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 PROFESSOR SETH W. STOUGHTON AS AMICUS CURIAE SUPPORTING PETITIONER

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### STATEMENT OF INTEREST[1]

Amicus curiae Seth Stoughton is a former officer of the Tallahassee Police Department who now serves as a Professor at the University of South Carolina Joseph F. Rice School of Law, a Professor (Affiliate) in the University's Department of Criminology and Criminal Justice, and the Faculty Director of the Excellence in Policing & Public

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus or his counsel made a monetary contribution intended to fund the brief 's preparation or submission.

Safety Program.[2] Professor Stoughton's articles have appeared in the Emory Law Journal, Minnesota Law Review, the Virginia Law Review, and other top journals. He is a frequent lecturer on policing issues, regularly appears in national and international media, and has written about policing for The New York Times, The Atlantic, Time Magazine, and other news publications.

As both an officer and a scholar, Professor Stoughton has developed special expertise in police tactics and the appropriate use of force. He has written multiple articles and book chapters on these subjects and given them comprehensive treatment as principal co-author of the book *Evaluating Police Uses of Force* (NYU Press 2020). He conducts training for law enforcement agencies on, *inter alia*, investigating and assessing officers' use of force.

Professor Stoughton also has an abiding concern for the proper interpretation of Fourth Amendment standards for the use of force, an interest in ensuring that the law does not undermine long-standing principles of professional policing, and a deep concern for individuals who will be subject to unreasonable searches and seizures without recourse under the "moment of the threat" doctrine adopted in a minority of the circuits, including the court below. He writes to provide the Court with the benefit of his policing expertise, and to urge the Court to abolish the "moment of the threat" doctrine once and for all.

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[2] Professor Stoughton is participating as amicus in his individual capacity and not on behalf of the University of South Carolina.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In evaluating whether instances of deadly force should be considered reasonable under the Fourth Amendment, the Court has directed lower courts to consider the "totality of the circumstances" of the officer's interaction with the suspect, *Graham* v. *Connor*, 490 U.S. 386, 396 (1989), paying "careful attention to the facts and circumstances of each particular case." *Ibid.* (quotation marks omitted). But a minority of federal circuit courts, including the court below, have instituted a rule called the "moment of the threat" doctrine that is invariably and willfully blind to many of the circumstances involved in deadly force situations. Under this approach to Fourth Amendment analysis, evaluating the constitutional permissiveness of an officer's use of deadly force is boiled down to a single moment in time, reducing the inquiry to consider only the reasonableness of the officer's actions at the moment he decides to use force—regardless of the preceding events that contributed to that decision.

This approach cannot be squared with either constitutional text or precedent and completely disregards the real-world circumstances in which the use of deadly force actually occurs. Threats requiring an officer to employ deadly force virtually never pop out of nowhere. They are instead the end product of a long line of decisions extending back to the beginning of the encounter between officer and suspect—and sometimes further beyond that point. Accordingly, when determining whether an officer's use of deadly force complies with the constitutional command of reasonableness, that evaluation cannot be reduced to the moment the shot is fired. It must instead include consideration of every action that contributed to the use of force.

That is what the "totality of the circumstances" means. And it is the only way to determine whether the officer unreasonably escalated the encounter to the point where violence became a foregone conclusion. The effort by some courts to artificially restrict the Fourth Amendment inquiry through the "moment of the threat" doctrine so as to ignore and immunize officers' patently unreasonable escalatory actions will undermine police training, incentivize further escalation, produce violence and death that a reasonable officer would have avoided, and deprive government actors of much-needed accountability in their interactions with private citizens.

For all these reasons, this Court should take this case and strike down the "moment of the threat" doctrine once and for all.

## ARGUMENT

### It is vitally important that the Court abolish the "moment of threat" doctrine.

#### A. Modern policing has long recognized the need to avoid "officer-created jeopardy."

1. "Officers do not use force in a vacuum." Seth W. Stoughton, *et al.*, *Evaluating Police Uses of Force* 154 (NYU Press 2020). Instead, scholars, criminologists, and officers have long recognized that the use of force is not the result of a single decision to employ force, but the result of "a contingent sequence of decisions and resulting behaviors—each increasing or decreasing the probability of an eventual use of *** force." Arnold Binder & Peter Scharf, *The Violent Police–Citizen Encounter*," 452 Annals of Am. Acad. of Pol, & Soc. Sci. 111, 116 (1980).

This "iterative process" (Stoughton, *supra*, at 154) often commences even before the encounter between officer and suspect begins—with the officer's previous "series of interactions" with the suspect, or before any officer-suspect interaction, as officers gather information about suspects, the locations where they may be found, and the means of confronting them. *Id.* at 155. From the moment this process begins, officers make decisions that will impact the likelihood that the situation will become violent, from the "decisions about how to approach the subject or other civilians" to the officer's actions once the encounter occurs, whereby officer and suspect trade "verbal and nonverbal cues, and react according to their position of those cues." *Id.* at 156. By the time the officer decides that the use of deadly force is necessary, that decision-point is informed by—and results from—everything that came before.

In most cases, officers perform admirably and the deadly force employed was unavoidable. On some occasions, however, officers use deadly force to address an imminent threat that resulted from the officer's own unreasonable actions. "An officer's decisions and conduct prior to that officer's use of deadly force can create [unnecessary] jeopardy for the civilian and the officer, increasing the risk of an officer-civilian encounter turning into a deadly confrontation." Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 8 Geo. Wash L. Rev. 1362, 1362 (2021). This is phenomenon is called "Officer Created Jeopardy" (Stoughton, *supra* at 156), a term that describes "*unjustified* risk-taking that can result in an officer using force to protect themselves from a threat that they were, in part, responsible for creating" Stoughton,

*supra* at 156-57 (emphasis added). This is not mere academic legalese, but is a terminology and definition pulled directly from police practice: The Police Executive Research Forum defines officer-created jeopardy as "a situation where an officer deviates from established tactics or policies and his/her actions unnecessarily place them (and/or others) at great risk of harm." *See* Tom Wilson, PERF, *Principles on Use of Force & ICAT: Integrating Communication, Assessment, and Tactics* 21, https://bit.ly/3XBASnR.

2. For decades, law-enforcement agencies, police observers, legal scholars, and criminologists have all recognized this problem of officer-created jeopardy. Decades of policy, training, and research has sought to minimize or eliminate it, with the goal of avoiding the application of deadly force whenever reasonably possible.

Police training emphasizes tactics: "the techniques and procedures that officers use to protect themselves and community members by reducing risks, mitigating the likelihood that risks will become threats, and preventing threats from manifesting into harms." (Stoughton, *supra*, at 155). Indeed, tactics have been a component of police training from the earliest days of formalized police training programs. George T. Ragsdale, *et al.*, *The Police Training School*, 146 Annals Am. Acad. Pol. & Soc. Sci. 170, 170 (1929). Among other things, departments teach officers to avoid "act[ing] precipitously on their own without waiting for available assistance from other officers." Stoughton, *supra* at 158. They educate officers to take advantage of "distance, cover, and concealment" and counsel them to avoid "willingly abandon[ing] tactically advantageous positions by moving into disadvantaged positions without justification." *Ibid.* And they provide officers with

communication strategies to help calm stressful situations and prevent them from escalating toward violence. *Ibid.* Officers are trained to "avoid placing themselves in a vehicle's path." Stoughton, *supra* at 216. And indeed, officers are even trained on *Graham* itself. See Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 Chi. L. Rev. 605, 610 (reporting the results of an empirical analysis that found "police departments regularly inform their officers about watershed decisions like *Graham* and *Garner*"). Thus, officers learn to evaluate the reasonableness of *their own conduct* through the totality of the circumstances.

Police tactics were developed precisely to "limit the suspect's ability to inflict harm and *** advance the ability of the officer to conclude the situation in the safest and least intrusive way." Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger* in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 568 (Roger Dunham and Geoffrey P. Alpert, eds., 7th ed. 2015). And training on these tactics has now become a major part of the instruction that officers receive throughout their careers. *See* John J. Sloan, III & Eugene Paoline, III, *"They Need More Training!" A National Level Analysis of Police Academy Basic Training Priorities*, 24 Police Quarterly 486 (2021).

Just as police officers have long recognized the need to prevent the use of deadly force by employing strategies in the period before deadly force becomes necessary, observers have sought to prevent the one-way ratchet of officer-created jeopardy, in which "bad police tactics create a situation where deadly police force becomes necessary." Ben Jones, *Police Generated Killings: The Gap Between Ethics and Law*, Political Research Quarterly vol. 75, Issue 2,

at 1 (May 3, 2021). NYPD lieutenant and criminologist James Fyfe, whose work was cited by the Court in *Tennessee* v. *Garner*, 471 U.S. 1, 10 n. 10 (1985), described what he called the "split second syndrome," or the mistaken belief that most use-of-force decision-making occurs in an instant, ignoring how officers' earlier actions affects the decision-making process by expanding, or limiting, their options. *The Split-Second Syndrome and Other Determinants of Police Violence*, in CRITICAL ISSUES IN POLICING 361-375 (8th ed. 2020). Instead of engaging in this faulty logic, Fyfe and other observers have long recognized that "evaluating a use of force requires assessing what happened in the seconds or minutes before the moment when the officer swung the baton or pulled the trigger," to determine the "effect that the officer's decisions and behaviors had on the probability that force would be used as well as on the ultimate severity of any force used." Stoughton, *supra* note 154. These observers have been pushing for courts to pay considerably more attention to officers' conduct prior to their use of force since even before *Graham* was decided. And these observers have sought to employ a variety of means to incentivize police officers to avoid officer-created jeopardy, including "legal sanctions" available through lawsuits under Section 1983. Jones, *supra* at 2.

This scholarly movement began in the 1970s with the work of James Fyfe and the four phases of analysis that Arnold Binder and Peter Schar developed in their books *The Violent Police-Citizen Encounter* (1980) and *The Badge and the Bullet* (1983). That movement has developed over time through works like Carl B. Klockars, *A Theory of Excessive Force and Its Control*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE

ABUSE OF FORCE 1, 8-10 (William A. Geller & Hands Toch eds., 1996), and Barbara Armacost's article *Police Shootings: Is Accountability the Enemy of Prevention*, 80 Ohio State L. J. 910, 910-11, 945-47, 952-62 (2019). And these ideas have become a big part of amicus's work, featured in books like *Evaluating Police Uses of Force*; a piece that amicus co-authored with Brandon Garrett, *A Tactical Fourth Amendment*, 203 Va. L. Rev. 211 (2017); and amicus's article *How the Fourth Amendment Frustrates Police Violence*, 70 Emory L. J. 522, 556-559 (2021).

### B. The "moment of the threat" doctrine undermines the goals of modern policing by encouraging and immunizing officer-created jeopardy.

1. Those who work in and study police departments have spent decades trying to widen the lens of police encounters—encouraging officers to make better decisions in the moments leading up to officer-initiated violence with hopes of preventing such moments from occuring. And is for this very reason that the majority of circuit courts, including the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits consider all of the circumstances that lead up to a shooting, holding that "preseizure conduct may be relevant in the reasonableness analysis."). *Rahim by Rahim* v. *Doe*, 51 F.4th 402, 418 n.14 (1st Cir. 2022); *see also* Pet. 16-31.

Certain courts, however, have sought to narrow the lens in a Fourth Amendment use-of-deadly-force case to *ignore* the moments before an officer deems the use of force to be necessary. A minority of circuit courts, including the court below, have adopted the "moment of the threat" doctrine in Fourth Amendment use-of force cases,

a doctrine that evaluates the reasonableness of an officer's actions only during the narrow window when the officer's safety was threatened, without considering the events that led up to the moment of threat. *See, e.g.*, *Salim* v. *Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Anderson* v. *Russell*, 247 F.3d 125, 132 (4th Cir. 2001); Pet. App. 7a-8a (5th Cir.); *Banks* v. *Hawkins*, 999 F.3d 521, 526 (8th Cir. 2021).

In these circuits, the "excessive-force inquiry is confined to whether the officers or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force." Pet. App. 7a-8a (quoting *Amador* v. *Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020)). As a result, courts in these circuits may consider only "the act that led the officer to discharge his weapon." *Ibid.* "Any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry." *Ibid.* (quoting *Harris* v. *Serpas*, 745 F.3d 767, 772 (5th Cir. 2014)).

By excluding consideration of the actions leading up to the moment that the officer finds himself in danger, courts adopting the "moment of the threat" doctrine refuse to consider whether the officer acted reasonably in the moments leading up to that encounter, even if those actions were a but-for and proximate cause of the ultimate danger. That not only ignores the reality of police encounters—because many of the decisions that lead to police uses of violence occur before the moment that the threat first arises—to focus on a single moment where the officer already senses a threat to their lives and safety, where the use of force becomes almost inevitable.

2. With the blinders required by the "moment of the threat" doctrine rule firmly in place, courts in the minority will be hard-pressed to find the officer's use of force unreasonable, because no court would consider an officer

faced with a threat of violence unjustified in using violence in kind. And that means many uses of deadly force will be deemed reasonable despite the fact that the officer acted completely unreasonably in creating the risk to their own safety that led to the use of deadly force.

This rule immunizes the "officer's own reckless or deliberate conduct" even when it "unreasonably creates the need to use deadly force." *Johnson* v. *City of Philadelphia*, 837 F.3d 343, 351 (3d Cir. 2016). And it undermines the incentives that policing has sought to foster for decades. The rule tilts the risk calculus of every encounter toward avoidable, officer-initiated violence, by completely immunizing behaviors that make officer-initiated violence more likely. That can only encourage the type of unprofessional risk-taking that leads to violence and produces serious injustices, where people who have been killed or grievously harmed have no recourse against manifestly unreasonable actions by police officers who harmed them. The result, as Judge Higginbotham stated so plaintively in urging this Court to take this case, "lessens the Fourth Amendment's protection of the American public, devalues human life, and frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." Pet. App. 10a. (quotation marks omitted).

### C. The "moment of the threat" doctrine enjoys no support in constitutional text, precedent, or common sense.

1. This unsound rule cannot be squared with constitutional text or precedent. After all, the Fourth Amendment demands an evaluation of the reasonableness of *every* action that results in a search or seizure. U.S. Const. amend.

IV. That is the very reason *Graham* demands courts considering the reasonableness of an officer's use of deadly force to consider "the totality of the circumstances" in the encounter between officer and suspect. 490 U.S. at 396. That demand cannot be met by excluding the majority of the events that lead up to the use of force.

Furthermore, whereas *Graham* requires courts to engage in a careful "balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake," 490 U.S. at 396, the "moment of the threat" pulls many of the relevant facts in determining reasonableness off the scale, to focus on a single moment where the balance almost always favors the use of deadly force.

Indeed, *Graham* specifically requires courts to consider events before the officer was faced with the decision to use force—including "the severity of the crime at issue," *Graham*, 490 U.S. at 396, based on the commonsense principle that "police do not approach the arrest of a jaywalker and a cop killer in the same fashion," *Deering* v. *Reich*, 183 F.3d 645, 650 (7th Cir. 1999). Yet the blinders imposed by the "moment of the threat" doctrine require courts to ignore "the gravity of the offense." Pet. App. 15a (Higginbotham, J., concurring); *accord Anderson*, 247 F.3d at 132 (holding severity of crime "irrelevant"). Accordingly, the "moment of the threat doctrine" must be rejected to ensure that *Graham* continues to mean what police officers have been taught that it means.

The Fourth Amendment also instructs courts to determine whether an officer provided a "warning" before using deadly force, *Garner*, 471 U.S. at 12, or sought "to temper or to limit the amount of force" deployed, *Lombardo* v. *City of St. Louis*, 594 U.S. 464, 467 (2021) (per curiam)

(quoting *Kingsley* v. *Hendrickson*, 576 U.S. 389, 397 (2015)). These factors also become irrelevant under the "moment of the threat" doctrine because they occur before the moment the officer faces the decision whether to use deadly force on the suspect. So courts in the minority find themselves deeming factors "irrelevant" that this Court has expressly instructed them to consider. *Anderson*, 247 F.3d at 132.

This backwards-facing logic of the "moment of the threat" doctrine was vividly demonstrated in *Anderson*, a case in which an officer mistook an innocent bulge in a victim's pocket for a gun and shot the victim. *Id.* 247 F. 3d at 128. A jury found that the shooting was unreasonable, but the Fourth Circuit reversed the jury verdict. *Id.* at 128-129. In its analysis, the Fourth Circuit recognized that under *Graham*, "the severity of the crime at issue is one factor" a court should evaluate when determining reasonableness. *Id.* at 131 (citing *Graham*, 490 U.S. at 393). The court also recognized that "the suspected criminal activity at issue was relatively minor"—namely, a misdemeanor violation of Maryland's concealed weapons law. Yet the court deemed that "factor *** irrelevant to [its] excessive force analysis," 247 F.3d at 132 (emphasis added), and focused solely on the fact that, at "*the precise moment* that [the officer] used deadly force, he reasonably believed that [the victim] posed a deadly threat," *ibid.* (emphasis added).

Accordingly, it is impossible to square the "moment of the threat" doctrine with this Court's precedent. And only the majority approach can be considered "consistent with the Supreme Court's mandate" in *Graham* to "consider these cases in the 'totality of the circumstances.'" *Young* v. *City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st

Cir. 2005) (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985)).

2. Ironically, the courts in the minority derive their inspiration for the "moment of the threat" rule from *Graham* itself. They note *Graham's* emphasis on "'split-second judgments' that were required to be made" in deciding whether to use force and therefore focus "on the reasonableness of the conduct 'at the moment' when the decision to use certain force was made," *Greenidge* v. *Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991). These courts worry that including circumstances occuring before the moment the officer encounters a threat would require officers to carry too much freight into the decision whether to use force, potentially forcing them to *refrain* from using reasonable force to protect themselves or others simply because they had acted unreasonably in creating the need for that violence.

3. The minority courts' legitimate recognition of the effect of time pressure on officer decision-making has led these courts to misread this Court's precedent. *Graham* explicitly instructed that Fourth Amendment reasonableness "must embody allowance for the fact that police officers are often forced to make split-second judgment—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary." 490 U.S. at 397. That directive was simply and clearly a reminder that courts are to view use-of-force incidents "from the perspective of a reasonable officer on the scene," *id.* at 396, a framework that recognizes the perceptual and cognitive limitations brought about by the heat of the moment.

But that language was never intended to be, and should not be read as, an instruction to ignore an officers'

unreasonable actions that contributed to the ultimate use of force. The ultimate goal of the Fourth Amendment inquiry is not to lard a single moment where the officer must choose whether to initiate violence with the freight of everything that came before, but rather incentivize officers to act reasonably over the course of an encounter involving a seizure, including by not recklessly escalating situations to the point where violence becomes necessary.

Properly interpreted by the majority of circuits, the *Graham* rule protects officers who make some imperfect but reasonable decisions in the heat of the moment. The minority rule, in contrast, protects those officers who make obviously unreasonable choices which foreseeably made the eventual, if preventable, use of violence inevitable.

4. The majority rule is also more consistent with other aspects of Fourth Amendment jurisprudence, matching the reality of police-suspect encounters and the goals of modern-day policing. As the officer's decision-making does not blink into being at the moment he decides to use force, so too evaluating the reasonableness of his decision-making should not focus myopically on the calculous that occurs at that point, but should consider all of the officer's decisions that lead up to that moment. Law enforcement has developed, and officers are extensively trained in, tactics that help to prevent officer-suspect encounters from reaching the point of violence. It only makes sense to include in the reasonableness inquiry whether officers' actions complied with that training. Garrett & Stoughton *supra*, at 290. And this Court and lower courts have routinely looked to police training when conducting Fourth Amendment analysis. *United States* v. *Leon*, 468 U.S. 897, 926 (1984) (whether a "reasonably well-trained police officer"

could have believed there was probable cause to search a house); *Malley* v. *Brigg*s, 475 U.S. 335, 345 (1986) (whether a "reasonably well-trained officer" would have known an affidavit failed to establish probable cause); *United States* v. *Zimmerma*n, 277 F.3d 426, 436 (3d Cir. 2002) (whether "an objectively reasonable, well-trained officer" would have been aware of a Fourth Amendment violation); *Ludwig* v. *Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) ("Although these 'police department guidelines do not create a constitutional right,' they are relevant to the analysis of constitutionally excessive force." (citation omitted)).

5. The majority approach is also commanded by the basic demands of fairness. In evaluating an encounter between police and suspect, the same standards should be applied to each member. "[I]n officer-involved shooting cases the jury is allowed to consider the victim-suspect's antecedent conduct that led the officer to perceive a need to use deadly force." Lee, *supra* at 1374. If the jury can consider whether the victim's behavior leading up to an officer's use of force properly reasonably put them on the receiving end of such force, then the jury should also be permitted to consider whether the officer's conduct leading up to that use of force was reasonable. After all, in these situations, each is reacting to the other. And if the officer is operating under a different set of incentives than the private person, then they are more likely to escalate the situation in a way that makes reasonably avoidable violence inevitable. Furthermore, for any civilian charged with homicide and claiming self-defense, "the jury may consider conduct of the defendant that increased the risk of a deadly confrontation" in the moments leading up to the attack. Lee, *supra* at 1423. Officers who are equipped,

armed, and trained agents of the state should not be treated more leniently than their civilian counterparts.

6. Finally, despite what courts in the minority believe, the majority rule will not tilt the playing field too far in favor of the suspect's rights. When courts look beyond the circumstances occurring at the moment the officer decides to initiate force against the suspect, those circumstances are just as likely to vindicate the officer's decision-making as impugn it.

Consider *Thomson* v. *Salt Lake County*, 584 F.3d 1304 (10th Cir. 2009). There, the plaintiff had argued that, at the moment the shot was fired, the suspect had not pointed his gun at the police. *Id.* at 1318. The Tenth Circuit, however, refused to artificially limit its inquiry to "the precise moment" of the shooting. *Ibid.* Instead, viewing "the totality of the circumstances," the court concluded "it was reasonable for the officers" to treat the suspect as "an immediate threat" based on what they had *previously* learned about the suspect. One can easily imagine myriad other circumstances that would produce a similar result.

In cases where the nature of a subject's actions are ambiguous, a reasonable officer's risk assessment will be, and must be, based on their observations *prior to* the use-of-force decision. An officer might have learned from previous encounters with a suspect that the suspect has a special propensity to violence or a special hatred of police or the habit of unlawfully carrying a weapon that would make the use of force reasonable—even if, at the moment the officer has to pull the trigger, the suspect was not (yet) actively pointing a weapon at the officer or others. Or during the encounter, the officer might learn that the suspect has committed some especially heinous crime that makes it

immediately necessary to use force to apprehend the subject without delay, so as to prevent others from being harmed.

The totality of the circumstances may—and will often—provide "justification for police action" by encompassing "some fact or another which validates a search, a seizure, or such things as the reasonableness of force used to carry out an arrest." *Deering*, 183 F.3d at 650. But the minority rule would prohibit courts from considering the circumstances in which that information was learned.

The minority rule purports to be more protective of officers than the textually sound "totality of the circumstances" approach. But it requires a cynical view of police behavior to conclude that the more conduct that is considered, the more likely the officer's judgment will be deemed unreasonable.

For that reason, among all the others stated above, it is critical for the Court to take this occasion to ensure that the "moment of the threat" doctrine is discarded once and for all.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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