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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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November 19, 2024

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party wrote this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

By applying the moment-of-threat doctrine and considering only facts immediately preceding a law enforcement officer's use of deadly force, the decision below contravenes this Court's clear mandate to consider the totality of the circumstances to evaluate the reasonableness of a seizure under the Fourth Amendment. Indeed, eight courts of appeals have rejected the moment-of-threat doctrine, recognizing that trial courts must consider all relevant facts and circumstances, including the officer's actions preceding the use of force. That approach is consistent with this Court's jurisprudence, as well as reciprocal analysis principles that are fundamental to our adversarial legal system. It is also a neutral test that favors neither law enforcement nor citizens suspected of crimes.

The decision below exemplifies the unjust outcomes that result from applying the moment-of-threat doctrine. During a brief, uneventful traffic stop for toll violations, Ashtian Barnes turned his vehicle back on. Up to that point, Mr. Barnes had not given the police officer any reason to suspect that he posed a threat. Nevertheless, the officer jumped onto the door sill of the running vehicle, shouted, and shoved his gun into Mr. Barnes's head, at which point the car started to move. Within two seconds, the officer then shot Mr. Barnes. In eight circuits, courts would evaluate all the facts bearing on the officer's conduct and determine that the seizure-by-deadly-force was not reasonable. But in four circuits, including the Fifth Circuit below, courts blind themselves to the

facts and consider only the moment immediately preceding the officer's use of deadly force. In those circuits, the officer's use of deadly force was reasonable and Mr. Barnes's Fourth Amendment rights were not violated.

As petitioner argues persuasively, the decision below illustrates the moment-of-threat doctrine's inherent shortcomings. The Court should reverse the Fifth Circuit's decision and confirm that courts must evaluate the totality of the circumstances when analyzing the reasonableness of a seizure-by-deadly-force.

ARGUMENT

I. The Moment-Of-Threat Doctrine Defies This Court's Command To Apply A Totality-Of-The-Circumstances Test When Assessing A Seizure's Reasonableness.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Many forms of police restraints constitute seizures under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (a seizure occurs whenever an officer "accosts an individual and restrains his freedom to walk away"). This Court has long recognized that "there can be no question that apprehension by the use of deadly force is a seizure." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

In assessing the reasonableness of a Fourth Amendment seizure, courts must consider the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Notwithstanding this clear mandate, four

courts of appeals—including the Fifth Circuit below—disregard the totality of the circumstances when analyzing seizures involving police use of deadly force. Instead, they apply the so-called moment-of-threat doctrine, a judicial construct divorced from this Court's precedent that forces courts to blind themselves to relevant facts and consider only "the act that led the officers to discharge their weapons." *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020).[2]

In this case, police stopped Ashtian Barnes for driving a rental car with outstanding toll tag violations. *See* Pet.App.2a. Mr. Barnes pulled over and shut off his car. *Id.* at 3a. After a short, uneventful exchange with Officer Roberto Felix, Jr., Mr. Barnes turned the car back on. *Id.* Not content to let Mr. Barnes go, Officer Felix stepped onto the door sill of the running vehicle, shouted, and shoved his gun into Mr. Barnes's head. At that point, the car started to move, and, within two seconds, Officer Felix shot Mr. Barnes. *Id.* at 3a–4a.

Mr. Barnes's parents sued Officer Felix and Harris County, Texas, under 42 U.S.C. § 1983, alleging that Officer Felix's use of deadly force was an unconstitutional seizure under the Fourth Amendment. *Id*. at 4a–5a. The District Court held that the seizure-by-deadly-force was reasonable because Mr. Barnes "posed a threat of serious harm" to the officer when his car began to move. *Id.* at 6a. The Court of Appeals applied the moment-of-threat

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[2] *See also Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (adopting the moment-of-threat doctrine); *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) (same); *Gardner v. Buerger*, 82 F.3d 248, 252 (8th Cir. 1996) (same).

doctrine and affirmed because *at the moment immediately before he shot Mr. Barnes in the head*, Officer Felix reasonably feared for his life. *Id.* at 8a.

One might wonder how the Court of Appeals could reach that conclusion given that Officer Felix stopped Mr. Barnes for outstanding toll violations, *id.* at 2a, Mr. Barnes made no threats and posed no immediate danger to Officer Felix at any point during the traffic stop, *see id.* at 16a (Higginbotham, J., concurring), and any potential threat to Officer Felix arose only after he chose to step onto the door sill of a running vehicle, *id.* But the moment-of-threat doctrine compelled that conclusion. Constrained by this unconstitutional judge-made rule to consider only the exact moment before Officer Felix pulled the trigger, the lower court concluded that Officer Felix acted within his constitutional authority when he shot Mr. Barnes to prevent him from fleeing the scene of a benign traffic stop related to a few dollars in unpaid tolls. *Id.* (finding that Officer Felix acted reasonably despite the totality of the circumstances revealing that "the use of lethal force against this unarmed man preceded any real threat to Officer Felix's safety").

This Court should reverse the Fifth Circuit's decision because it is inconsistent with this Court's jurisprudence regarding police use of force, as well as broader principles of our adversarial legal system.

A. The Moment-of-Threat Doctrine Is Inconsistent With This Court's Fourth Amendment Jurisprudence.

The touchstone of Fourth Amendment analysis is reasonableness. In assessing reasonableness, this Court has instructed that "the question [is] whether the totality of the circumstances justified a particular sort of . . . seizure." *Garner*, 471 U.S. at 8–9. Applying a reasonableness analysis in the context of a police seizure "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." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Accordingly, when assessing an unconstitutional seizure claim for excessive use of force, courts must consider all facts and circumstances relevant to the seizure.

In less-than-deadly-force cases, the Second, Fourth, Fifth, and Eighth Circuits correctly apply the totality-of-the-circumstances approach that *Graham* requires.[3] But when these same courts assess the reasonableness of seizures-by-deadly-force, they

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[3] *See, e.g., Rogoz v. City of Hartford*, 796 F.3d 236, 246–48 (2d Cir. 2015) (applying a *Graham* totality-of-the-circumstances analysis where an officer jumped on the back of a prone arrestee, fracturing his spine and a rib); *Hupp v. Cook*, 931 F.3d 307, 321–23 (4th Cir. 2019) (same where officer "grabb[ed] and thr[ew]" an unarmed woman to the ground); *Pena v. City of Rio Grande City*, 816 F. App'x 966, 969–74 (5th Cir. 2020) (same where officer used a stun gun on a fleeing woman); *Schoettle v. Jefferson Cnty.*, 788 F.3d 855, 859 (8th Cir. 2015) (same where officer pepper sprayed, struck, and pulled a man from a truck).

discard the totality of the circumstances in favor of a myopic view of only the exact moment before an officer deploys lethal force. *Amador*, 961 F.3d at 728 (considering only "the act that led the officers to discharge their weapons"). And district courts in these circuits are prohibited from considering "any of the officers' actions leading up to" the use of force, even if the officers created the circumstances that produced the moment of threat motivating their use of deadly force. *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014). In doing so, these courts diverge from this Court's precedent, arbitrarily delineate the moment of threat—usually beginning only a few seconds before the use of force—and disregard all other relevant facts. Pet.App.12a–13a (Higginbotham, J., concurring). This practice dictated the unjust outcome below.

In contrast, the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits correctly recognize that "totality of the circumstances" means what it says. These circuits consider all aspects of the seizure to determine whether police used unreasonably excessive force. In rejecting the moment-of-threat approach, they draw not only on *Garner* and *Graham* but also this Court's example in *Brower v. County of Inyo*, 489 U.S. 593 (1989).

Brower began as a high-speed pursuit. *Id.* at 594. Police, trying to stop a man in a stolen car, constructed a roadblock across both lanes of a highway. *Id.* at 594, 598. The fleeing driver crashed into the roadblock and died. *Id.* at 594. His heirs sued, alleging an unconstitutional seizure. *Id.* This Court concluded a seizure occurred and instructed the district court to

analyze the allegation that police "set[] up the roadblock in such manner as to be likely to kill" the fleeing driver (including by using headlights to blind him) to determine whether the seizure was reasonable. *Id.* at 599.

Most circuit courts draw this inescapable conclusion from *Brower*: the district court on remand would have to look beyond the mere seconds that make up the moment of threat to determine if the seizure was reasonable. *E.g.*, *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995). Otherwise, as one court explained, "remand . . . would have been pointless." *Abraham*, 183 F.3d at 292. Indeed, police "preseizure planning and conduct"—*i.e.*, constructing the roadblock minutes before the seizure—was "the only basis for saying the seizure was unreasonable." *Id.*

There is no other sensible reading of *Brower*. The Fifth Circuit's decision below reveals how moment-of-threat jurisprudence provides no "principled way of explaining when 'pre-seizure' events start and, consequently, [no] defensible justification for why conduct prior to that chosen moment should be excluded." *Abraham*, 183 F.3d at 291–92. By arbitrarily constricting its analysis to a mere moment in time and refusing to consider key facts, the Fifth Circuit—and other circuits that apply the moment-of-threat doctrine—ignored this Court's instructions in *Garner*, *Graham*, and *Brower* to analyze all relevant circumstances, including police conduct leading up to the use of force.

B. Totality-of-the-Circumstances Analyses Are Common In This Court's Jurisprudence.

This Court's criminal procedure jurisprudence consistently instructs courts to consider the totality of the circumstances. In the Fourth Amendment context, this holistic analysis "traditionally has guided probable cause determinations" when a magistrate evaluates an affidavit for the purposes of issuing a search warrant. *Gates*, 462 U.S. at 233. When performing a probable cause determination, judges undertake "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* at 234. This "flexible, easily applied standard . . . better achieve[s] the accommodation of public and private interests that the Fourth Amendment requires" than more restrictive approaches. *Id.* at 239.

This Court has instructed courts to consider the totality of the circumstances in other probable cause determinations, such as when police use a drug-detection dog to sniff out illicit substances. In *Florida v. Harris*, this Court instructed courts to examine "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." 568 U.S. 237, 248 (2013). The Court unanimously "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id.* at 244.

The same sort of reasoning informed this Court's analysis in *Terry v. Ohio*. 392 U.S. at 30. There, the Court held that an officer may stop a person if the officer has a reasonable suspicion that the person committed a crime. The officer may then search that person if there is reasonable suspicion that the person poses a danger to the officer or others.

The officer in *Terry* watched two men for about ten minutes and suspected they were likely "casing a job" and carrying a gun. *Id.* at 7. The Court found the officer's subsequent seizure reasonable even though, in the moments immediately preceding the stop, the men were merely wandering down a street and looking in a store window. *See id.* at 6–7, 30. It was the *cumulative* nature of their actions that created reasonable suspicion for the officer to act.

The Fifth Circuit itself has recognized in the *Terry* context that events preceding a seizure are relevant. For example, in *United States v. Rodriguez*, the Fifth Circuit considered information that undoubtedly spanned more than a moment. 33 F.4th 807 (5th Cir. 2022).[4] The court's analysis included: a car's passenger and driver moving in their seats in apparent response to police; removing a jacket; pulling into an apartment complex associated with gang activity; hesitation before stopping; and opening of car doors as officers approached. *Id.* at 813. The court concluded that this evidence was sufficient to support reasonable suspicion and render a subsequent search reasonable. *Id.* at 813–14.

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[4] *See also United States v. Brown*, 209 F. App'x 450, 453 (5th Cir. 2006); *United States v. Watson*, 953 F.2d 895, 897 (5th Cir. 1992).

Totality-of-the-circumstances analyses exist beyond the Fourth Amendment context, as well. To take one example, this Court has instructed that "courts must examine 'all of the circumstances surrounding [an] interrogation'" to determine whether a person is in custody for *Miranda* purposes under the Fifth Amendment. *Howes v. Fields*, 565 U.S. 499, 509 (2012) (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)). The Court listed five relevant, non-exhaustive factors to consider—"the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Id.* (cleaned up). These factors invite courts to consider not a single moment, but the entire set of facts and circumstances relevant to police conduct.

At bottom, this Court's criminal procedure jurisprudence directs courts to consider the full range of relevant facts when assessing the constitutionality of law enforcement conduct. The moment-of-threat doctrine is impossible to square with that jurisprudence. It is a "rigid rule" that artificially and unnecessarily blinds courts to critical context inherent in every police encounter.

C. Disregarding Circumstances Preceding An Officer's Use Of Deadly Force Diverges From The Reciprocal Analysis Applied Across Areas Of Law.

Fundamental to our adversarial legal system is reciprocal analysis. Where a party's conduct bears on the matter disputed before the court, it is to be considered.[5] This principle ensures complete and considered adjudication of legal disputes and supports doctrinal acknowledgement of police-created exigencies, officer-created dangers, unclean hands, and comparative (or contributory) negligence. To arbitrarily ignore a party's actions—as the moment-of-threat doctrine requires—is to rig the game, undermining the credibility of the courts and the legitimacy of law enforcement, and thereby eroding the consent of the governed.

In other areas of its Fourth Amendment jurisprudence, this Court has similarly demonstrated the need for reciprocal analysis of the parties' conduct. In *Kentucky v. King*, the Court explained that police-created exigencies do not fall within the exigent-circumstances exception to the warrant requirement. 563 U.S. 452, 462 (2011). For law enforcement to access a dwelling without a warrant based on potential destruction of evidence, officers must not have "create[d] the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Id.*

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[5] *See, e.g.*, FED. R. CIV. P. 13(a)(1)(A) (requiring joinder of claims that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim").

The Court's reasoning demarcates the power of the judiciary in its approach to Fourth Amendment analysis. It is inappropriate for the judiciary to design doctrines that would overtake the executive's responsibility to determine appropriate and effective police procedure. *Id.* at 467–68. But this limitation is counterbalanced by an interest in ensuring "evenhanded law enforcement." *Id.* at 464 (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)). The boundary between this dichotomy is marked—and the resolution of an apparent tension is resolved—by a reasonableness analysis that prohibits interference with "*legitimate* law enforcement strategies." *See King*, 563 U.S. at 466 (emphasis added). Thus, where officers without a warrant "do no more than any private citizen might do," they act reasonably and are not to blame for any exigency that may arise. *Id.* at 469, 472. But if officers exceed the legitimate limits of their power, they could not then call on the response to their misdeed as an *ex post* justification cognizable under the Fourth Amendment. Thus, although there are certain limitations on the court imposed by separation of powers, it is still very much within the court's responsibility to conduct reciprocal analysis.

Similarly, the equitable doctrine of unclean hands ensures that courts do not deliberately disregard conduct relevant to the dispute before them. This "rule of public policy," *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 522 (Del. Ch. 1998) (cleaned up), applies when "an individual's misconduct has 'immediate and necessary relation to the equity that he seeks,'" *Henderson v. United States*, 575 U.S. 622, 625 n.1 (2015) (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933)). Thus, for instance,

when petitioned for the return of otherwise innocent materials, a court should consider whether the petitioner was a bombmaker attempting to access tainted tools. *United States v. Kaczynski*, 551 F.3d 1120, 1129–30 (9th Cir. 2009). The doctrine of unclean hands is an assurance that a court will inquire into the relevant conduct of all the parties before it.

Reciprocal analysis also appears in tort doctrines. Traditionally, contributory negligence served as a complete bar to a plaintiff's action sounding in negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 166 (2007). Recently, the rule has relaxed in favor of comparative negligence, which provides for a reduction in damages proportional to a plaintiff's responsibility. Dan B. Dobbs *et al.*, *The Law of Torts*, § 218 (2d ed. 2023). Importantly, both the modern and traditional regime require that courts analyze all parties' relevant conduct.

This Court has recently alluded to the same necessity in the First Amendment context. In *National Rifle Association of America v. Vullo*, the petitioner alleged that a government regulator attempted to coerce insurers into dissociating from it to punish or suppress its views. 602 U.S. 175, 185 (2024). The NRA alleged that the regulator informed an insurer of regulatory violations but said she would be disinclined to bring an enforcement action—on apparently unrelated infractions—if the insurer dissociated from the NRA. *Id.* at 180–181. In finding a First Amendment violation, this Court held that "[o]ther allegations, viewed in context, reinforce" the claim. *Id.* at 193. The lower court had found for respondent only by "taking the allegations in isolation

and failing to draw reasonable inferences" in favor of petitioner. *Id.* at 194. The circuit's reasoning included a failure to analyze certain government actions "against the backdrop of other allegations in the complaint." *Id.* at 195. Ultimately, the lower court erroneously focused on doctrinal "guideposts" rather than the "'critical' question" at the heart of the case. *Id.* at 199 (Gorsuch, J., concurring) (citation omitted).

That this concept appears across legal doctrines is unsurprising because it simply expresses the principle that—in deciding a controversy—courts must consider the conduct of the parties to the controversy. Ignoring this well-settled and broadly applied principle, several circuits apply the moment-of-threat doctrine. Here, the court below removed from consideration Officer Felix's decisions to (1) stop Mr. Barnes for unpaid tolls; (2) draw his firearm in response to no apparent threat; and (3) mount Mr. Barnes's running vehicle. It instead determined reasonableness with a "moment" in time and effectively discarded the conduct of one party to the controversy. The moment-of-threat doctrine thus insulates unreasonable behavior by intentional judicial ignorance.[6] Continued application of this

[6] By evaluating the conduct of parties to the controversy in the seizure-by-deadly-force context, courts properly consider and respect the dignity of both the law enforcement officer and the citizen suspected of committing a crime. *See* Christopher J. Merken & Barnett J. Harris, *Damn the Torpedoes! An Unprincipled, Incorrect, and Lonely Approach to Compassionate Release*, 44 CARDOZO L. REV. 477, 518 (2022) ("We trust judges to uphold . . . values and ideals" including "mercy, forgiveness, redemption, [and] dignity.") (cleaned up). By contrast, courts that blind themselves to the facts preceding an officer's use of deadly force fail to respect the dignity of the decedent.

doctrine could embolden law enforcement officers to act recklessly and create unnecessary risks to their own safety, and the safety of the general public, in response to minor violations. Such effective immunity for lawlessness "breeds contempt for law"; "invites every man to become a law unto himself"; and "invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), overruled by *Berger v. State of N.Y.*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967).

II. The Moment-of-Threat Doctrine's Requirement To Ignore Important Context Prejudices Both Law Enforcement And Criminal Suspects.

Applying the moment-of-threat doctrine not only harms people subject to unreasonable uses of force; it can also harm officers who act reasonably based on facts that occur outside the moment of threat. In other words, the doctrine's limitation on courts' consideration of probative facts cuts both for and against law enforcement. And it always undermines a court's ability to accurately evaluate reasonableness.

Consider the following hypothetical: A police officer patrols a public park at night. From a distance, he sees a man point a gun at a woman before shoving her to the ground and running away. The officer goes to check on the woman and then looks for the man. The officer finds him several minutes later standing in a dimly lit area. The parties dispute what happens next, and there are no witnesses or security camera footage to verify what occurred. Ultimately, the officer shoots the man, paralyzing him. Is the fact that the

man brandished a gun and shoved a woman relevant to the officer's assessment of danger?

Of course. But a court applying the moment-of-threat doctrine might disagree. The opinion below states the "'moment of threat' test means that 'the focus of the inquiry should be on the act that led the officer to discharge his weapon.'" Pet.App.8a (quoting *Amador*, 961 F.3d at 728). Thus, the court defined the relevant "moment" as just the "two seconds before Barnes was shot." *Id.* The court further noted that "'[a]ny of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry[.]'" *Id.* (quoting *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014)). Applied to the above hypothetical, the moment-of-threat doctrine would require a court to ignore that the suspect had pointed a gun at a woman and shoved her to the ground, limiting its analysis only to the seconds immediately preceding the officer's use of deadly force.

This extreme view leaves courts with little room to consider important facts relevant to evaluating the reasonableness of police use of force. For example, in *Manis v. Lawson*, the Fifth Circuit considered whether police acted reasonably in shooting a man when he reached under his car seat. 585 F.3d 839, 845 (5th Cir. 2009). There, the Fifth Circuit refused to consider pre-shooting conduct, and thus disregarded assertions that police did not believe Mr. Manis had a weapon. *Id.* The court further disregarded testimony relating to an officer's claim that Mr. Manis cursed out officers, refused to comply with police orders, and acted erratically. *Id.* The court reasoned that "the *only* fact material to whether [the officer] was justified in using

deadly force [was] that [the suspect] reached under the seat of his vehicle and then moved as if he had obtained the object he sought." *Id.*[7] In other words, it did not matter if pre-shooting evidence demonstrated that officers knew there was no threat because, in evaluating the reasonableness of the police use of force, the court could consider only Mr. Manis's movements moments before the shooting. *Id.*

This artificially narrow view of the facts can cut both ways; indeed, the moment-of-threat test will not always favor law enforcement officers, even if they act reasonably under the totality of the circumstances. Take *Banks v. Hawkins*, where the Eighth Circuit applied its version of the moment-of-threat doctrine to reject a police officer's summary-judgment motion. 999 F.3d 521, 523 (8th Cir. 2021). In *Banks*, the officer was dispatched to a domestic abuse call, heard a woman screaming "no, no, no," followed by several loud noises, and was hit over the head when he entered the house. *Id.* at 523–24. Although the district court held that there were factual disputes, the Eighth Circuit concluded that it must "evaluate the reasonableness of [the officer]'s conduct by looking primarily at the threat present *at the time* he deployed the deadly force." *Id.* at 525–26. What was important was "'the seizure itself—here, the shooting—and not [] the events leading up to it.'" *Id.* (quoting *Gardner v. Buerger*, 82 F.3d 248, 253 (8th Cir. 1996)).

[7] There was no weapon in the car. *Id.* at 842.

Returning to the above hypothetical, if a court were to consider only the "act that led the officer to discharge his weapon," the court would not consider that the officer saw the suspect point a gun at a woman and shove her several minutes before the use of force. Instead, the court would consider only what happened in the few seconds before the use of force, ignoring critical evidence that would support a subsequent use of deadly force. Without clear evidence justifying the use of force in those moments immediately preceding the use of force, the moment-of-threat doctrine may not shield the officer from liability.[8]

By contrast, *Graham*'s totality-of-the-circumstances test protects officers who act reasonably based on facts beyond the immediate moment of the threat.[9] Numerous examples bear this out.

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[8] As a matter of fact, the Tenth Circuit addressed a scenario like this hypothetical in *In Estate of Taylor v. Salt Lake City*, 16 F.4th 744 (10th Cir. 2021). In that case, police officers shot a man after he ignored their commands, walked away from them with his hands near his waistband, verbally challenged the officers, then lifted his shirt and began removing one of his hands from his waistband as if drawing a gun. *Id.* at 747. Instead of considering only the facts immediately preceding the officers' use of deadly force, the court considered the totality of the circumstances, including the fact that police stopped the suspect because he (or one of his companions) matched the description of a man who had flashed a gun earlier that night. *Id.* at 771–777.

[9] Fourth Amendment jurisprudence in other contexts recognizes the necessity of considering the totality of the circumstances. In *Terry* cases, for example, federal courts often look to strings of events, each of which alone would be insufficient to justify an

In *Plumhoff v. Rickard*, this Court focused on one of the *Graham* factors—attempted flight—when examining officer use of deadly force. 572 U.S. 765. The decedent led police on a high-speed chase; when the officers caught up to him, he tried to speed away, and officers fired shots into his car. *Id.* at 768–70. The Court concluded that, given the suspect's previous actions, his "flight posed a grave public safety risk" and therefore officers "acted reasonably in using deadly force to end that risk." *Id.* at 777.

The Ninth Circuit recently considered a similar scenario where police officers shot and killed a criminal suspect in his car, which the officers had boxed in using their own vehicles. *Williams v. City of Sparks*, 112 F.4th 635, 640–42 (9th Cir. 2024). In holding that the officers' use of force was justified, the court considered facts well beyond the moment of the threat—including that the suspect had led officers on a forty-two-minute high-speed chase. *Id.* at 645.

Likewise, in *Thomson v. Salt Lake County*, the Tenth Circuit applied its totality-of-the-circumstances test to evaluate a police officer's use of deadly force. 584 F.3d 1304 (10th Cir. 2009). Although the decedent was not threatening others when police used force

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officer's reasonable suspicion of danger but together are sufficient. For example, in *Terry*, the Court considered an officer's observations of suspects over a long period of time to determine that the officer had a reasonable suspicion of danger sufficient for a search. 392 U.S. at 12; *see also Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (considering observations made by an officer from the moment he began tailing the suspect's car to find that the officer had a reasonable suspicion of danger); *United States v. Rodriguez*, 33 F.4th 807, 813 (5th Cir. 2022) (finding the same).

against him, he had a history of making violent threats. *Id.* at 1323. The Tenth Circuit concluded this tapestry of threats was relevant in evaluating police officers' use of force in a certain circumstance. *Id.*; *see also, e.g.*, *In re Estate of Bleck ex rel. Churchill*, 643 F. App'x 754, 756 (10th Cir. 2016) (Gorsuch, J.) (officers' use of force was reasonable based on facts known to the officers well before the moment immediately preceding the use of force, even though facts in that moment, standing alone, may not have supported the use of force); *Bannon v. Godin*, 99 F.4th 63, 79 (1st Cir. 2024) (officers reasonably used deadly force on a suspect who "posed an immediate threat both to the officers and to the public both before and at the time of" the shooting, which occurred after a lengthy, high-speed chase with many crashes on busy urban streets), *cert. docketed*, No. 24-287 (U.S. Sept. 12, 2024); *Smith v. Agdeppa*, 81 F.4th 994, 1004 (9th Cir. 2023), cert. denied, No. 24-15, 2024 WL 4427164 (U.S. Oct. 7, 2024) (officer acted reasonably in using deadly force on a man who had been engaged in a lengthy struggle with two officers in a small space "after the use of non-lethal force had proven ineffective, and only after the assault continued to intensify").

The moment-of-threat doctrine weakens a court's ability to consider facts probative of reasonableness. In this case, the doctrine favored a law enforcement officer acting unreasonably. In other instances, reasonable law enforcement activities may be disfavored. Regardless, the doctrine consistently prevents courts from appropriately analyzing Fourth Amendment reasonableness.

CONCLUSION

For the foregoing reasons, as well as those set forth by Petitioner, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 19, 2024