

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 FOR THE
INSTITUTE FOR AMERICAN POLICING REFORM
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	<u>Page</u>
Interest of <i>Amicus Curiae</i>	1
Summary of Argument	1
Argument	3
I. The Moment of Threat Doctrine Deviates from Police Training and Policies, Increasing the Risk of Officer Harm.	3
A. The Moment of Threat Doctrine conflicts with officer training and department policies that are designed to protect the community and law enforcement.....	7
B. The Moment of Threat Doctrine discounts officer judgment and the realities of policing.....	16
II. The Moment of Threat Doctrine Creates Risks of Other Collateral Harm to Officers.	22
A. The Moment of Threat Doctrine can erode community trust.	23
B. The Moment of Threat Doctrine threatens the mental health of officers.....	27
Conclusion	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Graham v. Connor</i> , 490 U.S. 386 (1989).....	5, 6, 7, 8
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	5
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985).....	5, 6
<i>United States v. Arvizu</i> , 534 U.S. 266 (2002).....	17
Statutes	
S.C. Code Ann. § 23-23-10.....	5
Supreme Court Rules	
S. Ct. Rule 37.6.....	1
Other Authorities	
Abene Clayton, <i>Distrust of police is major driver of US gun violence, report warns</i> , The Guardian (Jan. 21, 2020)	24

Abraham N. Tennenbaum, <i>The Influence of the Garner Decision on Police Use of Deadly Force</i> , 85 J. Crim. L. & Criminology 241 (1994).....	6
<i>America Less Confident In Police Than Ever Before: A Look At The Numbers</i> , Forbes (Feb. 3, 2023).....	23
Brian A. Reaves, <i>State and Local Law Enforcement Training Academies, 2013</i> , U.S. Dep’t of Justice (July 2016),	18
Clark Neily, <i>Why Are People So Mad at Police?</i> , The National Interest (Jan. 3, 2021)	26
Commission on Peace Officer Standards and Training, State of Nevada	5
Connor Brooks, <i>Sheriffs’ Offices, Procedures, Policies, and Technology, 2020 – Statistical Tables</i> , U.S. Dep’t of Justice (Nov. 2023).....	7
<i>Continuing Education Topics and Hours</i> , Nebraska Crime Commission.....	5
Crystal Newsom, <i>Officer Preparedness</i> , Medium (Feb. 17, 2022)	28

<i>Data Highlights, Campaign Zero</i>	8
Dave Collins, <i>New Police Use-Of-Force Training Focuses on ‘Moral Courage’</i> , The Bristol Press (Aug 14, 2021).....	10
David A. Graham, <i>Why Do Police Keep Shooting Into Moving Cars?</i> The Atlantic (May 21, 2021)	13
David Weisburd et al., <i>Reforming the Police Through Procedural Justice Training: A Multicity Randomized Trial at Crime Hot Spots</i> , PNAS (Mar. 28, 2022)	26
Disciplinary Administration, Detroit Police Department.....	20
Disciplinary Guidelines, Fort Worth Police Department.....	20
Disciplinary System Penalty Guidelines, New York City Police Department (Jan. 15, 2021).....	21
Emily D. Buehler, <i>State and Local Law Enforcement Training Academies, 2018 – Statistical Tables</i> , U.S. Dep’t of Justice (July 2021)	4, 17, 18

Everytown Research & Policy, <i>Which states substantially limit deadly force by police?</i>	8
<i>Force Policies and Research, Illinois Criminal Justice Information Authority</i> (Aug. 15, 2022)	9
General Order Number 1.02, Use of Force, Kansas City, Kansas Police (Aug. 18, 2022)	11
H. Douglas Otto & Alysson Gatens, <i>Understanding Police Officer Stress: A Review of the Literature</i> , ICJIA (May 24, 2022)	28
Harris County Sheriff’s Office, 501 - De-escalation & Response to Resistance	6, 8, 9, 15
<i>In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence</i> , Giffords Law Center (Sept. 9, 2021)	24
<i>It’s Time to Follow the Money on Police Misconduct</i> , Policing Project (Oct. 18, 2023)	25
Jon Swaine et al., <i>Moving Targets</i> , The Guardian (Sept. 1, 2015).....	15

Justice Manual, 1-16.000 – Department of Justice Policy on Use of Force at 1-16.600, U.S. Dep’t of Justice (updated July 2022).....	5, 14
Keith L. Alexander et al., <i>The hidden billion-dollar cost of police misconduct</i> , Washington Post (Mar. 9, 2022)	24
Kerry Breen, <i>Settlements for police misconduct lawsuits cost taxpayers from coast to coast</i> , CBS News (Sept. 27, 2023)	25
Kim Barker et al., <i>How Police Justify Killing Drivers: The Vehicle Was a Weapon</i> , The New York Times (Nov. 6, 2021) (last updated May 24, 2021)	12, 13
<i>Law Enforcement Misconduct</i> , U.S. Department of Justice (last updated June 7, 2023)	25
Law Enforcement Officers Killed and Assaulted, Federal Bureau of Investigation, Crime Data Explorer.....	17
Matthew J. Hickman, <i>Citizen Complaints about Police Use of Force</i> , U.S. Dep’t of Justice (June 2006)	20, 21

Nathan J. Robinson, <i>The Police Are The Problem</i> , Current Affairs (Jan. 29, 2023)	26
Osagie K. Obasogie & Zachary Newman, <i>The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law</i> , 104 Cornell L. Rev. 1281 (2019)	6, 9
<i>Overview of Police Use of Force</i> , National Institute of Justice (Mar. 5, 2020)	9
Paul Luschynski, <i>Protecting the protectors by recognizing the importance of suicide prevention and mental health support in law enforcement is crucial</i> , SoundThinking (Sept. 25, 2024).....	27
<i>Police Use of Force Policy Analysis</i> , Campaign Zero (Sept. 20, 2016)	16
Preston Draper, <i>Council on Law Enforcement Education and Training, 2024 Legal Update</i> (July 3, 2024; revised Oct. 4, 2024)	5

Procedure 501 – Use of Force, San Antonio Police Department, General Manual (Nov. 10, 2015).....	11
Rasheed Steward, <i>Principle-Based Reform of Peace Officers’ Use of Force</i> , Institute for American Policing Reform	10
Rich Morin et al., <i>Behind the Badge</i> , Pew Research Center (Jan. 11, 2017)	19, 20
Richard Brown, <i>Do We Trust The Police?</i> , Psychology Today (Apr. 28, 2023)	4, 26
Robert Gebeloff, <i>Mapping Gun Violence</i> , The New York Times (first published May 15, 2024; updated Sept. 4, 2024)	28
Robin S. Engel et al., <i>Examining the Impact of Integrating Communications, Assessment, and Tactics (ICAT) De-escalation Training for the Louisville Metro Police Department: Initial Findings</i> , Center for Police Research and Policy (Sept. 16, 2020)	12

Sean E. Goodison & Connor Brooks, <i>Local Police Departments, Procedures, Policies, and Technology, 2020 - Statistical Tables</i> , U.S. Dep't of Justice (Nov. 2023)	17
Siriporn Santre, <i>Mental Disorders and Mental Health Promotion in Police Officers</i> , Health Psychology Research (Feb. 17, 2024)	27
Susan Shah & Jim Burch, <i>How to Build Trust in Policing</i> , The Marshall Project (Oct. 23, 2015)	23
<i>The Use-of-Force Continuum</i> , National Institute of Justice (Aug. 3, 2009)	8
Trevor Bechtel et al., <i>Evidence on Measures to Reduce Excessive Use of Force by the Police</i> , Michigan Center for Racial Justice (Jan. 2023)	14
<i>Understanding Use of Force</i> , Baltimore Police Dep't (Nov. 18, 2024)	11
Use of Force Standards Database, National Conference of State Legislatures.....	7

Use of Force, IACP National Law Enforcement Policy Center (first published Feb. 1989; last updated Feb. 2006) 13

#8cantwait (last updated May 24, 2021) 4,13

Constitutional Provisions

U.S. CONST. amend. IV 1, 5

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae the Institute for American Policing Reform (“IAPR”) is a nonprofit, research-informed, and community-based organization focused on discovering the most successful and pragmatic pathway to policing reform. IAPR recognizes that police are essential to maintaining safe communities and that reform is needed. Through research, assessment, and evaluation, IAPR aims to help establish standardized and trustworthy policing reform that maintains public safety.

IAPR has an interest in this case because it concerns the Fourth Amendment right to be free from excessive use of force by law enforcement. IAPR has a strong interest in promoting police practices that honor human dignity and protect the safety of both the community and police. Protection against excessive use of force as provided by the Fourth Amendment is therefore vital to IAPR’s interests and its members.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be reversed, because rather than allowing officers to perform their responsibilities effectively, the Moment of Threat Doctrine actually increases the risk of harm to officers.

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. S. Ct. Rule 37.6.

I. The Moment of Threat Doctrine conflicts with and undermines police training and policies, thereby increasing the risk of harm to officers.

A. Police officers are trained to handle dangerous situations in a variety of ways, including by using de-escalation strategies or finding alternatives to lethal force. By reducing the likelihood of a situation escalating to a more dangerous one, those policies protect not just civilians, but also officers themselves. Empirical research confirms that police departments with more restrictive use of force policies also face lower incidents of officer injury and death. Yet the Moment of Threat Doctrine undermines these policies and sanctions police conduct that contravenes them. For example, some jurisdictions have policies that prohibit shooting into a moving vehicle. These policies are effective in reducing violence against officers, but the Moment of Threat Doctrine, as applied in this case, disregards those policies and encourages myopic by officers that actually increases the overall danger that officers face.

B. The Doctrine also minimizes or ignores the extensive training officers receive in order to intelligently make split-second decisions. Officers are trained not to make instinctive judgments based on incomplete information and to instead handle difficult situations in a way most civilians cannot. The Moment of Threat Doctrine, however, treats officers as though they are capable of processing only an immediate threat, rather than recognizing that officers are well prepared to evaluate situations holistically. Not only does this approach lead

to absurd results, but it also demeans the quality and decision-making of officers.

II. The police conduct sanctioned and encouraged by the Moment of Threat Doctrine exposes officers to a greater risk of collateral harm.

A. As recent events demonstrate, excessive use of lethal force erodes community trust in police officers. When that trust is diminished, civilians are less likely to report crimes to officers and officers are more likely to encounter dangerous situations. By increasing the risk of violence, the Doctrine threatens to further erode that trust and increase the everyday dangers officers face as a routine part of their jobs.

B. Violent or dangerous encounters can have a negative effect on officers' mental health, which is a serious issue of national concern. Studies show that officers who experience dangerous encounters can experience serious trauma and degraded mental health, which can lead to suicide or other harm. The Moment of Threat Doctrine increases those risks by discouraging responsible officer behavior.

ARGUMENT

I. **The Moment of Threat Doctrine Deviates from Police Training and Policies, Increasing the Risk of Officer Harm.**

Police training and department policies are designed to decrease the frequency of deadly interactions be-

tween civilians and police while maintaining (or improving) effective policing and community safety.² These policies not only promote good policing, but also help protect the safety of officers themselves. In recent years, police training has prioritized techniques aimed at reducing the potential for unintentional harm, with over 90% of officers receiving training in de-escalation tactics.³ For many officers, the use of de-escalation and other mitigation tools (such as first deploying non-lethal force or issuing a warning) is not merely best practice, but actually mandated by training or policy.⁴

In singularly focusing on the one moment before lethal force is used, the Moment of Threat Doctrine undermines those thoughtfully developed trainings and policies. As a result, dangerous officer behavior is condoned or even encouraged. This introduces unnecessary risk of physical harm not only to civilians, but also to the

² Throughout this brief, the use of “police officer,” “law enforcement officer,” or similar is a collective reference to police officers, deputies, federal agents, and any other local, county, regional, State, or federal official with policing or law enforcement authority. Some studies referenced may have been conducted with specific focus on one, some, or all jurisdictions of these officers.

³ Emily D. Buehler, *State and Local Law Enforcement Training Academies, 2018 – Statistical Tables* at 3, U.S. Dep’t of Justice (July 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/slleta18st.pdf>.

⁴ #8cantwait (last updated May 24, 2021), <https://8cantwait.org/#project>.

officers who dedicate their lives to protecting their communities.

This is not speculation. Courts—including the Supreme Court—expect that legal doctrine will impact police behavior. Under the qualified immunity doctrine, an officer is not liable for a Fourth Amendment violation unless their conduct was contrary to “clearly established law.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818–819 (1982). For this reason, many police officer continuing-education trainings include instruction on key case law and legal updates relating to constitutional issues.⁵

⁵ See, e.g., Preston Draper, *Council on Law Enforcement Education and Training, 2024 Legal Update* (July 3, 2024; revised Oct. 4, 2024), <https://oklahoma.gov/content/dam/ok/en/cleet/documents/legal-updates/Legal%20Update%202024%20Rev.pdf> (Oklahoma’s law enforcement update, including discussion of both state and federal relevant court decisions); S.C. Code Ann. § 23-23-10 (South Carolina Code of Laws requiring Continuing Law Enforcement Training on a variety of topics, including the Fourth Amendment); *Continuing Education Topics and Hours*, Nebraska Crime Commission, <https://ncc.nebraska.gov/continuing-education-topics-and-hours>, (Nebraska requiring officers to obtain additional training in areas including “[l]egal updates, including but not limited to, . . . Fourth Amendment issues”); State of Nevada, Commission on Peace Officer Standards and Training, [https://post.nv.gov/uploadedFiles/postnvgov/content/Training/POST%20Training%20Material%20AB%20478\(2\).pdf](https://post.nv.gov/uploadedFiles/postnvgov/content/Training/POST%20Training%20Material%20AB%20478(2).pdf) (Nevada Commission recommending officer training include an examination of *Garner* and *Graham* as they relate to the use of deadly force); Justice Manual, 1-16.000 – Department of Justice Policy on Use of Force at 1-16.600, U.S. Dep’t of Justice (updated July 2022), <https://www.justice.gov/jm/1-16000->

And numerous police department policies, including policies in Harris County (where the events underlying this case occurred), specifically reference court decisions such as *Graham v. Connor*, 490 U.S. 386, 396 (1989).⁶ In turn, the Court has previously considered the “policies adopted by” police departments in determining the scope of reasonable force.⁷ Studies have also shown that after a major Supreme Court decision on the use of force, *Tennessee v. Garner*, 471 U.S. 1 (1985), there was a noticeable reduction in police officers’ use of lethal force.⁸ Officers are thus aware of legal precedent and adjust their conduct in response to it. The application of the

department-justice-policy-use-force (“All officers shall receive training, at least annually, on the Department's use of force policy and related legal updates.”).

⁶ See, e.g., Harris County Sheriff’s Office, 501 - De-escalation & Response to Resistance § IV, <https://hcsopolicy.com/policy/501-de-escalation-response-to-resistance/> (explaining that it “examines reasonableness using the objective standard established in *Graham v. Connor*, 490 U.S. 386 (1989)”; Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 Cornell L. Rev. 1281, 1303 (2019), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4804&context=clr> (reviewing 75 use of force policies that all contained a reference to the reasonableness standard from *Graham*).

⁷ *Tennessee v. Garner*, 471 U.S. 1, 18 (1985).

⁸ Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. Crim. L. & Criminology 241, 255–256 (1994) (finding that there was a significant reduction—approximately 16%—between the number of lethal police shootings committed before and after *Garner*).

Moment of Threat Doctrine therefore can have actual, lethal consequences.

A. The Moment of Threat Doctrine conflicts with officer training and department policies that are designed to protect the community and law enforcement.

For the protection of both the community and officers, officer training materials, statutes, and department policies provide baseline expectations regarding when an officer may lawfully resort to lethal force. The Moment of Threat Doctrine undermines those policies by narrowing the range of facts an officer should consider before deploying lethal force, thereby increasing the risk of harm to officers and others.

Most States codify minimum standards for use of force or require that municipalities adopt use-of-force guidelines, and at least 41 States have statutes with specific standards regarding use of lethal force.⁹ At the local level, municipalities and departments set policies guiding the permitted level of force. In fact, 95% of police departments have written policies or procedural directives for the use of lethal force.¹⁰ Many department policies also provide additional guidelines and require-

⁹ *Use of Force Standards Database*, National Conference of State Legislatures, <https://www.ncsl.org/civil-and-criminal-justice/use-of-force-standards-database> (updated Jan. 12, 2021).

¹⁰ Connor Brooks, *Sheriffs' Offices, Procedures, Policies, and Technology, 2020 – Statistical Tables* at 12, U.S. Dep't of Justice (Nov. 2023), <https://bjs.ojp.gov/document/soppt20st.pdf>.

ments in excess of the reasonableness standard established by this Court in *Graham*, 490 U.S. at 396 (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).¹¹

In recent years, police departments have added policies to provide more clarity surrounding the use of force in order to reduce potential harm for all involved.¹² For example, many departments and municipalities require officers to evaluate situations on a continuum model, with the permitted force escalating as risks increase.¹³ It is also increasingly common for departments to require that officers engage in mitigation strategies before exercising lethal force.¹⁴ Mitigation aims to lower the

¹¹ Harris County, the jurisdiction in which the incident in the case occurred, explains that it “examines reasonableness using the objective standard established in *Graham v. Connor*, 490 U.S. 386 (1989).” Harris County Sheriff’s Office, 501 - De-escalation & Response to Resistance § IV, <https://hcsopolicy.com/policy/501-de-escalation-response-to-resistance/>. Harris County enumerates *thirteen* different non-exhaustive factors that may bear on the reasonableness of the force used—almost none of which the Moment of Threat Doctrine considers. *Id.*

¹² See *Data Highlights*, Campaign Zero, <https://campaignzero.org>.

¹³ See *The Use-of-Force Continuum*, National Institute of Justice (Aug. 3, 2009), <https://nij.ojp.gov/topics/articles/use-force-continuum>.

¹⁴ Everytown Research & Policy, *Which states substantially limit deadly force by police?*, Everytown (last updated Jan. 4, 2024), <https://everytownresearch.org/rankings/law/police-use-of-deadly->

risk of violence not only to the suspect, but also to the officer and bystanders. Strategies can include de-escalation, offering a verbal warning, and attempting nonlethal alternatives.¹⁵ In a survey of 100 police departments in the largest U.S. cities, roughly one in three require officers to attempt to de-escalate a situation where possible and over half require officers to provide a warning before exercising lethal force.¹⁶ Many jurisdictions include specific restrictions on when lethal force can be used, such as limiting when such force can be directed at a person in a motor vehicle or a fleeing felon, in light of this Court’s jurisprudence.¹⁷

Policies can range from ensuring that lethal force is used only when other means are exhausted, to comprehensive factor-based analyses. Some departments have

force-standard/; *see also* *Overview of Police Use of Force*, National Institute of Justice (Mar. 5, 2020), <https://nij.ojp.gov/topics/articles/overview-police-use-force>.

¹⁵ *Id.*

¹⁶ Emilee Green & Orleana Peneff, *An Overview of Police Use of Force Policies and Research*, Illinois Criminal Justice Information Authority (Aug. 15, 2022), <https://icjia.illinois.gov/researchhub/articles/an-overview-of-police-use-of-force-policies-and-research>. Indeed, Harris County, where the tragic incident of this case occurred, states that officers “are expected to de-escalate a situation whenever reasonably possible at all points before, during, and after an encounter” and a “verbal warning should precede the use of deadly force whenever reasonable.” Harris County Sheriff’s Office, 501 - De-escalation & Response to Resistance §§ III, V.C., <https://hcsopolicy.com/policy/501-de-escalation-response-to-resistance/>.

¹⁷ Obasogie & Newman, *supra* note 6, at 1307.

added policies that explicitly reference protection of human life as a key policing objective.¹⁸ These expectations provide necessary guardrails that officers are expected to comply with in order to ensure safety is prioritized and that officers do not merely act on impulse in response to a threat—as the Moment of Threat Doctrine implicitly suggests. Some examples include:

¹⁸ For example, prior to 2020, the Berkeley Police Department use of force policy required officers to “consider[] the seriousness of the suspected offense, the availability of de-escalation and other less aggressive techniques, and the risks of harm presented to members of the public and the officers involved.” The department has since expanded its policy to include the mission to “safeguard the life, dignity, and liberty of officers themselves and all members of the community they are sworn to protect and serve.” Rasheed Steward, *Principle-Based Reform of Peace Officers’ Use of Force* at 30, Institute for American Policing Reform, https://static1.squarespace.com/static/634da09b4cdfb11a4c461407/t/63e1589f12406a64f14f0208/1675712672531/The+IAPR+Use+of+Force+White+Paper_A+Principled-Based+Approach+to+Policing+Reform+02-03-23.pdf. Likewise, in 2021, Connecticut launched a new state-wide training program to foster officer courage, empathy, and promote de-escalation to help reduce fatal shootings and other violent acts. Dave Collins, *New Police Use-Of-Force Training Focuses on ‘Moral Courage’*, The Bristol Press (Aug 14, 2021), <https://patch.com/connecticut/across-ct/new-police-use-force-training-focuses-moral-courage>.

- In Baltimore, Maryland, officers may only use deadly force when “all lesser means of force have failed or could not be reasonably used.”¹⁹
- In Kansas City, Kansas, lethal force may only be used when “all reasonable lesser alternatives have failed or appear impractical.”²⁰
- In San Antonio, Texas, officers must consider a set of factors when determining the appropriate level of force. Among the factors officers must consider are whether the suspect is submitting peacefully or resisting, whether the suspect is armed, the nature of the crime, the number of suspects involved, and level of support available from other officers. Officers are also guided to de-escalate the situation, where possible.²¹

These kinds of escalation policies can help protect officers. Escalation of force increases risk of physical harm to the involved police officers. Remaining calm can help an officer maintain a clear head and focus on mitigating the conflict before them and protecting their

¹⁹ *Understanding Use of Force*, Baltimore Police Dep’t (Nov. 18, 2024), <https://www.baltimorepolice.org/resources-and-reports/understanding-use-force>.

²⁰ General Order Number 1.02, Use of Force, Kansas City, Kansas Police § III.C (Aug. 18, 2022), <https://www.kckpd.org/files/sharedassets/police/v/1/documents/1.02-use-of-force.pdf>.

²¹ Procedure 501 – Use of Force, San Antonio Police Department, General Manual (Nov. 10, 2015), <https://www.sanantonio.gov/Portals/0/Files/SAPD/501-UseOfForce-11-10-15.pdf>.

community. And de-escalation has the potential to remove a threat—to the officer and the public—altogether, through nonviolent means. Meanwhile, if an officer responds to a suspect’s aggression with their own aggression, the officer may misfire their weapon, invite return gunfire or another attack, or otherwise put themselves in a position of increased risk. The benefits of de-escalation are not only supported by common sense, but are supported by research. In one area where de-escalation training was introduced, officer injuries decreased by 36%.²²

But even though these policies are designed to (and do) reduce the threat of harm to officers, the Moment of Threat Doctrine treats them as legal nullities. Rather than encouraging officers to exercise lethal force judiciously and take into account the full context of a situation before reaching that resort (as these policies do), the Doctrine condones, or even encourages, officer conduct that runs contrary to the policies and procedures intended to protect officers.

²² Robin S. Engel et al., *Examining the Impact of Integrating Communications, Assessment, and Tactics (ICAT) De-escalation Training for the Louisville Metro Police Department: Initial Findings* at xii, Fig. 9, Center for Police Research and Policy (Sept. 16, 2020), https://www.theiacp.org/sites/default/files/Research%20Center/LMPD_ICAT%20Evaluation%20Initial%20Findings%20Report_FINAL%2009212020.pdf.

The circumstances here—firing into a moving vehicle—prove the point. Many jurisdictions prohibit officers from firing at moving vehicles.²³ Restrictions on shooting at moving vehicles protect not only the driver, but also bystanders and the responding officer. If an officer is trying to shoot a moving vehicle, they may be less focused on trying to get out of the way, risking serious injury to themselves. Moreover, gunfire, whether accurate or not, could cause the car to lose control, speed, or otherwise enter a dangerous state. Regardless of whether the vehicle slows down or speeds up after the driver is injured or killed, a collision is often the only way the vehicle will stop. As far back as 1989, the International Association of Chiefs of Police acknowledged that if the driver is killed, vehicles will “almost certainly proceed out of control and could become a serious threat to officers and others in the area.”²⁴

²³ Kim Barker et al., *How Police Justify Killing Drivers: The Vehicle Was a Weapon*, The New York Times (Nov. 6, 2021), <https://www.nytimes.com/2021/11/06/us/police-traffic-stops-shooting.html?smid=url-share;#scantwait> (last updated May 24, 2021), <https://scantwait.org/#project>.

²⁴ *Use of Force 7*, IACP National Law Enforcement Policy Center (first published Feb. 1989; last updated Feb. 2006), <https://s3.documentcloud.org/documents/2303827/useofforcepaper.pdf>. See also Barker, *How Police Justify Killing Drivers* (Chuck Wexler, the executive director of a law enforcement policy nonprofit and a former senior official in the Boston police department, saying that firing into a moving vehicle is “like you’ve created an un-guided missile” and that you’ve “basically lost control”); David A. Graham, *Why Do Police Keep Shooting Into Moving Cars?* The Atlantic (May 21,

Indeed, recognizing the risk to all involved, the Department of Justice has long-warned against shooting into moving vehicles, and police departments in most major cities have banned that practice.²⁵ Police academies no longer train new recruits to fire into moving vehicles; officers are instead encouraged to move out of the way.²⁶ And these policies have been successful in protecting both officers and civilians. After a child was shot and killed by police while joyriding in 1972, the New York City police department banned firing into a moving vehicle.²⁷ That policy change did not increase officer injury or death.²⁸ Rather, the opposite occurred; since

2021), <https://www.theatlantic.com/ideas/archive/2021/05/andrew-brown-police-shootings-moving-vehicles/618938/> (Geoffrey Alpert, a professor at the University of South Carolina and an expert on police use of force, explaining that “[i]t’s just as likely if you shoot someone that a foot’s going to go on the gas as on the brake”).

²⁵ See, e.g., Justice Manual, 1-16.000 – Department of Justice Policy on Use of Force at 1-16.200, U.S. Dep’t of Justice (updated July 2022) (“Firearms may not be discharged solely to disable moving vehicles. Specifically, firearms may not be discharged at a moving vehicle unless: (1) a person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle; or (2) the vehicle is operated in a manner that threatens to cause death or serious physical injury to the officer or others, and no other objectively reasonable means of defense appear to exist, which includes moving out of the path of the vehicle.”); *supra* note 23.

²⁶ Barker et al., *supra* note 23.

²⁷ *Id.*

²⁸ Trevor Bechtel et al., *Evidence on Measures to Reduce Excessive Use of Force by the Police*, Michigan Center for Racial Justice (Jan.

the ban was enacted, no single on-duty officer in New York City has been killed by a vehicle fleeing a traffic stop.²⁹ Moreover, in the decades following the ban, the number of officers in New York City killed in the line of duty fell by half.³⁰

Notwithstanding the empirical success of these policies, the Moment of Threat Doctrine was applied here to justify conduct that broke from those policies and exposed both the officer and Mr. Barnes to unnecessary danger. Like many other department policies, Harris County's de-escalation policy states that an officer "must move out of the path of a vehicle rather than discharge a firearm at a vehicle."³¹ Its policy also states that officers "are expected to de-escalate a situation whenever reasonably possible at all points before, during, and after an encounter."³² Yet Officer Felix, a Harris County Constable, arguably escalated the encounter by jumping on Mr. Barnes's vehicle, rather than moving out of the way, placing himself in a position of risk he would not have otherwise faced and leading to Mr. Barnes's tragic death. Adherence to his department's

2023), <https://sites.fordschool.umich.edu/pov-erty2021/files/2023/01/final-Policing-pb.pdf>.

²⁹ *Id.*

³⁰ Jon Swaine et al., *Moving Targets*, *The Guardian* (Sept. 1, 2015), <https://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted>.

³¹ Harris County Sheriff's Office, 501 - De-escalation & Response to Resistance § V.F.1, <https://hcsopolicy.com/policy/501-de-escalation-response-to-resistance/>.

³² *Id.* at §§ III, V.C.

de-escalation policies could have kept Officer Felix out of harm's way, but under the Doctrine, the court of appeals ignored this crucial part of the analysis. By focusing only on the split-second of the threat, the Moment of Threat Doctrine encourages officers to disregard the policies that protect them and the public, allowing situations to potentially escalate and harm civilians and officers alike.

Policies that encourage officers to exercise discretion, consider the totality of the circumstances, and explore alternatives before resorting to deadly force help protect officers from engaging in dangerous situations where lethal force may be needed. Officers in areas with those policies are “less likely to be killed in the line of duty” and “less likely to be assaulted.”³³ The Moment of Threat Doctrine undermines those policies and encourages officers to behave in ways that expose both them and the public to greater danger. Far from benefitting officers, the Doctrine in fact enhances danger to them, and can lead to unnecessary loss of civilian lives.

B. The Moment of Threat Doctrine discounts officer judgment and the realities of policing.

The Moment of Threat Doctrine, however, does more than just undermine or conflict with good policing policies and tactics: It largely imagines them out of existence.

³³ *Police Use of Force Policy Analysis* at 10, Campaign Zero (Sept. 20, 2016), <https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/policy-analysis-sinyangwe.pdf>; *see also id.* at Figs. 5 & 6.

Officers do not make decisions based on pure instinct, but instead rely on their training, experience, and situational awareness. Unfortunately, officers routinely encounter volatile and dangerous scenarios. In 2023, 60 police officers were feloniously killed while on the job.³⁴ Police training aims to prepare officers for a wide variety of situations and to minimize the risks inherent to policing. The training an officer receives informs and guides their decision-making, particularly when it comes to use of lethal force. Indeed, the Court has recognized, in other contexts, that training enables police officers to make more informed decisions than laypeople.³⁵

Although the specific contents of training varies by jurisdiction, all officers across the nation are taught how to exercise force safely and when force can be used. The average law enforcement officer receives hundreds of hours of training, both in the classroom and on the field.³⁶ Many police departments have annual training

³⁴ Law Enforcement Officers Killed and Assaulted, Federal Bureau of Investigation, Crime Data Explorer, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/le/leoka>.

³⁵ See *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (acknowledging that officers “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person” (quotation marks omitted)).

³⁶ 83% of state and local police academies require field training. In 2018, the average police recruit had 833 hours of basic training,

requirements in excess of State mandated requirements.³⁷ Officers are also taught how to keep themselves safe, with officers receiving, on average, at least 60 hours of training devoted to self-defense to better prepare them for high-risk scenarios where force may be required.³⁸ The amount and type of training has trended upward in recent years to comprise specialized de-escalation training, with over 90% of officers receiving training in de-escalation tactics, which includes training in use of non-lethal weapons.³⁹

Police training and department policies are intended to prepare officers for encountering risky scenarios so officers can make informed decisions in critical moments. The significant training officers receive confirms that officers are trained professionals who bring that training into the real-world as they encounter citizens

with field training totaling an average of 508 hours. Buehler, *State and Local Law Enforcement Training Academies*, at 2.

³⁷ Sean E. Goodison & Connor Brooks, *Local Police Departments, Procedures, Policies, and Technology, 2020 - Statistical Tables* at 12, U.S. Dep't of Justice (Nov. 2023), <https://bjs.ojp.gov/document/lpdppt20st.pdf>. Indeed, 91% of sheriff's offices required annual training hours for full time deputies, with an average of 38 annual training hours. *Id.* at 2.

³⁸ Brian A. Reaves, *State and Local Law Enforcement Training Academies, 2013* at 5, U.S. Dep't of Justice (July 2016), <https://bjs.ojp.gov/content/pub/pdf/slleta13.pdf>.

³⁹ Officers receive an average of 18 hours of de-escalation training, in addition to an average of 20 hours of training on the use of non-lethal weapons. Buehler, *State and Local Law Enforcement Training Academies*, at 3.

and work towards promoting safety. And officers find that training and policy useful when making decisions in the real world.⁴⁰

This training helps officers make real-time decisions about how to fulfill their duties and keep people safe. Officers may, for example, consider the reason for the encounter, including whether it is a routine traffic stop or a house call for potential violence against a child. They may consider whether the civilian is known to officers and whether the civilian has a felony record, whether the civilian is armed or unarmed, whether the civilian is making threats, or whether other people are present. These factors, and others not listed, practically inform officer decision making.

The Moment of Threat Doctrine takes none of this into account. Instead of recognizing that most officers make decisions to use lethal force as trained professionals, who are capable of following department policies and applicable regulations, the Moment of Threat Doctrine categorically treats all instances of lethal force as the result of split second decision-making, and nothing else. Indeed, in looking only at a split-second response in the face of danger, the Doctrine presumes that officers stop processing information as soon as they encounter a threat. This not only contravenes common sense, but also ignores and discredits officer training and experience. Even though officers operate in uniquely

⁴⁰ Rich Morin et al., *Behind the Badge* at 14, Pew Research Center (Jan. 11, 2017), https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf.

high-stress situations where an untrained person may unnecessarily resort to lethal force, officers are trained to handle high-stress worst-case scenarios. Indeed, most officers have “serious concerns” about their physical safety at least “sometimes,” with 42% of respondents stating that they “nearly always or often have serious concerns.”⁴¹ Yet, most officers, just under 75%, report never firing a lethal weapon in the line of duty.⁴² Of those that do, most do so in ways that are supported by their training and in compliance with applicable rules.⁴³ And if an officer does not comply with their department’s policies, they risk not only their own personal safety, but potential sanctions, probation, or termination.⁴⁴

⁴¹ *Id.* at 9.

⁴² *Id.* at 22.

⁴³ See Matthew J. Hickman, *Citizen Complaints about Police Use of Force*, U.S. Dep’t of Justice (June 2006), <https://bjs.ojp.gov/content/pub/pdf/ccpuf.pdf>.

⁴⁴ For example,

- In Detroit, Michigan, sanctions for violating department policies can result in a range of responses, from mandated counseling to suspension and firing. The city employs a disciplinary matrix, and can terminate officers if it is determined that officers have violated policies and a person has died or suffered serious injury. Disciplinary Administration, Detroit Police Department, [https://detroitmi.gov/sites/detroitmi.localhost/files/events/2022-03/DA BOPC Presentation 031722.pdf](https://detroitmi.gov/sites/detroitmi.localhost/files/events/2022-03/DA%20BOPC%20Presentation%20031722.pdf).

It is within this context that officers make life-and-death decisions. And for the most part, officers do rely on their training and department policies to guide their behaviors. In fact, 85% of officers find department guidelines on use of force “helpful” when “confronted with actual situations where force may be necessary.”⁴⁵ Instances of misconduct represent a small fraction of police encounters with civilians; most officers comply with department policies and rules.⁴⁶ Officers know that these policies help keep the public, and themselves, safe.⁴⁷

Considering only the single moment preceding the use of lethal force mandates tunnel vision. Even when

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- In Fort Worth, Texas, officers who violate use of force policies can face reprimands up to indefinite suspension, depending on the severity of the offense. Disciplinary Guidelines, Fort Worth Police Department, <https://fortworthreport.org/wp-content/uploads/2022/07/disciplinary-chart-With-Watermark-2-1.pdf>.
 - In New York, New York, when officers fail to comply with department policies regarding use of force, officers can face criminal and civil liability which can include termination, depending on the degree of harm caused. Disciplinary System Penalty Guidelines, New York City Police Department (Jan. 15, 2021), https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-competepdf.

⁴⁵ Morin, *supra* note 40, at 13.

⁴⁶ Hickman, *supra* note 43, at 1.

⁴⁷ Morin, *supra* note 40, at 13.

facts make clear that an officer's decision to exercise lethal force resulted from a careful consideration of risk, the mitigation strategies attempted, and the officer's training and experience, singling out one moment could permit courts to find an officer acted wrongly even if a holistic review could show that the officer followed their training protocol and complied with department policies. It does, of course, cut both ways, but ignoring this context fails to treat law enforcement officers as trained professionals capable of making informed decisions under pressure, and instead relegates them to the status of untrained civilians who may reflexively pull the trigger upon any threat. Such an analysis is a disservice to the skill and dedication of law enforcement officers.

II. The Moment of Threat Doctrine Creates Risks of Other Collateral Harm to Officers.

The risks created by the Moment of Threat Doctrine extend beyond the immediate physical safety of law enforcement in a dangerous encounter. In addition to decreasing officer safety during interactions with the public by contradicting officer training and policy, the Moment of Threat Doctrine also increases the risks from a broader range of harmful collateral consequences affecting officers.

Specifically, the Doctrine condones, and potentially encourages, dangerous officer behavior that fuels distrust between officers and the community. This can lead to higher incidence of violence that affects officers directly—both in the form of increased physical risks if civilians lash out and in the form of negative mental

health outcomes following increased exposure to violence. These long-term collateral consequences adversely affect law enforcement and the communities they protect.

A. The Moment of Threat Doctrine can erode community trust.

Law enforcement officers are deeply tied to the communities they serve, and the Moment of Threat Doctrine promotes police conduct that jeopardizes positive police and community relations. Officers rely on the public to cooperate with law enforcement in the investigation of criminal activities and the public relies on law enforcement to keep them safe. When relationships between the police and the community break down, it is difficult for law enforcement to do their job effectively and difficult for citizens to feel as though the police deserve their faith. Low levels of trust between the public and the police endangers both.

There is an ongoing crisis of distrust between the police and the communities they protect. In February 2023, just 39% of American adults surveyed stated that they have confidence in the police.⁴⁸ And the largest drops of confidence in police capability occurred after highly-publicized incidents of police misconduct—often

⁴⁸ Emily Washburn, *America Less Confident In Police Than Ever Before: A Look At The Numbers*, Forbes (Feb. 3, 2023), <https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/>.

including incidents of lethal (and often excessive) use of force.⁴⁹ This distrust can have dangerous consequences, as it makes the act of policing more difficult and the likelihood of violence against police greater.

Lack of trust has dangerous consequences for both officers and communities they serve. When there is distrust between the police and the community, citizens are less likely to report crimes and to cooperate with law enforcement investigations.⁵⁰ Moreover, interactions between officers and community members are more likely to turn violent.⁵¹ By sanctioning conduct that the

⁴⁹ See *id.*

⁵⁰ Richard Brown, *Do We Trust The Police?*, Psychology Today (Apr. 28, 2023), <https://www.psychologytoday.com/us/blog/understanding-health-behaviors/202303/do-we-trust-the-police>; Susan Shah & Jim Burch, *How to Build Trust in Policing*, The Marshall Project (Oct. 23, 2015), <https://www.themarshallproject.org/2015/10/23/how-to-build-trust-in-policing>.

⁵¹ Abene Clayton, *Distrust of police is major driver of US gun violence, report warns*, The Guardian (Jan. 21, 2020), <https://www.theguardian.com/us-news/2020/jan/21/police-gun-violence-trust-report> (finding that distrust of law enforcement makes civilians “more likely to seek vigilante justice” and is often found in combination with “underreporting of crimes, declines in witness cooperation and engagement with officers, less informed policing, unsolved murders and spikes in violence.”); *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, Giffords Law Center (Sept. 9, 2021), <https://giffords.org/lawcenter/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/> (“The research, and the recent experience of many of our nation’s cities, show that when police departments lose this trust, a dangerous, downward spiral of disengagement ultimately

community may view as unreasonable in light of all the circumstances, the Moment of Threat Doctrine erodes that trust and increases the risks of danger that an officer may face on a daily basis.

That erosion of trust can be exacerbated by misconduct lawsuits, especially for those lawsuits where the Moment of Threat Doctrine is applied. American taxpayers fund police misconduct settlements, which settlement reports show almost always involve excessive use of force claims.⁵² These settlements are typically paid by local governments, rather than the police officers involved or even the police department.⁵³ Because of the criminal protections offered by qualified immunity, lawsuits are often the only recourse for citizens to hold the police accountable for excessive use of force

leads to spikes in violence and vigilantism that threaten the safety of residents and officers alike.”).

⁵² See Keith L. Alexander et al., *The hidden billion-dollar cost of police misconduct*, Washington Post (Mar. 9, 2022) <https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-repeated-settlements/>; see also *Law Enforcement Misconduct*, U.S. Department of Justice (last updated June 7, 2023), <https://www.justice.gov/crt/law-enforcement-misconduct> (stating most investigations into police misconduct involve excessive use of force claims).

⁵³ *It’s Time to Follow the Money on Police Misconduct*, Policing Project (Oct. 18, 2023), <https://www.policingproject.org/news-main/2023/10/17/its-time-to-follow-the-money-on-police-misconduct>.

claims.⁵⁴ The Moment of Threat Doctrine can create a significant barrier to decreasing police misconduct settlements, because it actively promotes the occurrence of police misconduct itself and shields the officer from liability when it does occur. This lack of accountability can contribute further to anger and dissatisfaction held by the community towards police.⁵⁵

However, there are proven methods of building trust between the police and the community. Studies repeatedly show that when police treat citizens with fairness and respect, trust increases.⁵⁶ A 2022 National Policing Institute study found that training police officers to act with fairness and respect as the primary objective in citizen interactions reduced officer misconduct.⁵⁷ Thus, the research makes clear that when officers act as a re-

⁵⁴ Kerry Breen, *Settlements for police misconduct lawsuits cost taxpayers from coast to coast*, CBS News (Sept. 27, 2023), <https://www.cbsnews.com/news/police-misconduct-lawsuits-settlements-taxpayers/>.

⁵⁵ Clark Neily, *Why Are People So Mad at Police?*, The National Interest (Jan. 3, 2021), <https://nationalinterest.org/blog/reboot/why-are-people-so-mad-police-175385>; Nathan J. Robinson, *The Police Are The Problem*, Current Affairs (Jan. 29, 2023), <https://www.currentaffairs.org/news/2023/01/the-police-are-the-problem>.

⁵⁶ See Brown, *supra* note 50.

⁵⁷ David Weisburd et al., *Reforming the Police Through Procedural Justice Training: A Multicity Randomized Trial at Crime Hot Spots*, PNAS (Mar. 28, 2022), <https://www.pnas.org/doi/10.1073/pnas.2118780119>.

sult of careful decision making, and not split-second decisions based on instinct and fear, misconduct declines.⁵⁸

But under the Moment of Threat Doctrine, officers have less motivation to make thoughtful decisions if they know courts will ignore their preceding actions and the context they considered before resorting to lethal force. Because the Doctrine assumes officers make life-or-death decisions based strictly on the heat of the moment, the Doctrine encourages officers to view interactions with citizens through the narrow lens of the singular act that poses a threat to the officer. As a result, the Doctrine discourages the police from taking the time and effort to respond to complex situations and take mitigating action before using lethal force. Under this practice, not only could community members feel unheard, brewing resentment, but the use of lethal force could become more prevalent. This, in turn, erodes community trust in the police.

B. The Moment of Threat Doctrine threatens the mental health of officers.

The police conduct that the Moment of Threat Doctrine promotes can also aggravate law enforcement mental health.

⁵⁸ *Id.*

Public safety personnel sadly suffer from a higher rate of mental health disorders than the general public.⁵⁹ Law enforcement suicide is unfortunately a national problem, and the mental health of police officers is a significant public health concern.⁶⁰ One leading cause of mental health issues for police officers is exposure to traumatic, high-stress incidents, which can cause officers to develop depression or post-traumatic stress disorder.⁶¹ Indeed, it is difficult to imagine an experience more traumatic or stressful than having to decide whether to take someone's life. For many officers, particularly those in high-crime cities and counties where gun violence is prevalent, this can unfortunately be a frequent occurrence.⁶² Rather than encouraging police to work towards de-escalating these potentially traumatic encounters, the Moment of Threat Doctrine

⁵⁹ Siriporn Santre, *Mental Disorders and Mental Health Promotion in Police Officers*, Health Psychology Research (Feb. 17, 2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10875161/>.

⁶⁰ Paul Luszczynski, *Protecting the protectors by recognizing the importance of suicide prevention and mental health support in law enforcement is crucial*, SoundThinking (Sept. 25, 2024), <https://www.soundthinking.com/blog/law-enforcement-suicide-prevention/>.

⁶¹ *Id.*; H. Douglas Otto & Alysson Gatens, *Understanding Police Officer Stress: A Review of the Literature*, ICJIA (May 24, 2022), <https://icjia.illinois.gov/researchhub/articles/understanding-police-officer-stress-a-review-of-the-literature>.

⁶² See Robert Gebeloff, *Mapping Gun Violence*, The New York Times (first published May 15, 2024; updated Sep. 4, 2024), <https://www.nytimes.com/2024/05/15/briefing/gun-violence-united-states.html>.

instead pushes police to act on their stress impulses and exercise lethal force in the immediate face of threat.

The research is clear that training officers to develop an increased awareness of the contexts that inform their work and to think through next steps before taking action provides officers with much-needed tools to approach high stress situations with less emotional impact.⁶³ But the Moment of Threat Doctrine rejects a holistic approach, and instead exacerbates the problem of poor mental health among law enforcement.

⁶³ Crystal Newsom, *Officer Preparedness*, Medium (Feb. 17, 2022), <https://medium.com/book-bites/officer-preparedness-84f3d4e66fa8#:~:text=The%20second%20aspect%20of%20mind-set,in%20less%20stressful%20police%20actions.>

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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