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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about more than the Fourth Amendment: it is also about the Fourteenth Amendment, which responded to an epidemic of police abuse in the post–Civil War South by extending constitutional safeguards against unreasonable seizures to the actions of state and local officers. Stemming unwarranted police violence was, in other words, a key factor in the adoption of the Fourteenth Amendment.

This case is also about whether the Fourth Amendment will continue to offer the same degree of security it afforded at the Founding in a nation transformed by the ubiquitous presence of professional police forces, armed with the power to seize individuals on little suspicion for the most minor of potential offenses.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

To uphold the promise of both the Fourth and Fourteenth Amendments, this Court should reject the moment-of-threat doctrine, which finds no support in the Constitution's text or history. The Founders and the Reconstruction Framers alike recognized the dangers of unchecked law enforcement authority, enshrining in the Constitution the principle that such unfettered discretion is unreasonable. And the Fourteenth Amendment—ratified against the backdrop of mass pretextual arrests of Black people and notorious police-led killings—was centrally concerned with police violence. To realize fully the Fourth Amendment right to be secure from unreasonable seizures, it must be read in light of the Fourteenth Amendment's aim of restraining police violence and abuse.

Ashtian Barnes was shot and killed by Respondent Felix during a three-minute traffic stop for suspected toll violations associated with the rental car Barnes was driving. After ordering Barnes to exit the vehicle—and before any threat to his safety arose—Officer Felix drew his weapon. Then, when the car started rolling forward with the door open, Felix jumped onto the door sill of the moving vehicle, "shoved his gun into Barnes's head," and blindly fired two shots, ultimately killing Barnes. Pet. App. 4a (quotation marks omitted). When Barnes's mother sought redress for excessive force under Section 1983, the courts below dismissed her claim under the moment-of-threat doctrine. Considering only the two seconds between Felix's jumping onto the vehicle and his shooting of Barnes, the courts concluded that during those two seconds Felix reasonably feared for his life.

But by requiring the courts to consider only the two seconds after Felix jumped on the vehicle, and to ignore everything that occurred before that moment, the moment-of-threat doctrine tilted the scales in

Officer Felix's favor, overlooking any conduct that might have unreasonably created a perceived need for deadly force.

In refusing to consider all the circumstances of a seizure, the doctrine grants police officers an elevated status denied to ordinary civilians and individuals on the receiving end of police violence. After all, courts routinely consider the *victims'* prior conduct in such cases without the same limitations. Courts also consider, and give officers the benefit of, their prior attempts to de-escalate violent encounters. And when ordinary civilians charged with violence raise self-defense claims, courts take into account their prior conduct precipitating the event, rather than looking only at the precise moment of perceived danger. In all these ways, the moment-of-threat doctrine creates double standards that uniquely insulate police officers from accountability, subverting both the Fourth and Fourteenth Amendments.

**1.** The Fourth Amendment, like all of the Bill of Rights, was originally understood to bind only the federal government. *Barron v. Baltimore*, 32 U.S. 243, 247 (1833). But after the Civil War, Americans ratified the Fourteenth Amendment to demand that states and their officers respect the right to be free from unreasonable searches and seizures.

The Fourteenth Amendment was in no small part a response to an epidemic of police violence and abuse. Across the South, police officers played a leading role in subjugating formerly enslaved persons under newly passed vagrancy laws—the centerpiece of the Black Codes—which were used to justify baseless and often violent seizures. Congress heard extensive testimony about how police routinely arrested Black people "on various pretexts," S. Exec. Doc. No. 39-6, at 129 (1867), and "for the most trivial of offences," Report of the

Joint Committee on Reconstruction, H.R. Rep. No. 39-30, pt. III, at 8 (1866), making officers a "terror to . . . all colored people," *id.*, pt. II, at 271.

As Congress learned, police officers often exploited these seizures as an excuse for violence. In some places, "whenever a colored man was arrested for any cause, even the most frivolous, . . . by the police, the arrest was made in a harsh and brutal manner." Memphis Riots and Massacres, H.R. Rep. No. 39-101, at 6 (1866); *see id.* at 156 ("When the police arrested a colored man they were generally very brutal towards him," even "for the slightest offence."). All told, "the police . . . conducted themselves towards the freedmen, in respect to violence and ill usage, in every way equal to the old days of slavery." Report of the Joint Committee, *supra*, pt. IV, at 79.

Police officers also instigated warrantless and destructive invasions of Black Americans' homes, using the fear of an armed insurrection as pretext. As Congress found, "the local police have been guilty of great abuses," going "in squads" to "search houses and seize arms." *Id.*, pt. II, at 272; *see* H.R. Exec. Doc. No. 39-70, at 239 (1866) ("law-officers disarm the colored man and hand him over to armed marauders").

Perhaps most notoriously, police officers led horrific massacres of Black Americans and their white allies in Memphis and New Orleans that galvanized support for constitutional reform. After exhaustive investigation of the Memphis events, Congress concluded that "the chosen guardians of the public peace . . . were found the foremost in the work of murder and pillage," giving an "infamy to the whole proceeding which is almost without a parallel in all the annals of history." H.R. Rep. No. 39-101, *supra*, at 34. The events in New Orleans were called "an absolute massacre by the police." New Orleans Riots, H.R. Exec. Doc. No. 39-68,

at 11 (1867); *see* New Orleans Riots, H.R. Rep. No. 39-16, at 10 (1867) ("Colored persons . . . peaceably pursuing their lawful business, were attacked by the police, shot, and cruelly beaten.").

Without constitutional change, Congress concluded, "the whole body of colored men" would continue to be "slaughtered without mercy and with entire impunity from punishment." *Id.* at 35. Members of Congress described how vagrancy laws gave the police sweeping and easily abused arrest powers, vowing that the Fourteenth Amendment would secure to all Americans "the right to be exempt from unreasonable searches and seizures." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). The Framers thus sought to deter police violence and eliminate the unbounded discretion that enabled Southern police officers to seize, arrest, and harass with impunity—vindicating the demands of those freed from enslavement that "now we are free[,] we do not want to be hunted," but to be "treated like human[] beings." Letter from Mississippi Freedpeople to the Governor of Mississippi (Dec. 3, 1865), *reprinted in Freedom: A Documentary History of Emancipation, 1861–1867, ser. 3, vol. 1: Land and Labor, 1865*, at 857 (Steven Hahn et al. eds., 2017).

**2.** Just as this Court should consider the Fourteenth Amendment's focus on deterring police violence when construing the amendment's limit on unreasonable seizures by state and local officers, this Court should also consider how the safeguards of the original Fourth Amendment have been put at risk by revolutions in the law and practice of policing.

Since the Fourth Amendment's ratification, the development of professional police forces and investigative law enforcement has transformed the nature of policing, making armed officers a more pervasive and intrusive presence than at the Founding. At the same

time, important limits on warrantless arrest authority once imposed by the common law have gradually been discarded by courts and legislatures, expanding the power of officers to initiate seizures with little evidence and for the most minor offenses. In recent decades, this Court's decisions have further heightened officers' discretionary power to conduct on-the-street searches and seizures, *e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968), while extending to officers a similar discretion to detain motorists, even for pretextual reasons, *Whren v. United States*, 517 U.S. 806 (1996), and to order such motorists out of their vehicles during these stops, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

It is precisely because of these expansions in law enforcement authority that deadly encounters like the one between Ashtian Barnes and Officer Felix—spurred by suspicion of a low-level traffic offense punishable only by a modest fine, *see* Pet. App. 11a—have become possible. Given that police officers' discretionary powers today reach far beyond what the Founders conceived of, courts must be especially vigilant in ensuring fidelity to the Fourth Amendment's reasonableness standard and its safeguards for liberty and personal security—preserving "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Torres v. Madrid*, 592 U.S. 306, 316-17 (2021) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Such vigilance requires fairly considering *all* the circumstances involved in a seizure, not turning a blind eye to unreasonable police conduct that creates a perceived need for deadly force.

* * *

Like the vagrancy laws of the Reconstruction era, today's legal regime governing stops and arrests gives police officers immense discretionary power to seize

people on scant suspicion in relation to trivial offenses. And as during Reconstruction, this power can be exploited as a pretext for discriminatory policing. But the Founders adopted the Fourth Amendment to protect against the sweeping discretionary powers exemplified by the general warrant, and the Fourteenth Amendment responded to the violent and baseless seizures of Black Americans by police officers wielding similarly broad discretionary powers. By facilitating rather than deterring unjustified police violence, the moment-of-threat doctrine is at odds with this constitutional history. This Court should reject it.

## ARGUMENT

### I. The Moment-of-Threat Doctrine Is at Odds with the Fourteenth Amendment's Guarantee of Protection from Unfettered Police Discretion and Police Violence.

**A.** The moment-of-threat doctrine limits excessive-force inquiries to whether a police officer "was in danger *at the moment of the threat*" that prompted the officer's use of violence, *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 493 (5th Cir. 2001), regardless of whether the officer's own actions unreasonably created the very danger to which the officer responded with deadly force, *see Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992). By imposing this artificial restriction on the circumstances that courts may consider, the doctrine gives police officers a special status that ordinary civilians and those on the receiving end of police violence are denied.

In evaluating whether officers used excessive force when carrying out a seizure, courts routinely consider the prior conduct of the seized individuals, ruling against excessive-force plaintiffs whose own behavior brought about the need to use deadly force. *E.g.*, *Scott*

*v. Harris*, 550 U.S. 372, 384 (2007) ("It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [the officer] confronted."). Taking account of the victim's conduct is consistent with analyzing all "the facts and circumstances of each particular case, including the severity of the crime at issue." *Graham v. Connor*, 490 U.S. 386, 396 (1989). This approach becomes "one-sided," however, when courts apply the moment-of-threat doctrine to judge reasonableness "by looking to the subject's precipitating behaviors but ignoring the officer's." Seth Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 Emory L.J. 521, 559 (2021).

Exacerbating this double standard, courts also permit consideration of an officer's attempts to de-escalate an encounter that later turns violent. "If the officer took cover, called for backup, or tried to talk with or calm the individual, the jury may consider this conduct in assessing the reasonableness of the officer's use of force." Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 Geo. Wash. L. Rev. 1362, 1431 (2021). Thus, police actions that reduce the need for deadly force may be considered, while police actions that unreasonably create a need for deadly force are excluded.

Moreover, when ordinary civilians raise self-defense claims, courts often consider their conduct leading up to the use of deadly force with which they are charged, including actions that created a dangerous situation or increased the likelihood that deadly force would be used. *See, e.g.*, *id.* at 1424-26 (describing how the jury in the George Zimmerman case was presented

with evidence of his actions that increased the risk of a deadly encounter). Courts also may consider whether the defendant was the initial aggressor or had less-deadly alternatives available. *See* Rachel Harmon, *When Is Police Violence Justified?*, 102 Nw. U.L. Rev. 1119, 1147-48 (2008) (explaining that civilians must show that force was necessary and proportionate).

In these ways, the moment-of-threat doctrine departs from the rules that govern ordinary civilians and the victims of police violence, uniquely shielding officers from accountability when they unreasonably use deadly force in response to crises of their own creation. "All persons, civilians, soldiers, and police officers alike, 'are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" Kindaka J. Sanders, *The New Dread, Part II: The Judicial Overthrow of the Reasonableness Standard in Police Shooting*, 71 Clev. St. L. Rev. 1029, 1126 (2023) (quoting *Graham*, 490 U.S. at 396-97). Selectively overlooking police conduct that undercuts the reasonableness of officers' decisions risks establishing a "protected class status for law enforcement." *Id.* But placing police officers in such an elevated position, thereby enhancing their discretion and reducing their accountability, is completely at odds with the aims of the Fourteenth Amendment.

**B.** Police abuse lies at the core of the Fourteenth Amendment's history. When the Founders wrote the Bill of Rights, there was no such thing as the police. *See infra* Part II. But more than eighty years later, professional police forces had emerged across the nation, particularly in cities. And during Reconstruction, Southern police officers wielded open-ended grants of

discretionary authority as a tool of racial oppression. Directly responding to these abuses, the Fourteenth Amendment was "meant to stamp out" laws and practices "that had designated [Black people] as special targets for various searches and seizures." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268 (1998). The Fourteenth Amendment was centrally concerned, in a way the original Fourth Amendment was not, with curbing police violence. *See* David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 239 (2021).

After the Civil War, Southern states tried to "maintain the prewar racial hierarchy" through the Black Codes, the cornerstone of which were new "vagrancy" laws that granted sweeping discretionary authority to search, seize, and arrest Black people for "dubious offenses," *Timbs v. Indiana*, 586 U.S. 146, 153 (2019), such as "neglect[ing] their calling or employment," An Act to Amend the Vagrant Laws of the State, § 1 (Mississippi, Nov. 24, 1865), *reprinted in* S. Exec. Doc. No. 39-6, at 192 (1867), or otherwise acting in ways that white people deemed idle. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 199-202 (1988).

The Black Codes were enforced by professional police forces, then a relative novelty. In the decades before this period, "virtually all of the largest cities in the country established uniformed police forces," including the "Southern cities of Baltimore, New Orleans, Charleston, Richmond, and Savannah." Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the 19th-Century American South* 82-83 (1984). The Black Codes gave these new police officers the power to seize and arrest Black people as they saw fit. As one Southern newspaper urged, officers "should be

permitted to hold a rod *in terrorem* over these wandering, idle, creatures. Nothing short of the most efficient police system will prevent strolling, vagrancy, theft, and the utter destruction of or serious injury to our industrial system." *Lynchburg Virginian*, June 12, 1865, *reprinted in* Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* 200 (2001).

By allowing police officers to stop, arrest, and harass Black people as they saw fit, these regimes aimed to "place the freedmen under a sort of permanent martial law." Report of Maj. Gen. Carl Schurz on Conditions of the South, S. Exec. Doc. No. 39-2, at 24 (1865). And indeed, Black Americans were singled out and arrested under the guise of vagrancy and other trivial or pretextual offenses across the South. *See* Vernon Lane Wharton, *The Negro in Mississippi, 1865–1890*, at 91 (1947) (describing vagrancy roundups); *Freedom: A Documentary History of Emancipation, 1861–1867, ser. 3, vol. 2: Land and Labor, 1866–1867*, at 125-27, 153, 527, 530-32, 536-37, 928-29 (detailing vagrancy arrests); Leon F. Litwack, *Been in the Storm so Long: The Aftermath of Slavery* 284, 287-88, 318-19 (1979) (describing mass arrests and arrests for trivial offenses). In some communities, police demanded that Black people on public streets present a pass from their employer and arrested those who could not present such documentation. *Id.* at 319. The singling out of Black people for "harassment, violence, and discriminatory arrests by police officers" drove a Black teacher in Alabama to complain that "[t]he police of this place make the law to suit themselves." *Id.* at 288.

Congress was flooded with reports about police officers' abuse of their arrest authority, and about the trivial, pretextual bases for these arrests. *E.g.*, S. Exec. Doc. No. 39-6, *supra*, at 129 (describing how "the police of [Nashville] arrested some forty or fifty young

men and boys (colored) on various pretexts, mostly for vagrancy"); Report of the Joint Committee on Reconstruction, H.R. Rep. No. 39-30, pt. III, at 8 (1866) (observing that "there were a large number of negroes in jail, the most of them for the most trivial of offences," including "breaking a plate" and "throwing a stone").

In response to these and other abuses, Congress formed the Joint Committee on Reconstruction in 1866 to investigate conditions in the South and to propose legislative and constitutional reforms. *See* Cong. Globe, 39th Cong., 1st Sess. 6, 30 (1865). The committee heard extensive evidence of how white police officers used their nearly unfettered discretion to seize and arrest Black people under the pretext of vagrancy laws. *See* Gans, *supra*, at 275-76. For instance, a Freedmen's Bureau official in New Orleans testified that "the police of that city conducted themselves towards the freedmen, in respect to violence and ill usage, in every way equal to the old days of slavery; arresting them on the streets as vagrants . . . simply because they did not have in their pockets certificates of employment." Report of the Joint Committee, *supra*, pt. IV, at 79. Another witness described "[t]he county police" arresting a woman who "was earning her own living" but "was seized," "her children refused to her, and under the vagrant act . . . set to work on the old plantation." *Id.*, pt. II, at 177; *see also id.* at 62 (describing instances in Virginia "where officers of the State attempted to enforce the vagrant laws" and "sold colored people . . . to service").

The committee also heard from witness after witness about gratuitous, violent seizures by police officers, who were a "terror to . . . all colored people or loyal men." *Id.* at 271; *see* Gans, *supra*, at 279-84. In North Carolina, the committee learned, the police "have taken negroes, tied them up by the thumbs, and

whipped them unmercifully." Report of the Joint Committee, *supra*, pt. II, at 185. One witness described a "sergeant of the local police" who "brutally wounded a freedmen when in his custody, and while the man's arms were tied, by striking him on the head with his gun, coming up behind his back." *Id.* at 209. Another witness described how a "policeman felled [a] woman senseless to the ground with his baton," and an incident in which a "negro man was so beaten by . . . policemen that we had to take him to our hospital for treatment." *Id.* at 271. Other testimony recounted how a police officer "went up and down the street knocking in the head every negro man, woman, and child that he met, tumbling some of them into the gutter, and knocking others upon the sidewalks." *Id.*, pt. IV, at 80.

Some cities became particularly infamous for the routine brutality with which police officers seized and arrested Black residents for petty offenses. For example, Congress learned that in Memphis, "whenever a colored man was arrested for any cause, even the most frivolous, . . . by the police, the arrest was made in a harsh and brutal manner, it being usual to knock down and beat the arrested party." Memphis Riots and Massacres, H.R. Rep. No. 39-101, at 6 (1866); *see id.* at 30 (describing a case in which "a negro was most brutally and inhumanly murdered publicly in the streets by a policeman"); *id.* at 156 ("When the police arrested a colored man they were generally very brutal towards him. I have seen one or two arrested for the slightest offence, and instead of taking the man quietly to the lock-up, as officers should, I have seen them beat him senseless and throw him into a cart.").

Such police abuses were endemic: across the South, officers regularly meted out unjustified violence on Black Americans they encountered in the streets.

*See* Hadden, *supra*, at 217 (describing "white officers . . . beating [B]lack suspects for no reason"); Litwack, *supra*, at 290 (describing incident in which "the chief of police shot and killed a young freedman while arresting him for a misdemeanor"); *Freedom: A Documentary History*, *supra*, ser. 2, at 743 (reprinting statement of a Tennessee man that a policeman "struck me with his *club*, on the head" and then "another Policeman came up and he struck me several times[,] and they thr[ew] me down and stamped me in the back while lying on the ground").

With the aid and participation of police officers, Southerners also used fear of insurrection as an excuse to break into the homes of formerly enslaved persons and violently search and seize without justification. *See* William McKee Evans, *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear* 71-72 (1967) ("the county police began ransacking Negro homes in search of weapons"). The Joint Committee heard evidence that "the local police have been guilty of great abuses . . . . They go in squads and search houses and seize arms. . . . Houses of colored men have been broken open, . . . trunks opened and money taken." Report of the Joint Committee, *supra*, pt. II, at 272; *see* H.R. Exec. Doc. No. 39-70, at 239 (1866) ("law-officers disarm the colored man and hand him over to armed marauders"); Gans, *supra*, at 277-79.

Police brutality flared up in 1866 as Congress finished its work on the Fourteenth Amendment and Americans began debating its ratification. That year, police officers led mobs that killed and brutalized hundreds of Black Americans in two notorious massacres. *See* Foner, *supra*, at 261-63. These events, as *Harper's Weekly* put it, accomplished "more than the abstract argument of a year to impress the country with the conviction that we can not wisely hope for peace at the

South so long as inequality of guarantees of personal and political liberty endure." *The New Orleans Report*, 10 Harper's Wkly. 658 (1866).

In Memphis, clashes between police officers and recently discharged Black soldiers resulted in the police leading a three-day killing spree against the Black community. As a congressional investigation concluded, "an organized and bloody massacre of the colored people of Memphis" was "led on by sworn officers of the law." H.R. Rep. No. 39-101, *supra*, at 5. Indeed, "the chosen guardians of the public peace . . . were found the foremost in the work of murder and pillage," giving an "infamy to the whole proceeding which is almost without a parallel in all the annals of history." *Id.* at 34; *see* Report of Colonel Charles F. Johnson and Major F.W. Gilbraith on Memphis Riot (May 22, 1866) ("Negroes were hunted down by police, . . . shot, assaulted, robbed, and in many instances their houses searched under the pretense of hunting for concealed arms, plundered, and then set on fire.").

The House report detailed one unspeakable act after another: "policemen firing and shooting every negro they met," "policemen shooting" at Black people and "beating [them] with their pistols and clubs," high-ranking officers exhorting the mob that all Black people ought to be killed, and policemen "firing into a hospital." H.R. Rep. No. 39-101, *supra*, at 8-10. Under the pretext of effectuating arrests or searching for weapons, police officers brutally raped Black women. *Id.* at 13-15. The police ransacked houses, broke open doors and trunks, robbed people, and burnt down schoolhouses and churches. *Id.* at 10, 25.

Weeks later, local police led another well-publicized massacre of Black Americans. "No single event in 1866 more clearly illustrated the states' continued failure to protect the constitutionally enumerated

rights of American citizens than the New Orleans Riot of July 30, 1866." Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 Geo. L.J. 1275, 1307 (2013). Under the pretext of quashing an illegal assembly, the police, joined by a mob, killed or wounded more than 150 Black persons and 20 of their white allies. Major General Philip H. Sheridan called the event "an absolute massacre by the police." New Orleans Riots, H.R. Exec. Doc. No. 39-68, at 11 (1867). As another congressional investigation found, "the police and mob, in mutual and bloody emulation, continued the butchery . . . until nearly two hundred people were killed and wounded." New Orleans Riots, H.R. Rep. No. 39-16, at 11 (1867); *see id.* at 10 ("Colored persons . . . peaceably pursuing their lawful business, were attacked by the police, shot, and cruelly beaten.").

Along with the day-to-day abuse, harassment, and violence that accompanied police officers' enforcement of Southern vagrancy laws, these massacres demonstrated that unchecked police violence would continue without changes to the Constitution. Otherwise, a congressional report concluded, "the whole body of colored men" would continue to be "slaughtered without mercy and with entire impunity from punishment." *Id.* at 35.

**C.** To "provide a constitutional basis" for the protection of rights in the South, Congress passed and Americans ratified the Fourteenth Amendment, which "fundamentally altered our country's federal system." *McDonald v. City of Chicago*, 561 U.S. 742, 775, 754 (2010). The "chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States." *Id.* at 762. Introducing the Amendment in

the Senate, Senator Jacob Howard stressed that it would require states to respect the rights "secured by the first eight amendments of the Constitution," including "the right to be exempt from unreasonable searches and seizures." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

During the debates on the Amendment, members of Congress denounced Southern practices that subjected Black Americans to being seized at will by the police, denying them personal security and freedom of movement. "What kind of freedom," Senator Lyman Trumbull asked, "is that which the Constitution of the United States guaranties to a man that does not protect him from the lash if he is caught away from home without a pass?" *Id.* at 941-42. Other lawmakers described how vagrancy laws gave the police sweeping powers of arrest and licensed unreasonable seizures, mocking the Constitution's promise of personal security. *See* Gans, *supra*, at 286-89. As one Representative declared, when Black Americans "are subject to a system of vagrant laws . . . which operates upon them as upon no other part of the community, they are not secured in the rights of freedom." Cong. Globe, 39th Cong., 1st Sess. 1124 (1866); *see also id.* at 1629 (arguing that republican government requires respect for "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

In short, the proponents of the Fourteenth Amendment insisted on securing to all people the right "to be free from unreasonable searches and seizure," along with other "rights that belong under the federal Constitution to persons who are free." Remarks of Judge Noah Davis at Republican Union State Convention held in Syracuse, New York, on Sept. 5, 1866, *quoted in* Michael Kent Curtis, *No State Shall Abridge: The*

*Fourteenth Amendment and the Bill of Rights* 140 (1986). The Amendment would "fetter forever" state-sanctioned "cruelty and carnage and murder." John A. Bingham, *A Noble and Eloquent Plea for the Country* (Sept. 4, 1866), *in Mr. Bingham's Speech*, Wheeling Daily Intelligencer, Sept. 5, 1866, at 2. It sought to make "the security of life, person and property, a reality and not a mere sham, all over the land." *Secretary Browning's Letter*, Evening Post, Oct. 24, 1866, *quoted in* Lash, *supra*, at 1322.

**D.** In requiring states to respect the Fourth Amendment's right to be secure against unreasonable seizures, the Framers of the Fourteenth Amendment rebelled against the broad, discretionary powers that Southern police officers used to subject Black people to pretextual and violent arrests with impunity.

Like the vagrancy laws abhorred by the Framers of the Fourteenth Amendment, today's legal regime governing stops and arrests gives police officers immense discretionary power to seize individuals on scant suspicion in relation to the most trivial offenses. And as during Reconstruction, this power too often is exploited as a pretext for discriminatory policing. *See, e.g.*, Bradley R. Haywood, *Ending Race-Based Pretextual Stops: Strategies for Eliminating America's Most Egregious Police Practice*, 26 Rich. Pub. Int. L. Rev. 47 (2023). It should come as no surprise, then, that Black Americans bear the brunt of these encounters, particularly in the context of low-level traffic offenses.[2] And when traffic stops escalate to violence,

[2] *See, e.g.*, *New Data Shows Traffic Stops in Illinois Continue to Escalate as Racial Disparities Persist*, ACLU of Illinois (July 11, 2024), https://www.aclu-il.org/en/press-releases/new-data-shows-traffic-stops-illinois-continue-escalate-racial-disparities-persist.

Black Americans are killed by law enforcement officers at a disproportionate rate.[3]

When these encounters turn deadly and victims or their families seek redress for the use of excessive force, the moment-of-threat doctrine prevents courts from considering the totality of the circumstances in order to assess fully the reasonableness of officers' actions. *See* Pet. Br. 24-29. As Judge Higginbotham explained in his concurrence below, this "impermissible gloss" on this Court's guidance "stifles a robust examination of the Fourth Amendment's protections for the American public." Pet. App. 16a. By artificially narrowing the Fourth Amendment inquiry in a way that selectively privileges police officers who act unreasonably, the doctrine contravenes the Fourteenth Amendment's promises to hold law enforcement officers accountable and deter police violence.

## II. Because Warrantless Arrest Authority Has Expanded Far Beyond What the Founders Conceived, Courts Must Vigilantly Ensure Reasonableness by Considering All the Circumstances of a Seizure.

As society develops, "this Court has sought to 'assure . . . preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. United States*, 585 U.S.

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[3] *See, e.g.*, *Fatal Force*, Wash. Post, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last updated Nov. 6, 2024) (reporting that Black Americans are killed by police at more than twice the rate of white Americans); *Mapping Police Violence*, https://mappingpoliceviolence.us/ (last updated Oct. 31, 2024) (reporting that Black people are 3 times as likely to be killed as white people, are 1.3 times as likely as white people to be unarmed, and were more likely to be killed while fleeing).

296, 305 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). But the modern-day system of law enforcement is vastly different from the rudimentary policing apparatus in effect at the Founding. Central to this transformation was the creation of professional police forces in the nineteenth century and the conferral of expansive arrest authority on these new officers. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 725 (1999). Unlike when the Fourth Amendment was adopted, cadres of professional officers now operate on their own initiative not merely to keep the peace and respond to complaints but to proactively investigate and prevent crime. Over time, legislatures and courts have expanded law enforcement officers' warrantless arrest authority, exceeding the limits the common law once imposed. And in more recent decades, this Court's decisions expanded even further the discretionary powers granted to law enforcement.

It is precisely because of this transformation in the nature of policing that encounters like the one between Ashtian Barnes and Officer Felix are now tragically commonplace. The expansion in the role that police officers play in daily life, along with the enlargement of their discretionary authority, makes it all the more imperative that courts ensure fidelity to the Fourth Amendment's safeguards for liberty and personal security. Such vigilance requires fairly considering all the circumstances involved in a seizure, not turning a blind eye to unreasonable police conduct that precipitates the infliction of deadly force.

Since the Founding, many critical protections that the common law once provided against warrantless arrest authority have been eroded by transformations in the law and in the practice of policing. To start, the range of misdemeanors for which an officer may make

a warrantless arrest has significantly expanded. At common law, "warrantless misdemeanor arrests were usually limited to breaches of the peace," along with some "specific exceptions . . . to accommodate an unusual need for prompt arrest of relatively serious misdemeanants." Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 317 (2002).

"With the growth of organized police forces in the late nineteenth and early twentieth centuries," however, American jurisdictions "expand[ed] the[se] common law arrest powers." William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 789 (1993); *see* Horace L. Wilgus, *Arrest Without a Warrant* (pt. 1), 22 Mich. L. Rev. 541, 550 (1924) (the states have enlarged the right to arrest without a warrant "for various misdemeanors and violations of ordinances, other than breaches of the peace"). Legislatures granted "sweeping arrest powers" and "began to authorize custodial arrests for minor crimes." Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 258-59 (1989). Indeed, by the 1920s, commentators were already objecting that the "legislative mill turns out a steady addition to the list of misdemeanors," and that "every over-zealous peace officer . . . is permitted to take up, on sight, every person whom he detects in the act of committing" such minor crimes. Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. Pa. L. Rev. 485, 491 (1927).

Not only has the range of qualifying misdemeanors expanded, the requirements for making an arrest

have diminished as well. At common law, an officer was "authorized to make an arrest without a warrant, for a mere misdemeanor" only when it was "committed in his presence." *Bad Elk v. United States*, 177 U.S. 529, 534 (1900); *Kurtz v. Moffitt*, 115 U.S. 487, 498 (1885). But the rule that an officer must witness the misdemeanor for which he makes an arrest was ultimately jettisoned in favor of a probable-cause standard, *see* Horace L. Wilgus, *Arrest Without a Warrant* (pt. 2), 22 Mich. L. Rev. 673, 705-06 (1924), albeit not without some judicial resistance, *e.g.*, *In re Kellam*, 41 P. 960, 961 (Kan. 1895) ("The liberties of the people do not rest upon so uncertain and insecure a basis as the surmise or conjecture of an officer that some petty offense has been committed."). This development gave officers more much leeway to make misdemeanor arrests because, among other things, "hearsay can be used to establish probable cause." Schroeder, *supra*, at 805 n.106 (citing, *inter alia*, *Draper v. United States*, 358 U.S. 307, 312-13 & n.4 (1959)).

Officers' authority to make warrantless felony arrests has expanded as well. The common law made it "absolutely necessary" that "a felony has been really committed," though an officer needed only probable cause to believe that the person he arrested was "properly suspected" as the perpetrator. Saunders Welch, *Essay on the Office of Constable*, at 117, *reprinted in Conductor Generalis* (N.J. 1764); *see* 2 Matthew Hale, *History of the Pleas of the Crown* 90-91 (1736) (permitting warrantless arrest "when a felony is *certainly* committed" and the arrestee is suspected "upon probable grounds to be the felon"); 4 William Blackstone, *Commentaries on the Laws of England* 292 (1791) ("upon probable suspicion" for a "felony actually committed").

After the Founding, that rule was supplanted by a new rule in which "[n]o felony need in fact have been committed." Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 Harv. L. Rev. 566, 576 (1936); *see id.* at 568-77 (tracing the evolution of this change). By allowing officers to make warrantless arrests without certainty that any felony actually occurred, this more lenient standard "displac[ed] the previous reliance on arrest warrants." Davies, *Recovering*, *supra*, at 637.

Add to all this "the creation of professional police forces," an innovation that began in the nineteenth century. Schroeder, *supra*, at 775 n.6; *see* Lawrence M. Friedman, *A History of American Law* 213 (3d ed. 2005) (before that, "the usual haphazard collection of constables and night watchmen was the standard"). "Our twentieth-century police and even our contemporary sense of 'policing' would be utterly foreign to our colonial forebears." Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 830 (1994). Whereas Founding-era constables "generally served without training, uniforms, weapons, or other accoutrements of modern law enforcement officers," supplying only a "rudimentary peacekeeping function," the "new police forces differed in their personnel, function, and organization," performing a "greatly enlarged investigative function" and "an expanded preventive function as well." *Id.* at 831, 834; *see* Hall, *supra*, at 578-90. "Modern procedure, which is structured to accommodate proactive enforcement of criminal laws and investigation aimed at 'ferreting out' complaintless crimes, accords police officers far more power than the Framers ever imagined or intended." Davies, *Case Study*, *supra*, at 252.

While the growth of investigatory policing and warrantless arrest authority may be an unsurprising

response to modern conditions, the enhanced power and discretion it confers on officers has "created new threats to '[t]he right of the people to be secure . . . against unreasonable searches and seizures.'" Steiker, *supra*, at 830 (quoting U.S. Const. amend. IV).

Beginning in the last century, this Court's Fourth Amendment jurisprudence further expanded police officers' warrantless, on-the-street search and seizure authority. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court permitted certain searches and seizures in which officers lack probable cause, allowing stop-and-frisk practices whenever an officer can point to "specific and articulable facts" that lead him "to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." *Id.* at 21, 30.

Soon after, that power expanded. Shifting away from *Terry*'s focus on police officer's personal observations and experience as justifying warrantless investigative searches and seizures, this Court permitted officers to conduct *Terry* stops based on anonymous tips. *See Adams v. Williams*, 407 U.S. 143 (1972).

This Court's original rationale in *Terry* of protecting officers from harm also soon faded as a factor in the reasonableness analysis. For instance, in *United States v. Sokolow*, 490 U.S. 1 (1989), this Court upheld a *Terry* stop of a suspect in an airport based on officers' belief that his behavior was consistent with a drug courier profile. *Id.* at 7-11; *see also Illinois v. Wardlow*, 528 U.S. 119, 124, 126 (2000) (concluding that a *Terry* stop was reasonable because the suspect fled after allegedly looking in the direction of the officers while "in an area of heavy narcotics trafficking," and reasoning further that "*Terry* accepts the risk that officers may stop innocent people").

Notably here, the newly relaxed standards for warrantless investigatory seizures were applied to traffic stops. Now, for instance, an anonymous 911 call can bear "adequate indicia of reliability" to give officers reasonable suspicion to conduct a *Terry* stop, even when officers personally observe no traffic-law violations or suspicious conduct. *Navarette v. California*, 572 U.S. 393, 398 (2014). And "once a motor vehicle has been lawfully detained for a traffic violation," police officers "may order the driver to get out of the vehicle," *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977), exacerbating the possibility of disputes and misunderstandings that culminate in deadly violence.

Further enlarging officer discretion and the prevalence of warrantless roadside seizures, this Court has also permitted traffic stops to be made for pretextual reasons. *Whren v. United States*, 517 U.S. 806, 813 (1996). And this Court shored up the expansion of police officers' authority to seize people for low-level misdemeanors, permitting officers to make warrantless arrests for offenses punishable only by small fines, such as driving without a seatbelt fastened. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

The cumulative result of these legislative and judicial developments since the Founding is a significant departure from the law enforcement regime to which individuals were subject at the time of the Fourth Amendment's adoption. The dramatic growth of police officers' discretionary power to seize and arrest makes it all the more imperative that courts be vigilant in ensuring the constitutional reasonableness of officers' actions, adhering to the Amendment's "central concern of . . . protect[ing] liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

The moment-of-threat doctrine frustrates that imperative, artificially stifling the Fourth Amendment inquiry by preventing courts from considering the full range of circumstances surrounding an officer's decision to use deadly force on a private citizen. Because the doctrine is at odds with both the Fourth and Fourteenth Amendments, subverting their promise of protection from the abuses of unchecked law enforcement authority, this Court should reject it.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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