surrendered. *Id.* Still, one of the rookies shot Mr. Waller six times, killing him. *Id.* The entire confrontation lasted forty-four seconds. *Id.* at 585.

The district court assumed the officer's use of deadly force was unreasonable. *Id.* at 582. The court

addressed, instead, whether the city employing the officer could be liable for several policies that contributed to Mr. Waller's death, including the city's failure to require officers to verify they were at the correct address, failure to partner rookies with more seasoned officers, and failure to require officers to identify themselves before using deadly force. *Id.* at 583–84.

The court emphasized that, under the moment-of-threat doctrine, the excessive force analysis "focuses on the officer's decision to use deadly force," and "any of the officer's actions leading up to the shooting are not relevant." *Id.* at 584 (quoting *Harris*, 745 F.3d at 772). Thus, in the court's view, it could only look to the forty-four seconds in which the officer decided to use excessive force. *Id.*

But then the court went further: It stated it could also only consider "***policies*** that would have affected [the officer's] judgment in those 44 seconds." *Id.* at 585 (emphasis added). And with that limitation in place, the court "ignore[d] the case's most disturbing fact—that the officers were at the wrong house." *Id.*

Critically, the court disposed of each of the plaintiffs' challenges by reasoning that, although the policies "set the stage" for the shooting, they did not affect the officer's decision to shoot. *Id.* For instance, the court acknowledged the city's failure to train its officers to ensure they were at the right home was a "clear" error, "worthy of blame," and a cause of the shooting. *Id.* But under the moment-of-threat's circumscribed test, "[h]ow and why [the officer] was there are irrelevant." *Id.* For the same reason, it did not matter that a more senior partner may have helped the rookie officer avoid the standoff. *Id.* It was even irrelevant that

the city failed to require officers to identify themselves ***during standoffs***. *Id.* at 586. In the court's view, that policy did not affect the officer's decision-making in the "relevant 44 seconds," because "if [he] shot an unarmed man, why wouldn't he also violate a policy of identifying himself?" *Id.*

The Fifth Circuit affirmed. *Hoeppner*, 2022 WL 4494111, at *4. It too reasoned that under the moment-of-threat doctrine, "a city policy or custom had to directly influence the use of excessive force during the crucial forty-four seconds of the shooting." *Id.* Because the challenged policies fell outside the court's self-imposed timeframe, they were irrelevant. *Id.*

B. The moment-of-threat doctrine makes it all but impossible to hold a municipality liable for the use of deadly force.

Waller's most basic problem is that it is hard to imagine ***any*** municipal policy that could affect an officer's instantaneous, subjective decision to use deadly force.[2] And under *Waller*'s application of the moment-of-threat doctrine, policies that lead directly to a deadly shooting—but do not shape the officer's subjective decision to shoot—cannot support municipal liability.

So, for instance, a municipality could not be liable for a policy that requires officers to keep their service

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[2] There are other serious problems with *Waller*'s reasoning. For instance, an officer's subjective decision-making when he uses deadly force is irrelevant to the Fourth Amendment—"the 'reasonableness' inquiry in an excessive force case is an objective one." *Graham*, 490 U.S. at 397.

weapons drawn at all times. Nor could a municipality be liable for a policy requiring officers to rush all armed suspects, even if the suspect is holding a hostage. Those policies might "set the stage" for a shooting and make a deadly confrontation much more likely. *See Waller*, 515 F. Supp. 3d at 585. But they would not shape an officer's instantaneous decision to shoot. Thus, under *Waller*, the moment-of-threat doctrine effectively eliminates municipal liability for deadly shootings.

The Court should grant certiorari to correct the anomalies the moment-of-threat doctrine creates in cases like *Waller*. When deadly force is at issue, courts must consider ***more*** than an officer's split-second decision to shoot. Instead, courts must look to the totality of the circumstances surrounding the shooting. *Garner*, 471 U.S. at 8–9. Those circumstances include a number of factors beyond the moment of threat, including the severity of the crime at issue and whether the suspect is actively resisting arrest or fleeing. *Graham*, 490 U.S. at 396. By ignoring those circumstances, the moment-of-threat doctrine—as reflected in cases like *Waller*—impermissibly narrows the Fourth Amendment's protections to absurd results.

CONCLUSION

For the foregoing reasons, TCRP fully supports the Petition. While eight federal circuits have rejected the moment-of-threat doctrine, it lives on in the Fifth Circuit, Texas, and other states across the nation. In Texas and these other states, the doctrine allows what the Fourth Amendment forbids: the use of deadly force when, under the totality of the circumstances, deadly force is unreasonable. As a result, the Fourth

Amendment means less in these places—it offers less protection to those pulled over for routine traffic stops, those experiencing mental health crises, and those sleeping in their own homes. The Court should reject the moment-of-threat doctrine and make clear that it has no place under the Fourth Amendment.

Respectfully submitted,

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