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 THE NATIONAL URBAN LEAGUE AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Urban League is a civil rights organization that for 114 years has been dedicated to helping African Americans and historically underserved people achieve their highest potential, self-reliance, power, civil rights, and social parity. Founded in 1910 in New York City, the National Urban League works to uplift communities through economic empowerment, equality, and social justice. It has a network of 91 local affiliate Urban League organizations in 37 states and the District of Columbia, which serve more than 300 communities and more than 2 million people annually. Since its founding, the National Urban League has worked with historically underserved communities to promote public safety and combat inequitable policing. Nationally, *amicus's* constituents continue to be directly harmed by inconsistencies in regional policing practices.

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. LDF has long been concerned about the pernicious influence of race on the administration of criminal justice. LDF is especially concerned with policing policies and practices that target and

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

disproportionately harm communities of color, especially African Americans. For over a decade, LDF has represented a class of Black and Latino public housing residents and their guests in a federal lawsuit challenging the unlawful policing of public housing residences in New York City. *See Davis v. City of New York*, Civ. No. 10-699 (S.D.N.Y.). LDF has also represented the family members of Bradley Blackshire, the victim of a fatal police shooting. *See Walls v. Stark,* 19-cv-398 (Ed. Ark.).

SUMMARY OF THE ARGUMENT

Federal courts play a critical role in balancing individual rights against state policing interests. This is particularly true in cases involving government searches and seizures—from brief investigatory stops to the use of deadly force. For that reason, this Court has repeatedly emphasized in its Fourth Amendment jurisprudence that the reasonableness of an officer's conduct "is not capable of precise definition or mechanical application" but instead "requires careful attention to the facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see Tennessee v. Garner*, 471 U.S. 1 (1985). This Court has therefore instructed that lower courts must consider *all* relevant facts and circumstances giving rise to an officer's use of force in determining whether the force was reasonable.

But some courts ignore that clear mandate and instead apply the "moment of threat" doctrine, evaluating an officer's use of force only at the precise moment he pulls the trigger. This upends the careful balance between individual rights and police power that the Fourth Amendment is meant to achieve.

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

Such truncated analysis harms officers and civilians alike. Nobody has the opportunity to explain how or why a deadly encounter proceeded as it did, and everybody is bound by the factfinder's review of a single, isolated moment in time. The consequences of this doctrine are not academic. When officers know that their conduct throughout an encounter may be scrutinized in the courtroom, they have an incentive to de-escalate before using force. But when officers know that their conduct leading up to the moment of force will be deemed irrelevant, that incentive all but vanishes. This leads to less accountability for unnecessary uses of force, which erodes public trust in police, which results in even *more* violent interactions.

That cycle harms everyone, especially racial and ethnic minority communities, and Black Americans in particular. Black Americans are more than three times as likely as their white peers to be killed by police officers. The repercussions of the moment of threat doctrine, then, are not borne equally: Black individuals are disproportionately affected by police violence, so the breadth of the reasonableness analysis is more likely to impact them than any other group.

The Court should reaffirm its adherence to a "totality of circumstances" approach that determines

reasonableness based on all relevant facts, before and during the use of force.

ARGUMENT

I. The Totality of Circumstances Approach Ensures a Balance Between Individual Rights and State Interests.

The Fourth Amendment prohibits police officers from using "unreasonable" force. U.S. Const. amend. IV. In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that reasonableness depends on the "totality of the circumstances" related to officers' conduct. *Id.* at 8-9 (central question is "whether the totality of the circumstances justified a particular sort of search or seizure"). Evaluating the reasonableness of an officer's use of force thus requires an assessment of "*how* [a] seizure is made." *Id.* at 8. And that, in turn, requires consideration of all circumstances leading to the use of force—from whether the officer warned a suspect before using deadly force, *id.* at 12, to what tactics the officer used, *In Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), to whether the suspect was retreating, *Salvato v. Miley*, 790 F.3d 1286, 1293 (11th Cir. 2015), and even to what time of day it was, *Deering v. Reich*, 183 F.3d. 645, 649, 652 (7th Cir. 1999); *see also Graham v. Connor*, 490 U.S. 386, 396 (1989) ("proper application" of the reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

That detailed assessment, as this Court has reiterated time and again, carefully balances individual privacy interests with "countervailing governmental interests." *Graham*, 490 U.S. at 396 (quotation omitted); *see Garner*, 471 U.S. at 7-8 (reasonableness assessment balances "the nature and quality of the intrusion" against the "governmental interests alleged to justify the intrusion" (quotation omitted)). And to uphold that balance, the Court has refused to make broad pronouncements about when the use of force is or is not reasonable.

In *Garner*, for example, the Court explicitly declined to adopt a categorical rule permitting deadly force "to prevent the escape of all felony suspects, whatever the circumstances," *id.* at 11-12, instead reinforcing the importance of the "balancing process" required by the Constitution. The necessity of that holistic analysis, the Court explained, is self-evident in excessive-force cases: the "intrusiveness of a seizure by means of deadly force is unmatched"—it results in loss of life *Id.* at 9. And it also "frustrates" our broader societal interest "in judicial determination of guilt and punishment." *Id.* Deadly force ends a suspect's life before they are given a fair trial—or any trial.

The Court's subsequent decisions have continued to reinforce the importance of ensuring the "careful balance" contemplated by *Graham*. In *Scott v. Harris*, 550 U.S. 372 (2007), for instance, the Court again emphasized that the reasonableness analysis "must balance … the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* at 383 (quotation omitted). In line with that principle, the Court rejected the notion of "a magical on/off switch

that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382. An "easy-to-apply legal test" that failed to consider the facts of any particular case was improper. *Id.* at 383. Rather, courts "must still slosh [their] way through the factbound morass of 'reasonableness.'" *Id.* In this way, the totality of the circumstances approach aims to achieve a just outcome rather than to offer outsized protection to either the individual or the state.

Indeed, as the Court has emphasized, a holistic analysis honors not just individual rights but the countervailing government interests at stake during a seizure. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court held that an officer was justified in "half-dragging" a man to prevent him from advancing toward the vice president during a speech, then using a "gratuitously violent shove" to get him inside a vehicle. *Id.* at 198, 208. There, the "circumstances … disclose[d] substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did" to protect the vice president. *Id.* at 208. The officer's actions were thus permissible under the totality of the circumstances.

Likewise, in *Plumhoff v. Rickard*, 572 U.S. 765 (2014), the Court held that an officer acted reasonably when he used deadly force against a suspect who was driving 100 miles per hour and had forced more than "two dozen vehicles" to alter course. *Id.* at 769. The Court reiterated that the reasonableness analysis mandates "careful balancing" of individual and state interests. *Id.* at 774. After weighing the suspect's rights against the "grave public safety risk" he posed, the Court concluded that the scales tipped in favor of the officer's use of force. *Id.* at 777.

As these cases show, this Court has reaffirmed time and again that to determine whether the use of force is reasonable under the Fourth Amendment, courts must consider *all* relevant circumstances to ensure a balance between state interests and individual rights.

II. The Moment of Threat Doctrine Upsets That Balance.

The moment of threat doctrine does not strike the balance the Fourth Amendment requires. This doctrine limits the reasonableness analysis to the "final frame"—the precise "moment" an officer exercises deadly force.[2] *See Barnes v. Felix*, 91 F.4th 393, 397 (5th Cir. 2024) ("[T]he excessive-force inquiry is confined to whether officers or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force." (internal citation omitted)). Using this approach, which this Court has never endorsed, courts cannot consider what happened in the hours, minutes, or even seconds leading to a violent encounter. Such a truncated analysis ignores this Court's repeated admonitions to evaluate reasonableness based on "the totality of the circumstances." *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8-9). That is because events leading up to the moment an officer pulls the trigger necessarily bear on the reasonableness of that act.

Consider just a few examples of fatal police shootings of men and boys—two Black and one

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

Latino. In each case, an officer behaved in an arguably unreasonable manner, created a dangerous situation for himself, and used deadly force as a result—but ultimately was not held liable. In each case, the officer was not held liable because prosecutors determined that the officer feared for his life at the moment of threat. And in each case, considering the totality of the circumstances rather than the moment of threat may lead to a starkly different conclusion about whether the use of force was justified.

Bradley Blackshire. A police officer in Little Rock, Arkansas, shot and killed Blackshire, an African American man, on February 22, 2019. At the "moment of threat," the officer was standing in front of Blackshire's vehicle as Blackshire drove forward.[3] Blackshire bumped the officer with his car, and the officer began to shoot. *Id.* Prosecutors determined that the officer was "confronted with the imminent threat of deadly force" when Blackshire drove toward him and ultimately bumped him, which justified the officer's decision to shoot.[4]

The totality of the circumstances tells a different story. Blackshire had driven into a parking lot.[5] The officer followed Blackshire, whose vehicle had been flagged as stolen by an automatic license-plate reader, rendering him a "high-risk" suspect. *Id.* Violating protocol, the officer did not wait for backup; instead, he drove to within feet of Blackshire's vehicle

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

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

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

and parked directly in front of it. *Id.* The officer then exited his cruiser, drew his gun, ran in front of Blackshire's vehicle, and positioned himself just outside Blackshire's window. *Id.* The officer commanded Blackshire to get out of the car but never explained why. *Id.* Blackshire did not comply, and began to drive slowly to his left, toward the officer. *Id.* Blackshire bumped the officer, who began to shoot while simultaneously stepping out of the path of the moving vehicle. *Id.* Still shooting, the officer stepped back into the path of the vehicle, which was still moving, jumped on its hood, and fired multiple additional rounds into the windshield, killing Blackshire. *Id.*

Tamir Rice. In what became national news, a police officer Cleveland, Ohio, shot and killed Rice—a Black boy, just 12 years old—on November 22, 2014. At the "moment of threat," the officer was within feet of Rice, who the officer thought was armed. Rice reached into his waistband, and the officer shot him. Prosecutors determined that the officer "had a reason to fear for his life" given his proximity to a potentially armed suspect who was reaching into his waistband.[6]

Again, the totality of the circumstances paints a different picture. The officer and his partner were patrolling near a park.[7] Dispatch sent out a "Code 1"—a high-urgency situation. *Id.* The officer and his

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

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

partner sped directly into the park. *Id.* They pulled up to within feet of Rice, which "made it difficult to take cover, or to use verbal persuasion or other tactics suggested by the department's use-of-force policy." *Id.* The officer opened his door and, within *two seconds* of arriving on scene, shot Rice—"raising doubts that he could have warned the boy ... to raise his hands, as the police later claimed." *Id.*

Anthony Vega Cruz. A police officer shot and killed Vega Cruz, a Latino man, on April 20, 2019, in Wethersfield, Connecticut. At the "moment of threat," the officer was standing in front of Vega Cruz's vehicle as Vega Cruz drove forward.[8] The officer "feared for [his] life and knew that [he] had to stop the operator from running [him] over …" *Id.* So the officer shot Vega Cruz through the windshield. Prosecutors determined that the officer reasonably feared for his life in that moment, and justifiably used deadly force as a result. *Id.*

Here, too, the totality of the circumstances tells a different story. One officer had pulled Vega Cruz over for having heavily tinted windows; he then summoned a second officer for backup. *Id.* The first officer exited his cruiser and walked toward Vega Cruz. *Id.* As the first officer approached, Vega Cruz fled, and both officers pursued Vega Cruz in their respective cruisers. *Id.* Vega Cruz eventually spun out, and the second officer's cruiser collided with Vega Cruz's car head-on. *Id.* The second officer exited his

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[8] Gail P. Hardy, *Report of the State's Attorney General for the Judicial District of Hartford Concerning the Use of Deadly Physical Force on April 20, 2019, by Wethersfield Police Resulting in the Death of Anthony Vega-Cruz*, CONN. DIV. OF CRIM. JUST. (Mar. 3, 2020), http://portal.ct.gov/dcj/whats-news/reports-on-the-use-of-force-by-peace-officers/2019---april---anthony-vega-cruz---wethersfield.

cruiser, gun drawn, while Vega Cruz reversed and attempted to spin his car back around. *Id.* The second officer chased after Vega Cruz on foot and caught him just as he was about to drive away, positioning himself directly in front of Vega Cruz. *Id.* Vega Cruz then began to drive forward. *Id.* The second officer felt threatened, and shot Vega Cruz as a result. *Id.*

In each of these examples, whether the officer's use of force was reasonable could easily turn on how much of the encounter the factfinder considers. For Blackshire, the final frame suggests that the officer found himself within inches of a car that was moving towards him and had actually hit him; but going back just a few frames suggests that the officer failed to wait for backup in a "high-risk" situation, drove to within feet of a "high-risk" suspect, deliberately stepped into the path of a moving vehicle, and jumped onto its hood. For Rice, the final frame suggests that the officer found himself within feet of a potentially armed individual reaching into his waistband; but considering even a few more seconds shows that the officer drove to within feet of a potentially armed individual, left the safety of his cruiser, and likely offered little or no warning before opening fire. And for Vega Cruz, the final frame suggests that the officer found himself within inches of a car that was speeding toward him; but the totality of the circumstances shows that the officer ran in front of a fleeing suspect's car.

These cases demonstrate that the final frame bears little resemblance to the entire picture. To ensure that factfinders can accurately discern the truth, they must be able to consider what led up to the moment of force, not just the moment itself.

A. The moment of threat doctrine increases the likelihood of violent interactions and decreases public trust between police and civilians.

The moment of threat doctrine does more than contravene this Court's clear instructions and improperly shield officers from liability: it also encourages officers to shoot first and ask questions later. When officers understand that courts and juries will consider *all* the circumstances leading to their use of force, they have a legal incentive to de-escalate the situation. By warning suspects and not placing themselves in unnecessary danger, officers can demonstrate that force, if used at all, was a reasonable last resort. The moment of threat doctrine removes that incentive, creating the potential for more violent encounters and, in turn, decreased public trust. Those outcomes are devastating for all Americans, but especially for Black individuals, who are most likely to victims of police violence.

1. Officers have less incentive to de-escalate encounters with civilians, leading to more violent encounters.

The vast majority of encounters between police and civilians do not involve the use of force. *See, e.g.*, Deepak Premkumar, et al., *Police Use of Force and Misconduct in California*, PUB. POL'Y INST. OF CAL. (Oct. 2021). For instance, in 2019, officers from California's largest law enforcement agencies aimed weapons at civilians in just four encounters out of 1,000—and fired a weapon in just four encounters out of 100,000. *Id.* That is due, in part, to the de-escalation tactics many officers use. Officers can "create space, slow things down, ask open-ended questions and hold off reaching for their gun to avoid

ramping up confrontation."[9] Rachel Abanonu, *De-Escalating Police-Citizen* Encounters, 27 S. CAL. REV. OF L. & SOC. JUST. 239, 245 (2018) (de-escalation is "combination of communication, empathy, instinct, and sound officer safety tactics").

These strategies work. Take, for example, an encounter between a Baltimore police officer and a man wielding a knife in public.[10] The officer, standing at a distance, began by stating his name: "Officer Villaronga, by the way. You can call me V." *Id.* He continued: "Why do you want us to hurt you, man? … We could have you sit down right here on this curb and we could talk to you." *Id.* After the man started walking away, the officer continued: "I can relate to you, bro. There's not a thing in this world that I have not dealt with that you probably have dealt with." *Id.* At that point, the man dropped the knife—and no one resorted to violence. *Id.*

Or consider an encounter between Seattle police officers and another knife-wielding man.[11] The officers trailed behind the man at a distance. *Id.* One

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[9] Tom Jackman and Dan Morse, *Police De-Escalation Training Gaining Renewed Clout as Law Enforcement Seeks to Reduce Killings*, WASH. POST (Oct. 27, 2020), https://www.washingtonpost.com/local/deescalation-training-police/2020/10/27/3a345830-14a8-11eb-ad6f-36c93e6e94fb_story.html.

[10] Kevin Rector, *Body Camera Footage Shows Baltimore Police Officer De-Escalate Standoff With Armed Man in Crisis*, BALTIMORE SUN (Nov. 8, 2017, updated July 1, 2019), https://www.baltimoresun.com/2017/11/08/body-camera-footage-shows-baltimore-police-officer-de-escalate-standoff-with-armed-man-in-crisis/.

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

officer said: "You gotta drop the knife, buddy." *Id.* When the man did not comply, the officers exited their cruiser and walked slowly towards the man, still maintaining distance. *Id.* Another officer said: "If you put the knife down and come over here and sit down, we can work something out." *Id.* The man ultimately complied—and again, no one resorted to violence. *Id.*

De-escalation thus helps keep everyone safe—officers and civilians alike. Indeed, injuries to both civilians and officers drop precipitously in areas where officers practice de-escalation, as do complaints of excessive force. In Dallas, the number of excessive force complaints fell from 147 in 2009, before de-escalation training, to *just 21* a few years after. And in Louisville, Kentucky, civilian injuries there dropped by more than 26%—and officer injuries by 36%—after the city's police force completed de-escalation training. *See, e.g.*, Robin Engel et al., *Assessing the Impact of De-Escalation Training on Police Behavior: Reducing Police Use of Force in the Louisville, KY Metro Police Department*, 21 CRIM. & PUB. POL'Y 199, 199 (2022); U.S. Comm'n on Civ. Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 117 (2018).

Yet the moment of threat doctrine tells officers that these proven tactics do not matter. Regardless of how an officer acts in the lead up to a shooting—jumping on a moving car, verbally provoking a suspect, ignoring department protocol—the doctrine makes clear that nothing but the "final frame" will matter in court. And that, in turn, reduces the incentive to de-escalate. Indeed, "[a]s long as the focus is on whether the circumstances justified the use of force *at the moment it was applied*, officers have

no legal incentive to step back and ask themselves whether they could have avoided the entire situation without a violent confrontation." Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 471 (2004) (doctrine "reduces incentives for constructive review and training to avoid excessive force in future police-citizen interactions").

The upshot? More violent encounters, leading to more tensions between officers and civilians, leading to yet more violence. Reaffirming the totality of circumstances approach can help end this cycle; the moment of threat doctrine accelerates it. *See* Jessica Winters, *New ASU Research Says Officer De-Escalation Training Works. Here's Why.*, 12NEWS (Nov. 3, 2021) ("Officers who received the one-day [de-escalation] training last year were 58% less likely to injure someone in a use of force encounter than those who didn't do the training.").

2. Increased violence between police and civilians erodes public trust in the police, which perpetuates more violence.

This cycle harms more than just the people involved in violent interactions. Every violent police encounter harms not only the person injured—or killed—but also their family, their friends, and their community. And these wounds fester, eroding public trust in law enforcement as civilians see police as more harmful than helpful.[12] Indeed, when civilians experience or hear about police conduct they consider

[12] Cedric L. Alexander, *Ex-Cop: Atatiana Jefferson's Killing Further Erodes Police Legitimacy*, CNN (Oct. 14, 2019), https://www.cnn.com/2019/10/14/opinions/atatiana-jefferson-police-shooting-death-alexander/index.html.

unjust, they are more likely to question the police's legitimacy and less likely to treat officers with respect. *See id.*; U.S. Dep't of Just., *Investigation of the Ferguson Police Department* 80 (Mar. 4, 2015) ("when police … treat people unfairly, unlawfully, or disrespectfully, law enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct").

That leads to more violence. Some researchers have explained, for example, that waning trust in police leads to an increase in gun violence as civilians "seek vigilante justice" and try to "take care of themselves" where they "can't count on help from the state and its agents."[13] Other researchers have dubbed this community-police dynamic a "cycle of mistrust": people "who have not been victims of police violence themselves may lose trust in law enforcement if they perceive the police as a discriminatory institution" which "can result in a downward spiral where a heightened sense of alienation fuels more violence." Jonathan Ben-Menachem et al., *Police Violence Reduces Trust in the Police Among Black Residents*, PLOS ONE, 19(9) 2 (Sept. 11, 2024) ("unjust interactions with police … lead to reduced trust in police, thus leading to reduced legal compliance" and more violent interactions).

And it is not just civilians that bear the consequences of this dangerous cycle. Officers do, too. More violence between police and civilians breeds more public distrust in the police; more public distrust leads to more mutual fear in police-civilian

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[13] Abené 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.

encounters; and more mutual fear in those encounters increases the likelihood of violence—both by and against police. *See, e.g.*, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted, Special Report* (May 14, 2024) (from 2021 to 2023, more officers were feloniously killed than in any other consecutive three-year period; in 2023, law enforcement agencies reported the highest officer assault rates in the past 10 years).

Just one example of how this frightening cycle plays out: in 2016, a sniper killed five Dallas police officers just days after officers there killed Philando Castile and Alton Sterling, two Black men.[14] The Dallas shooting was precisely the type of "retaliatory" violence stemming from the "divisiveness between our police and our citizens." *Id.* Days before he killed the officers, the shooter wrote on social media that he was fed up with the "killing and participating in the death of innocent beings," and the "brualiz[ation]," by police, of African Americans.[15] The "downward spiral" of violence was clear.

Reaffirming the correct standard for determining the reasonableness of an officer's use of force can help reverse this cycle. By teaching officers that their pre-seizure conduct matters, a totality of the circumstances regime incentivizes officers to deploy de-escalation tactics; de-escalation leads to fewer violent encounters between police and civilians; fewer

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[14] Manny Fernandez et al., *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html.

[15] Gina Cherelus et al., *Dallas Shooting Suspect's Online Posts Reflect Anger, Frustration*, REUTERS (July 9, 2016), https://www.reuters.com/article/world/dallas-shooting-suspects-online-posts-reflect-anger-frustration-idUSKCN0ZO2BI/.

violent encounters increases public trust in police; and increased public trust in police reduces future violence. Assessing the totality of the circumstances also ensures a sense of procedural justice—everything that *should* matter *does* matter. This too, reduces violence, promoting the public perception that the policing system is fair and reducing friction between officers and civilians. Julia Simon-Kerr, *Public Trust and Police Deception*, 11 Ne. U. L. Rev. 625, 666-70 (2019).

B. The moment of threat doctrine disproportionately harms Black communities.

The costs of this cycle of violence and mistrust are not borne equally; they have a particularly devastating effect on Black communities. That is because Black individuals have a much higher risk of facing police violence than their white peers. *See* Joanna C. Schwartz, *An Even Better Way*, 112 CALIF. L. REV. 1083, 1086 (2024); Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PNAS 16,793, 16,793 (2019). A Department of Justice report analyzing police encounters from 2020 found that Black and Hispanic individuals were more likely to experience the threat of force or use nonfatal force during their most recent police encounter than white individuals. Susannah N. Tapp & Elizabeth J. Davis, *Contacts Between Police and the Public, 2020*, U.S. DEP'T OF JUST. at 1 (2022).

And when force is used, Black people are three times as likely as their white peers to be killed by the police. *See* Gabriel L. Schwartz et al., *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities*, 2013-

2017, PLOS ONE, at 5 (June 24, 2020). That disparity is even greater in major cities: in 2013 through 2019, police departments in the nation's 100 largest cities killed *four times* as many unarmed Black civilians as unarmed white civilians. *See* Note, Evelyn Michalos, *Time over Matter: Measuring the Reasonableness of Officer Conduct in § 1983 Claims*, 89 FORDHAM L. REV. 1031, 1034 n. 12 (2020). Black men and boys are particularly vulnerable. Statistical models predict that one in 1,000 Black men and boys will die from police violence—a higher likelihood than any other group. *See* Edwards, *supra*, at 16,794.

In the context of traffic enforcement, these disparities are reaching crisis levels. Since 2017, more than 800 people have been killed by police during traffic stops—an average of more than 100 deaths per year.[16] One in four were Black. From 2016 to 2021, "police officers ha[d] killed more than 400 drivers or passengers who were not wielding a gun or a knife, or under pursuit for a violent crime—a rate of more than one a week."[17]

Experts attribute these staggering numbers to an "overstat[ed] risk" of danger during traffic stops, compounded by racial stereotypes that fuel officers' inaccurate assessments of encounters, including misperceptions of threat. Research has shown that officers are more likely to misperceive the existence of a threat during an encounter with a Black person due to "[d]eeply rooted stereotypes that link Black

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[16] Mapping Police Violence (Sep. 12, 2024), https://mappingpoliceviolence.us/.

[17] David D. Kirkpatrick, Steve Eder, Kim Barker, & Julie Tate, *Why Many Police Traffic Stops Turn Deadly,* N.Y. Times (Oct. 31, 2021), https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html.

[individuals] with violence, danger, and criminality." *See* Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 L. & CONTEMP. PROBLEMS 145, 150 (2016); *United States v. Weaver*, 9 F.4th 129, 185 (2d Cir. 2021) (Chin, J., dissenting). "The government's reliance on racial stereotypes to assess dangerousness is not only constitutionally noxious, *see Buck v. Davis*, 580 U.S. 100, 119 (2017), but also lead many police to view Black people more suspiciously than they do white people without cause.[18] Unsurprisingly, then, Black men are more likely than white men to be mistaken for being armed[19] and are more likely to be seen as physically threatening, even when controlling for their physical size. John Paul Wilson, Kurt Hugenberg, and Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. OF PERSONALITY & SOC. PSYCH. 59, 74–75 (2017). These biases "can influence the decision to use force," including "decisions to shoot unarmed Black men in first-person shooter simulations." *Id.* at 59–60; 74–76. As a result, both "perceived threat to the officer" and "[p]ercieved noncompliance may be exacerbated depending on the race of the suspect … which can lead the encounter to escalate in severity." Kimberly Barsamian Kahn, Joel S. Steele, Jean M. McMahon & Greg Stewart, *How Suspect Race Affects Police Use of Force in an*

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[18] Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 URB. AFF. REV. 858, 858–59 (2009), https://journals.sagepub.com/doi/10.1177/1078087408326973.

[19] *See* Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50, 55 (2016), gspp.berkeley.edu/assets/uploads/research/pdf/SpencerCharbonneauGlaser.Compass.2016.pdf.

Interaction Over Time, 41 117, 117 (2017) (internal citations omitted).

In part due to these misperceptions, Black and Latino people have been shown to "receive[] higher levels of police force earlier in interactions," as compared to white suspects. *Id.* at 122. Researchers partially attribute this disparity to "[r]acial stereotypes associating Black [individuals] and Latinos with danger," which "may bias perceptions at the beginning stages of an interaction, making suspects seem more threatening or in need of force to control." *Id.* Generally, "[s]tereotype application is most powerful under conditions of ambiguity, scarce resources, anxiety and less information, as they serve to fill in the interpretation of ambiguous actions." *Id.* at 118. For these same reasons, officers are more likely to fire upon Black people. *See e.g.*, Tom S. Clark, et al., *Are Police Racially Biased in the Decision to Shoot?* 85 J. OF POL. 827 (2023). For example, a 2023 study examined officer-involved shooting data from 2010 to 2017 in eight jurisdictions, and estimated that "at least 30% of Black civilians shot [by the police] would not have been shot had they been White." *Id.* at 827. As researchers stressed, these findings are "consistent with the claim that police officers have a lower threshold for deciding to use lethal force against Black civilians than against White civilians." *Id.* at 836-37.

This Court has been unequivocal: There is no place for racial stereotypes in the enforcement of law and administration of justice. *See Buck*, 580 U.S. at 1243 (making clear that racial stereotypes in the legal system are "especially pernicious" because such discrimination "injures not just the defendant," but rather "'the community at large'" (quotation

omitted)); *Miller-El v. Dretke,* 545 U.S. 231, 237–38 (2005) (emphasizing the harm to people of color when law enforcement takes actions based on "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice" (quoting *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 128 (1994))). By prohibiting courts from considering the totality of circumstances, which can consist of myriad factual scenarios that may include unreasonable escalations based on racial bias, the moment-of-threat doctrine risks immunizing discriminatory officer conduct at the beginning of the encounter.

Shielding potentially discriminatory police conduct in this manner subjects Black people, who are unfairly and inaccurately stereotyped as dangerous, to greater risk of police violence without recourse or accountability. Such a result would be inconsistent with the law: As Judge Higginbotham made clear, the moment-of-threat doctrine impermissibly "narrow[s] the totality of circumstances inquiry by circumscribing the reasonableness analysis of the Fourth Amendment" by "remov[ing] the consideration of the entire circumstances required by Garner, including the gravity of the offense at issue." Pet. App. 14a (Higginbotham, J., concurring). In this way the moment-of-threat doctrine prohibits courts from making the type of fact-intensive inquiry that this Court requires, *id.*, and risks further eroding trust in law enforcement's ability to treat people fairly based on credible evidence, not inaccurate stereotypes.

The corrosion of public trust from increased police violence thus has an acute impact on Black communities. Again, more violence and less trust leads to communities that are more dangerous for residents and police officers alike. *Supra* Part II.A.

Black individuals are most likely to be impacted by that increased danger. More than three-quarters of American homicide victims are people of color, and nearly 60 percent of those victims are Black people.[20] Yet shootings are often not reported to the police—"not because victims and witnesses don't feel terrified or outraged but because they often do not view their police force as capable of or interested in keeping them safe." *Id.* As a result, a majority of Black victims' families never see the perpetrator arrested, let alone convicted. *Id.*

Because Black Americans are disproportionately affected by police violence, factfinders assessing use of force cases are more frequently asked to weigh in on whether to use deadly force against Black individuals is reasonable. This makes it imperative, particularly for Black communities, that factfinders make thorough reasonableness determinations, informed by *all* relevant facts. If officers are held accountable when they act unreasonably—and only when they act unreasonably—both officers' and community members' interests will be protected.

CONCLUSION

For the above reasons, the Fifth Circuit's decision should be reversed.

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[20] Giffords Law Center, *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence* (2020), https://files.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf.

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