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

BRIEF OF THE NATIONAL URBAN LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Urban League is a civil rights organization that for 114 years has been dedicated to helping African Americans and historically underserved people to achieve their highest potential, self-reliance, power, civil rights, and social parity. Founded in 1910 in New York City, the National Urban League works to uplift communities through economic empowerment, equality, and social justice. It has a network of 91 local affiliate Urban League organizations in 37 states and the District of Columbia, which serve more than 300 communities and more than two million people annually. Since its founding, the National Urban League has worked with historically underserved communities to promote public safety and combat inequitable policing. Nationally, *amicus's* constituents continue to be directly harmed by inconsistencies in regional policing practices.

SUMMARY OF THE ARGUMENT

Since Congress enacted Section 1983 in the 1870s, federal courts have played a critical role in balancing individual rights against state policing interests. This is particularly true in cases involving government searches and seizures—from brief investigatory stops to the use of deadly force. In its Section 1983 jurisprudence, this Court has repeatedly emphasized that the reasonableness of an officer's

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of *amicus curiae*'s intent to file this brief.

conduct "is not capable of precise definition or mechanical application," and that the reasonableness analysis "requires careful attention to the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see Tennesee v. Garner*, 471 U.S. 1 (1985). The Court has therefore instructed that lower courts must consider *all* relevant facts and circumstances giving rise to an officer's search or seizure when determining whether the officer's conduct was reasonable.

The "moment of threat" doctrine adopted by the Second, Fourth, Fifth, and Eighth Circuits ignores that instruction and upends the balance between individual rights and police power. Under the "moment of threat" approach, a court's reasonableness analysis is blind to the circumstances that precede the moment an officer pulls the trigger or otherwise uses lethal force.

For example, courts adhering to the moment of threat doctrine ignore anything officers do to put themselves in danger—like jumping on someone's car or provoking a hostile reaction. And on the other side of the ledger, these courts also ignore evidence that an officer attempted to de-escalate a confrontation and used force only as a last resort.

Ignoring the full context surrounding a deadly encounter serves neither officers nor civilians. Nobody has the opportunity to explain how or why the deadly encounter proceeded as it did, and everybody is bound by the factfinder's review of a single, isolated moment in time.

The moment of threat doctrine's limitations have an outsized effect on racial and ethnic minority communities, and on African Americans in particular. African Americans are more than three times as likely as their white peers to be killed by the police. This community is thus particularly vulnerable to inaccurate reasonableness determinations that stem from a factfinder's inability to evaluate the circumstances leading up to an officer's use of force.

The Court should reaffirm its adherence to a "totality of circumstances" approach that determines reasonableness based on all relevant facts, before and during the use of force.

ARGUMENT

I. Federal Courts Have Historically Played An Important Role In Protecting Individuals From Excessive Force.

Americans affected by excessive force have always faced obstacles to vindicating their rights. In the wake of the Civil War, it was nearly impossible for individuals—particularly African Americans—to meaningfully challenge ongoing misconduct by police officers and other state officials. At the time, state actors at every level, often in southern states, interfered with African Americans' civil rights, individual liberty, and personal safety. Violence was rampant and well documented. For example, a 600-page report published by a Senate select committee in 1871 "recounted pervasive state-sanctioned lawlessness and violence against the freedman and their White Republican allies." *Health & Hosp. Corp. of Marion Cnty. v. Talevski,* 599 U.S. 166, 176 (2023).

Law-enforcement officers in southern states often turned a blind eye to brutality against African Americans. *See Mitchum v. Foster*, 407 U.S. 225, 241 (1972). And some officers actively participated in that brutality, whipping, killing, and torturing African Americans. Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 689-90 (2003).

Recourse for this violence was limited. State legislatures enacted Black Codes that perpetuated the existing racial hierarchy and prevented African Americans from "voting, testifying in all court cases, or in any other way asserting and protecting their rights as free people." Finkelman, *supra*, at 690; *see also Timbs v. Indiana*, 586 U.S. 146, 153 (2019). And state courts, rather than punishing and deterring excessive force by state actors, were commonly "used to harass and injure individuals." *Mitchum*, 407 U.S. at 240. State judges and juries exhibited open bias against African American plaintiffs in particular, making it difficult for them to succeed on any claim challenging police violence against them. Note, Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. Ann. Surv. Am. L. 391, 399 (2008). Indeed, this rampant corruption meant that pursuing such claims was not just fruitless but could lead to further violence: "Among the most dangerous things an injured party [could] do [was] to appeal to justice." *Mitchum*, 407 U.S. at 241 (quoting Cong. Globe, 42d Cong., 1st Sess. App. 78 (1871)). Then as now, state criminal prosecutions against police officers were rare

and brought "only in the most egregious cases." Barbara A. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo. Wash. L. Rev. 453, 464-67 (2004); *see also* Note, Ryan Hartzell C. Balisacan, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-Mendez Agenda*, 54 Harv. C.R.-C.L. L. Rev. 327, 334-35 (2019). By the early 1870s, it was apparent that state remedies did not protect against unjustified officer violence.

In 1871, Congress enacted Section 1983 "to provide a federal remedy where [state remedies], though adequate in theory, [were] not available in practice." *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Section 1983 created a federal private right of action for individuals to sue state authorities and others acting "under color of" state law for violations of their constitutional rights. 42 U.S.C. § 1983. Passed in the same year that the Senate select committee published its report on state-sanctioned violence, the act's clear purpose was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242.

It would take nearly a century for Section 1983 to live up to that purpose. For decades, federal courts interpreted the statue's operative language—"under the color" of state law—to mean that police officers could not be held liable for their conduct unless they were acting in accordance with, rather than in violation of, state law. Lacks, *supra*, at 399-401. This narrow interpretation meant that Section 1983 was

rarely invoked against police officers. *Id.* at 399-401. From 1871 to 1920, for example, federal courts heard only 21 Section 1983 claims. Note, Evelyn Michalos, *Time Over Matter: Measuring the Reasonableness of Officer Conduct in § 1983 Claims*, 89 Fordham L. Rev. 1031, 1037 (2020).

In 1961, this Court expressly rejected that reading, holding that Section 1983 could be used to impose civil liability against police officers for their unlawful acts. *Monroe*, 365 U.S. at 187. In *Monroe*, 13 Chicago police officers broke into the petitioners' home and subjected them to an illegal search and seizure. *Id.* at 169. This Court held that Section 1983 properly applied to that conduct because the statute was specifically enacted to prevent unlawful state action. *Id.* at 180-81.

The Court again expanded Section 1983's scope in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). There, the Court held that a plaintiff can bring a Section 1983 claim against a municipality whose official policy, practice, or custom resulted in a violation of the plaintiff's constitutional rights. *Id.* at 690-91. By permitting individuals to sue a municipality for its departments' policies, *Monell* paved the way "for direct constitutional challenges to State laws and departmental policies relating to police use of deadly force." Lacks, *supra*, at 401 (quoting Urey W. Patrick & John C. Hall, *In Defense of Self & Others …: Issues, Facts & Fallacies—The Realities of Law Enforcement's Use of Deadly Force* 6 (2005)). Together, *Monroe* and *Monell* gave plaintiffs a meaningful legal avenue to challenge an officer's use of force—and highlight the important role federal

courts play in protecting individual rights from state overreach.

II. The Totality Of The Circumstances Analysis Ensures A Balance Between Individual Rights And State Interests.

Following *Monroe* and *Monell*, federal courts began to develop the standard for evaluating whether a police officer's use of force violates a person's constitutional rights. This Court eventually adopted the "totality of the circumstances" approach, which requires courts to consider all relevant circumstances when assessing a violent encounter. Consistent with Section 1983's purpose of "interpos[ing] the federal courts between the States and the people," *Mitchum*, 407 U.S. at 242, the "totality of the circumstances" approach requires federal courts to consider all information bearing on the officer-civilian interaction to ensure the best balance between individual rights and state policing interests.

Courts initially assessed excessive-force claims under the Due Process Clause of the Fourteenth Amendment. The Second Circuit's decision in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), exemplifies courts' reasoning at the time. *See* Stephanie Bing, *Lawful But Awful: Evaluating Reasonableness in Excessive Force Claims Against the Mentally Ill, Emotionally Disturbed, and Intoxicated*, 47 Vt. L. Rev. 271, 274 (2022); Benjamin I. Whipple, *The Fourth Amendment and The Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 San Diego L. Rev. 177, 189 (1991). Under this framework, "undue force" violated the 14th Amendment where "law enforcement officers

deprive[d] a suspect of liberty without due process of law." *Glick*, 481 F.2d at 1032. To determine whether an officer had crossed this "constitutional line," courts considered several factors, including "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id*. at 1033. *Glick* made clear that assessing officers' use of force is not an analysis "that can be applied by a computer" but rather requires a detailed, fact-bound inquiry of all relevant circumstances. *Id.*

In *Tennesee v. Garner*, 471 U.S. 1 (1985), this Court transitioned *Glick*'s balancing test to a Fourth Amendment framework. Bing, *supra*, at 274. The Court held that the Fourth Amendment's objective reasonableness standard applied to assessing whether a police officer's use of deadly force violated an individual's constitutional rights, and that reasonableness is based on the "totality of the circumstances" of each case. *Garner*, 471 U.S. at 8-9; *see also* Bing, *supra*, at 274.

Garner emphasized that the Fourth Amendment requires an assessment of "*how* [a] seizure is made," which in turn requires "balanc[ing] the nature and quality of the intrustion" against the "governmental interests alleged to justify the intrustion." 471 U.S. at 7-8 (quotation omitted). Reviewing a range of cases assessing whether seizures were reasonable under the Fourth Amendment, this Court concluded that the central question in the reasonableness analysis is

"whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 8-9.

Garner also reinforced the importance of the "balancing process" that federal courts undertake in excessive-force cases. Indeed, the Court declined to adopt a categorical rule permitting deadly force "to prevent the escape of all felony suspects, whatever the circumstances," *id.* at 11-12, instead embracing the totality approach. The gravity of that holistic analysis is self-evident in excessive-force cases—the "intrusiveness of a seizure by means of deadly force is unmatched." *Id.* at 9. And an officer's use of deadly force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* Those realities must inform how a court balances "governmental interests in effective law enforcement" in deadly force cases. *Id.*

Four years later, in *Graham v. Connor*, 490 U.S. 386 (1989), the Court reaffirmed the "totality of the circumstances" approach. *Graham* held that proper application of the reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Like *Glick*, *Graham* recognized that this analysis "is not capable of precise definition or mechanical application," but requires consideration of all relevant facts, including the individual's actions and the "perspective of a reasonable officer on the scene." *Id.* (quotation omitted). Again, this Court required lower

courts to undertake a holistic evaluation of whether an officer's use of force was reasonable, to ensure "careful balancing" of an "individual's Fourth Amendment interests" with the "countervailing governmental interests at stake." *Id.* (quotation omitted).

This Court's subsequent decisions have continued to reinforce the totality approach. In *Scott v. Harris*, 550 U.S. 372 (2007), for instance, the Court again left no doubt that the reasonableness analysis must consider *all* factual circumstances of the encounter. The *Scott* Court rejected the notion that there is "a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382. An "easy-to-apply legal test" that failed to consider the facts of any particular case was improper. *Id.* at 383. Rather, courts "must still slosh [their] way through the factbound morass of 'reasonableness.'" *Id.* In this way, the totality of the circumstances approach centers the reasonableness analysis on achieving a just outcome rather than offering outsized protection to either the individual or the state.

This Court has made clear, too, that a holistic analysis protects responsible police officers. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court held that an officer was justified in "half-dragging" a man to prevent him from advancing toward the Vice President during a speech, and then using a "gratuitously violent shove" to get him inside a vehicle. *Id.* at 198, 208. There, the "circumstances … disclose[d] substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did." *Id.* at 208. His actions were

thus permissibe under the totality of the circumstances. Likewise, in *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017), the Court reiterated that where "an officer carries out a seizure that is reasonable" based on all surrounding circumstances, "there is no valid excessive force claim." *Id.* at 428. Emphasizing its benefits for officers and civilians alike, this Court has reaffirmed time and again that a broad, totality of the circumstances analysis ensures a balance between state interests and individual rights.

III. The Moment Of Threat Doctrine Impedes Courts' Ability To Balance Individual Rights And State Interests.

A. The moment of threat doctrine limits courts' ability to consider relevant aspects of deadly force encounters.

The moment of threat doctrine does not strike the balance the Fourth Amendment requires. This doctrine limits the reasonableness analysis to the "final frame"—the precise "moment" an officer exercises deadly force.[2] *See Barnes v. Felix*, 91 F.4th 393, 397 (5th Cir. 2024) ("[T]he excessive-force inquiry is confined to whether officers or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force." (internal citation omitted)). That means that courts cannot consider what happened in the hours,

[2] Robin Stein et al., *Before the Final Frame: When Police Missteps Create Danger*, N.Y. Times (Oct. 30, 2021), https://www.nytimes.com/interactive/2021/10/30/video/police-traffic-stops-danger-video.html.

minutes, or even seconds leading to the violent encounter. Such a truncated analysis ignores this Court's repeated admonitions to evaluate reasonableness based on "the totality of the circumstances." *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8-9). That is because events immediately preceding the moment an officer pulls the trigger nececssarily bear on the reasonableness of that act.

Consider just a few examples of fatal police shootings of men and boys—two African American, and one Latino. In each case, an officer behaved in an arguably unreasonable manner, created a dangerous situation for himself, and used deadly force as a result—but ultimately was not held liable. Prosecutors in these cases determined that the officers feared for their lives at the moment of threat. Yet these cases exemplify how the moment of threat doctrine can lead to a different conclusion than the totality of the circumstances approach about swhether the force was justified.

Bradley Blackshire. A Little Rock, Arkansas police officer shot and killed Blackshire, an African American man, on February 22, 2019. At the "moment of threat," the officer was standing in front of Blackshire's vehicle as Blackshire drove forward.[3] Blackshire bumped the officer with his car, and the officer began to shoot. *Id.* Prosecutors determined that the officer was "confronted with the imminent threat of deadly force" when Blackshire drove toward

[3] Stein, *supra*, n.2.

him and ultimately bumped him, which justified the officer's decision to shoot.[4]

The totality of the circumstances tells a different story. Blackshire had driven into a parking lot.[5] The officer followed Blackshire, whose vehicle had been flagged as stolen by an automatic license plate reader, rendering him a "high-risk" suspect. *Id.* Violating protocol, the officer did not wait for backup; instead, he drove to within feet of Blackshire's vehicle and parked directly in front of it. *Id.* The officer then exited his cruiser, drew his gun, ran in front of Blackshire's vehicle, and positioned himself just outside Blackshire's window. *Id.* The officer commanded Blackshire to get out of the car but never explained why. *Id.* Blackshire did not comply, and began to drive slowly to his left, toward the officer. *Id.* Blackshire bumped the officer, who began to shoot while simultaneously stepping out of the path of the moving vehicle. *Id.* Still shooting, the officer stepped back into the path of the vehicle, which was still moving, jumped on its hood, and fired multiple additional rounds into the windshield, killing Blackshire. *Id.*

Tamir Rice. In what became national news, a Cleveland, Ohio police officer shot and killed Rice—an African American boy, just 12 years old—on November 22, 2014. At the "moment of threat," the officer was within feet of Rice, who the officer thought

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[4] Andrew DeMillo and Hannah Grabenstein, *Prosecutor: No Charges Against Arkansas Officer in Shooting*, Associated Press (Apr. 19, 2019), http://apnews.com/general-news-9ee7546d004f47018f521030ad7dce95.

[5] Stein, *supra*, n.2.

was armed. Rice reached into his waistband, and the officer shot him. Prosecutors determined that the officer "had a reason to fear for his life" given his proximity to a potentially armed suspect who was reaching into his waistband.[6]

Again, the totality of the circumstances paints a different picture. The officer and his partner were patrolling near a park.[7] Dispatch sent out a "Code 1"—a high-urgency situation. *Id.* The officer and his partner sped directly into the park. *Id.* They pulled up to within feet of Rice, which "made it difficult to take cover, or to use verbal persuasion or other tactics suggested by the department's use-of-force policy." *Id.* The officer opened his door and shot Rice within *two seconds* of arriving on scene—"raising doubts that he could have warned the boy ... to raise his hands, as the police later claimed." *Id.*

Anthoney Vega Cruz. A police officer shot and killed Vega Cruz, a Latino man, on April 20, 2019, in Wethersfield, Connecticut. At the "moment of threat," the officer was standing in front of Vega Cruz's vehicle as Vega Cruz drove forward.[8] The

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[6] Timothy Williams and Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. Times (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html.

[7] Shaila Dewan and Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. Times (Jan. 22, 2015), http://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html.

[8] Gail P. Hardy, *Report of the State's Attorney General for the Judicial District of Hartford Concerning the Use of Deadly Physical Force on April 20, 2019, by Wethersfield Police Resulting in the*

officer "feared for [his] life and knew that [he] had to stop the operator from running [him] over …" *Id.* So the officer shot Vega Cruz through the windshield. Prosecutors determined that the officer reasonably feared for his life in that moment, and justifiably used deadly force as a result. *Id.*

Here, too, the totality of the circumstances tells a different story. The officer's partner had pulled Vega Cruz over for having heavily tinted windows, and summoned the officer for backup. *Id.* The partner then exited his cruiser and walked towards Vega Cruz. *Id.* As the partner approached, Vega Cruz fled, and the officer and his partner pursued Vega Cruz in their respective cruisers. *Id.* Vega Cruz eventually spun out, and the officer's cruiser collided with Vega Cruz's car head-on. *Id.* The officer exited his cruiser, gun drawn, while Vega Cruz reversed and attempted to spin his car back around. *Id.* The officer chased after Vega Cruz on foot and caught him just as he was about to drive away, positioning himself directly in front of Vega Cruz. *Id.* Vega Cruz then began to drive forward. *Id.* The officer felt threatened, and shot Vega Cruz as a result. *Id.*

In each of these examples, whether the officer's use of force was reasonable could easily turn on how much of the encounter the factfinder considers. For Blackshire, the final frame suggests that the officer found himself within inches of a car that was moving towards him and had actually hit him; but going back just a few frames suggests that the officer failed to

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Death of Anthony Vega-Cruz (Mar. 3, 2020), http://portal.ct.gov/dcj/whats-news/reports-on-the-use-of-force-by-peace-officers/2019---april---anthony-vega-cruz---wethersfield.

wait for backup in a "high-risk" situation, drove to within feet of a "high-risk" suspect, deliberately stepped into the path of a moving vehicle, and jumped onto its hood. For Rice, the final frame suggests that the officer found himself within feet of a potentially armed individual reaching into his waistband; but considering even a few more seconds shows that the officer drove to within feet of a potentially armed individual, left the safety of his cruiser, and likely offered little or no warning before opening fire. And for Vega Cruz, the final frame suggests that the officer found himself within inches of a car that was speeding towards him; but the totality of the circumstances tells that the officer ran in front of the car of a fleeing suspect.

These cases demonstrate that the final frame is not the entire picture. To ensure that factfinders can most accurately discern the "truth," they must be able to consider not just the moment of force, but the events leading up to it.

B. The moment of threat doctrine disincentiviezes de-escalation tactics.

Officers' training can impact how they address potentially threatening situations. For example, officers who learn that they must be hypervigilant and always ready to battle [9] tend to escalate

[9] Some law enforcement training programs teach a "warrior-style" mindset. Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 Harv. L. Rev. F. 225, 227 (2015). At the 2021 Street Cop Training Conference, for example, one presenter encouraged officers to be "'more dangerous' than the situations they encountered." Robert Klemko, *Much of America Wants Po-*

encounters with civilians or overreact to perceived threats. *See* Bryan Borodkin, *Officer-Created Jeopardy and Reasonableness Reform: Rebuttable Presumption of Unreasonableness Within 42 U.S.C. § 1983 Police Use of Force Claims*, 55 U. Mich. J. L. Reform 919, 923 (2022) (officers' overreactions lead to "officer-created jeopardy"). Consider the officer who shot and killed Philando Castile, an African American man, in 2016. That officer attended an online training that encouraged officers to "be ready to kill" or else risk being killed.[10] During the officer's encounter with Castile, the officer put that training into practice: when Castile said during a traffic stop, "Sir, I have to tell you, I do have a firearm on me," the officer immediately put his hand on his own gun, and yelled: "Don't pull it out!"[11] Castile replied: "I'm not pulling it out." *Id.* Nevertheless, trained to kill or be killed, the officer leaned through Castile's window and fired seven shots. Five of those shots hit Castile, killing him within 20 minutes.

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licing to Change. But These Self-Proclaimed Experts Tell Officers They're Doing Just Fine, Wash. Post (Jan. 26, 2022), https://www.washingtonpost.com/national-security/2022/01/26/police-training-reform/. Another presenter likened officers to lions, civilians to jackals, and proclaimed: "Sometimes, every now and again, you've got to remind those jackals what you are." *Id.* Some trainings are even more explicit, instructing trainees to be "mentally prepared to react violently." Stoughton, *supra*, at 227 (quotation omitted).

[10] Tad Vezner, *Fiery Debate Over 'Warrior' Training for Officer in Philando Castile Shooting*, St. Paul Pioneer Press (July 14, 2016), http://www.twincities.com/2016/07/14/fiery-debate-over-warrior-training-for-officer-in-philando-castile-shooting/.

[11] *Philando Castile Death: Police Footage Released*, BBC (June 21, 2017), http://www.bbc.com/news/world-us-canada-40357355.

In contrast, some training programs encourage officers to "use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training … before resorting to force." *See* National Consensus Policy on Use of Force 3 (Jan. 2017); *see also* Tom Jackman and Dan Morse, *Police De-Escalation Training Gaining Renewed Clout as Law Enforcement Seeks to Reduce Killings*, Wash. Post (Oct. 27, 2020)[12] (encouraging officers to "create space, slow things down, ask open-ended questions and hold off reaching for their guns to avoid ramping up confrontation"). Take, for example, the City of Seattle. In 2015, Seattle rolled out an officer training program to school its officers in de-escalation tactics.[13] Just months later, Seattle officers put that training into practice. When a man walked down the street wielding a knife, the officers trailed behind him at a distance. *Id.* One officer said: "You gotta drop the knife, buddy." *Id.* When the man did not comply, the officers exited their cruiser and walked slowly towards the man, still maintaining distance. *Id.* Another officer said: "If you put the knife down and come over here and sit down, we can work something out." *Id.* The man ultimately complied—and no one resorted to violence. *Id.*

By permitting juries and courts to consider the circumstances leading up to an encounter, the totality

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[12] https://www.washingtonpost.com/local/deescalation-training-police/2020/10/27/3a345830-14a8-11eb-ad6f-36c93e6e94fb_story.html.

[13] Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-Escalate*, N.Y. Times (June 27, 2015), https:www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html.

of the circumstances doctrine provides a legal incentive for officers to avoid escalation—and to employ de-escalation techniques—in their civilian encounters. When factfinders are restricted to only the moment of violence, they can consider neither evidence that an officer overreacted to a perceived threat nor evidence of an officer's attempts to de-escalate before using force. The totality of circumstances approach, in contrast, permits the factfinder to understand the full context of the officers' actions and arrive at a fair determination of reasonableness.

C. The moment of threat doctrine especially harms African American communities.

Restricting courts' analysis to the precise moment an officer exercises force has a particularly devastating effect on African American communities. African Americans are more than three times as likely as their white peers to be killed by the police. *See* Gabriel L. Schwartz et al., *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, PLOS ONE, at 5 (June 24, 2020). That disparity is even greater in major cities—between January 2013 and December 2019, police departments in the nation's 100 largest cities killed four times as many unarmed African American civilians as unarmed white civilians. *See* Michalos, *supra*, at 1034 n. 12. African American men and boys are particularly vulnerable to fatal police violence. Statistical models predict that one in 1,000 African American men and boys will die from police violence—a higher likelihood than any other group. *See* Frank Edwards et al., *Risk*

of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex, 116 PNAS 16,793, 16,794 (2019).

Because African Americans are disproportionately affected by police violence, factfinders must frequently weigh in on whether the use of deadly force against African Americans is reasonable. It is therefore imperative, particularly for African Americans, that factfinders reach correct reasonableness determinations—informed by all relevant facts. Where factfinders are prohibited from reviewing the totality of the circumstances, they risk making incorrect reasonableness determinations that, in certain cases, may exonerate officers from their unreasonable use of force against African Americans and other civilians.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiori should be granted.

Respectfully submitted.

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