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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent does not even try to dispute that this case presents an important constitutional question that has divided twelve circuits. Nor does he dispute that this question was fully litigated and served as the sole basis for the Fifth Circuit's decision below. Respondent addresses none of the seven *amicus* briefs filed in support of Petitioner—by the Cato Institute, the Law Enforcement Action Partnership, the Center for Policing Equity, the Due Process Institute, Restore the Fourth, the National Urban League, the Texas Civil Rights Project, Color of Change, the Rutherford Institute, and former police officer turned leading Fourth Amendment academic Professor Seth Stoughton—or the important reasons why those *amici* ask this Court to grant certiorari.

Instead, Respondent attempts to manufacture vehicle problems where none exist. Respondent claims that because Officer Felix may have committed *other* Fourth Amendment violations when he brandished his weapon and jumped onto the rental car, this Court should not review whether Officer Felix violated Barnes's constitutional rights when he shot Barnes dead. That argument is a distraction. The core question in this case is whether Officer Felix violated the Fourth Amendment when he killed Barnes. Whether he may *also* have independently violated the Fourth Amendment at other points along the way is not before this Court. Indeed, this case is a clean vehicle precisely because it asks the Court to address a single constitutional question that is squarely presented, fully litigated, and outcome determinative, as Judge Higginbotham's concurrence

makes clear. *See* Pet. App. 10a-16a (Higginbotham, J., concurring).

Respondent also claims that this Court should deny certiorari because he might ultimately win under a totality of the circumstances test, and because he might be entitled to qualified immunity. *See* BIO 14-23. But neither of those questions was decided by either the District Court or the Fifth Circuit, and they are not before this Court. *See McLane Co.* v. *EEOC*, 581 U.S. 72, 85 (2017) (holding that this Court is one "of review, not of first view" (quotation marks omitted)). Judge Higginbotham's concurrence makes clear, moreover, that Officer Felix's actions *were* unreasonable under the totality of the circumstances. *See* Pet. App. 16a. And even if Officer Felix were entitled to qualified immunity (he's not), Harris County is also a defendant in this case and is not entitled to qualified immunity—meaning the Fourth Amendment question before this Court must still be resolved. The Court should thus grant certiorari to address that question and resolve the entrenched split.

The facts of this case, where a police officer shot and killed someone over a toll violation, when coupled with the longstanding and deep circuit split, call out for this Court's review.[1]

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[1] Harris County and Officer Felix were jointly represented by the County Attorney below and are still jointly represented in the *pro se* petition filed by Ashtian Barnes's father in No. 23-7541.

ARGUMENT

I. RESPONDENT DOES NOT CONTEST THE DEEP SPLIT.

The Courts of Appeals are fundamentally divided. *See* Pet. App. 13a-14a & n.13 (Higginbotham, J., concurring). The Fifth Circuit, "joined by the Second, Fourth, and Eighth Circuits," apply the moment of the threat doctrine. *Id*. at 13a. The remaining circuits—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits—do not. *Id*. at 13a-14a & n.13; *see also* Pet. 12-26 (discussing split). This Court's intervention is plainly warranted.

Respondent does not dispute this deep and acknowledged split. Instead, in a footnote (at 15 n.7), Respondent asserts that "[m]any of the cases" on Petitioner's side of the split "were decided prior to" *County of Los Angeles* v. *Mendez*, 581 U.S. 420 (2017), and *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600 (2015). But *Mendez* expressly declined to resolve the question presented here, *see* 581 U.S. at 429 n.*, and *Sheehan* resolved a qualified immunity issue, *see* 575 U.S. at 613. Respondents do not cite any court that has applied *Sheehan* or *Mendez* to revisit its

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With respect to this Petition only, Harris County has proceeded separately and did not file a brief in opposition. When faced with this circumstance in other cases, the Court has granted the petition without calling for another response, and it may do so here. *See, e.g.*, *Murr* v. *Wisconsin*, No. 15-214 (one respondent filed brief in opposition, the other waived, and the Court granted the petition); *Massachusetts* v. *EPA*, No. 05-1120 (one respondent waived, others filed briefs in opposition, and the Court granted the petition). If the Court grants the Petition, it should hold the *pro se* petition filed by Ashtian Barnes's father in No. 23-7541 pending the resolution of this Petition.

Fourth Amendment precedents with respect to the question presented here. To the contrary, courts have expressly held that the totality of the circumstances approach "remain[s] good law" after *Mendez*. *Pauly* v. *White*, 874 F.3d 1197, 1219 n.7 (10th Cir. 2017); *see also, e.g.*, *S.R. Nehad* v. *Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) (Ninth Circuit applying majority approach after *Mendez* and *Sheehan*). The fact that a twelve-circuit split persists *seven years after Mendez* demonstrates that this Court should grant certiorari.

II. THERE IS NO VEHICLE PROBLEM.

Respondent cannot contest the split, so he tries to manufacture a vehicle problem where none exists. Remarkably, he now claims that there may have been *multiple* violations of the Fourth Amendment during the traffic stop, including when Officer Felix brandished his weapon, when he jumped onto the rental car, and when he shot Barnes. Respondent asserts that because Petitioner raised on appeal the most serious of those violations—Officer Felix's killing shots just minutes into a traffic stop over unpaid toll violations—that somehow prevents this Court's review of the moment of the threat doctrine.

The opposite is true. This case presents a clean vehicle for the Court's consideration because the Petition involves a single Fourth Amendment seizure: Officer Felix's shooting of Barnes. And this Petition asks the Court to address a single legal question related to that seizure: Should federal courts apply the moment of the threat doctrine when analyzing the reasonableness of Officer Felix's actions, or should courts instead evaluate the totality of the circumstances? The answer to that question is outcome determinative, as Judge Higginbotham's

concurrence explains: "Here, given the rapid sequence of events and Officer Felix's role in drawing his weapon and jumping on the running board, the totality of the circumstances merits finding that Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force." Pet. App. 16a. But because the Fifth Circuit applied the moment of the threat doctrine, it reached the opposite conclusion. *Id*. at 10a. This Court can, and should, grant certiorari to address this important Fourth Amendment question, which is squarely presented.

Respondent's invocation of a vehicle problem makes little sense and appears to undermine his own position on the question presented. Respondent apparently concedes that the District Court was *permitted* to consider the "totality" of the circumstances when evaluating whether Officer Felix violated Barnes's Fourth Amendment rights by "jumping on the vehicle," BIO 11, but was *not* permitted to do so when considering whether Officer Felix violated Barnes's Fourth Amendment rights by shooting him a heartbeat later. Respondent does not explain why a court *must ignore* the totality of the circumstances when an officer uses deadly force, but *may consider* those circumstances for any other Fourth Amendment claim.

And in any event, Respondent argued the exact opposite below. In the District Court, Respondent argued that under the moment of the threat doctrine, the *only* Fourth Amendment violation the District Court was permitted to consider was the moment Officer Felix killed Barnes. D. Ct. Dkt. 67, at 1 (arguing that the District Court was not permitted to "parse and analyze the deadly force encounter by"

considering Officer Felix's actions "prior to the actual threat"). Respondent can hardly complain that Petitioner chose to litigate that question to the Fifth Circuit and now this Court.

Respondent also attempts to evade review by claiming that he may prevail down the line under the totality of the circumstances standard. *See* BIO 15-20. But that question was not addressed by either the District Court or the Fifth Circuit majority decision, because binding Fifth Circuit precedent forbade both courts from evaluating it. *See* Pet. App. 7a-8a (Fifth Circuit), 23-25a (District Court). This Court thus need not address whether Officer Felix's actions were reasonable under the circumstances in order to resolve the question presented. *See McLane*, 581 U.S. at 85; *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 56 (2015). And in any event, as Judge Higginbotham's concurrence makes clear, Officer Felix's actions were plainly unreasonable when he chose to jump onto a moving vehicle, shoot, and kill a motorist over someone else's unpaid toll violations on a rental car. *See* Pet. App. 16a (Higginbotham, J., concurring).

Respondent's contention that his actions were reasonable rests on breezily equating Officer Felix's decision to *unholster* his firearm with his decision to *kill* Barnes. But even if Officer Felix reasonably brandished his weapon, that does not mean (as Respondent claims) that "his decision to use that weapon" "must also be constitutionally reasonable." BIO 2. It should go without saying, but we say it anyway: There is a massive constitutional difference between unholstering a pistol and shooting someone. *See Tennessee* v. *Garner*, 471 U.S. 1, 9 (1985). Officer

Felix's decision to shoot and kill Barnes over a toll violation was unreasonable.

Finally, the Brief in Opposition seeks to forestall review on the theory that Officer Felix is entitled to qualified immunity. But neither the District Court nor the Fifth Circuit passed on that question, nor is it encompassed within the question presented. Indeed, the Court should grant certiorari in this case precisely *because* the Fifth Circuit ruled solely on Fourth Amendment grounds, creating a clean vehicle to review a purely constitutional question that has so far escaped the Court's attention despite a twelve-circuit split. In *National Rifle Association* v. *Vullo*, 602 U.S. 175 (2024), the Court recently granted certiorari to resolve a First Amendment question, even though the Court of Appeals had held that the respondent was entitled to qualified immunity, a ruling the petitioner had also asked this Court to review. After granting certiorari only on the merits, and not the qualified immunity question, the Court reversed on the merits and remanded for further proceedings on qualified immunity. *See id.* at 186 n.3, 199 & n.7. The Court can follow a similar path here.

Moreover, even if Officer Felix were somehow entitled to qualified immunity despite his obviously unreasonable actions,[2] Petitioner has also brought suit against the County, *see* Pet. 32 n.6; Pet. App. 9a, which is not entitled to qualified immunity, *see*

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[2] Petitioner vigorously contests Respondent's claim to qualified immunity under the facts of this case and preserves all arguments regarding qualified immunity. *See also* BIO 20-21 (conceding that Officer Felix is not entitled to qualified immunity if his use of force was obviously unreasonable).

Leatherman v. *Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 166 (1993). The Fourth Amendment question in this case thus must be resolved regardless of whether Officer Felix has qualified immunity.

III. RESPONDENT CANNOT DEFEND THE MOMENT OF THE THREAT DOCTRINE.

1. The moment of the threat doctrine conflicts with this Court's precedent and produces deeply unjust outcomes. The Court's landmark decision in *Graham* held that "*all* claims that law enforcement officers have used excessive force—deadly or not—" "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989).

To determine "whether the force used to effect a particular seizure is 'reasonable,' " this Court has instructed the lower federal courts to consider "the totality of the circumstances." *Id*. at 396 (quotation marks omitted); *see also, e.g.*, *Mendez*, 581 U.S. at 427-428; *Plumhoff* v. *Rickard*, 572 U.S. 765, 774 (2014). Those circumstances include factors such as "the severity of the crime at issue," *Graham*, 490 U.S. at 396; any "warning[s]" an officer gave before deploying force, *Garner*, 471 U.S. at 12; and whether an officer sought "to temper or to limit the amount of force," *Lombardo* v. *City of St. Louis*, 594 U.S. 464, 467 (2021) (per curiam) (quotation marks omitted).

The four circuits that apply the moment of the threat doctrine ignore those factors—and anything else that occurs prior to the moment of threat. This approach "starves the reasonableness analysis" of critical facts. Pet. App. 15a (Higginbotham, J.,

concurring). Thus, in this case, the Fifth Circuit considered only "the two seconds before Barnes was shot." *Id*. at 8a (majority op.). As a result, the Fifth Circuit reached the bizarre conclusion that Officer Felix acted *reasonably* when he "stepped on the running board of the car and shot Barnes within two seconds, lest he get away with driving his girlfriend's rental car with an outstanding toll fee." Pet. App. 16a (Higginbotham, J., concurring).

As *amici* confirm, it is past time for this Court to correct this terrible injustice, which has been repeated many times in other cases applying the moment of the threat doctrine—and which will continue until this Court intervenes. In addition to contravening *Graham* and its progeny, the moment of the threat doctrine conflicts with the original meaning of the Fourth Amendment, *see* Cato Institute et al. Amicus Br. 3-9, "lessens the Fourth Amendment's protection of the American public," and "devalues human life," Pet. App. 10a (Higginbotham, J., concurring), with the heaviest costs falling on minority communities and individuals with mental health issues, *see* National Urban League Amicus Br. 19-20; Color of Change Amicus Br. 7-9; Texas Civil Rights Project Amicus Br. 8-17.

The moment of the threat doctrine harms police officers, too. As the leading scholar—himself a former officer—explains, a full analysis of the totality of the circumstances is "just as likely to exonerate" "the officer's decision-making as impugn it." Professor Seth W. Stoughton Amicus Br. 16. In contrast, the moment of the threat doctrine penalizes "officers who act reasonably based on facts that occur outside the moment of threat," because it prohibits courts from

considering critical pre-seizure facts. Rutherford Institute Amicus Br. 16. "In this case," the moment of the threat "doctrine favored a law enforcement officer acting unreasonably. In other instances, reasonable law enforcement activities may be disfavored." *Id*. at 19; *see* Pet. 31-32 (arguing same). The Court should grant this Petition not just to vindicate Ashtian Barnes's constitutional rights, but also to protect police officers who act reasonably based on the totality of the circumstances.

2. Against this wealth of precedent and the compelling concerns raised by *amici*, Respondent offers little to support the moment of the threat doctrine. Respondent says (at 25-26) that *Mendez* supports their position, but *Mendez* expressly declined to address the question presented. *See* 581 U.S. at 429 n.*. And if anything, *Mendez*'s logic supports Petitioner: Justice Alito's opinion emphasized that an officer—like any other tortfeasor—should bear responsibility for the "foreseeable" consequences of his actions. *Id*. at 430. That means Officer Felix should bear responsibility for jumping onto a moving vehicle and then shooting the driver a heartbeat later, all to collect revenue for toll violations incurred by someone else. Pet. 28.

Respondent's invocation (at 27-28) of *City of Tahlequah* v. *Bond*, 595 U.S. 9, 12 (2021) (per curiam), is puzzling. Like *Mendez*, *Bond* declined to decide "whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment." *Bond*, 595 U.S. at 12. *Bond* thus confirms the need to grant the Petition: The

question presented reoccurs in case after case, including before this Court.

Respondent cites (at 28-31) decisions from this Court "involving fleeing suspects and high speed chases," which Respondent claims support the moment of the threat doctrine. But those cases rebound on Respondent. The Court's high-speed chase decisions *refute* that doctrine. As the Due Process Institute's *amicus* brief explains, "[b]ecause pursuit can span many minutes and miles before seizure of the suspect by terminating the chase, this Court typically analyzes events prior to the 'moment of the threat' " in such cases. Due Process Institute et al. Amicus Br. 10.

In short, the moment of the threat doctrine has no basis in constitutional text, history, or precedent. Applying it in this case led to a palpable injustice: Petitioner Janice Hughes Barnes did not deserve to lose her only son in a senseless shooting, only to find the doors to federal court shut tight against her claim that Officer Felix violated her son's fundamental rights. This Court should grant the Petition and vindicate the Fourth Amendment.

CONCLUSION

For the forgoing reasons, and those in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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AUGUST 2024