

IN THE  
**Supreme Court of the United States**

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JANICE HUGHES BARNES, INDIVIDUALLY AND AS  
REPRESENTATIVE OF THE ESTATE OF ASHTIAN BARNES,  
DECEASED,

*Petitioner,*

v.

ROBERTO FELIX, JR., ET AL.,

*Respondents.*

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

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**Brief of The National Police Accountability  
Project as *Amicus Curiae* In Support of  
Petitioner**

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## INTEREST OF THE *AMICUS CURIAE*

This brief is submitted on behalf of the National Police Accountability Project (the “NPAP” or the “Amicus”).<sup>1</sup> Established in 1999, the NPAP is dedicated to protecting the civil rights of individuals in their interactions with law enforcement and detention facility personnel. With a membership of approximately 600 attorneys practicing nationwide, the NPAP works to ensure accountability for law enforcement officers and their employers in cases involving constitutional and legal violations. Each year, its members litigate thousands of cases to advance police accountability and dismantle procedural barriers that prevent individuals from seeking redress in civil courts. The NPAP has previously submitted amicus briefs to this Court in key cases, including *Brownback v. King* (19-546), *Thompson v. Clark* (20-659), *Vega v. Tekoh* (21-499), *Egbert v. Boule* (21-147), *Reed v. Goetz* (21-442), and *City of Grants Pass v. Johnson et al.* (23-175).

This case raises a critical constitutional issue concerning the appropriate standard for evaluating claims of excessive force by police officers under the Fourth Amendment. The “moment of the threat” doctrine, as applied by the Fifth Circuit, conflicts with this Court’s established precedent and undermines efforts to hold officers accountable when individuals’ Fourth Amendment rights are violated. Because of

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, Amicus states that this brief was prepared in its entirety by amicus curiae and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amicus curiae and its counsel.

these concerns, the Amicus submits this brief to assist the Court in resolving this important issue.

### SUMMARY OF THE ARGUMENT

Under the Fourth Amendment, a police officer is prohibited from using “unreasonable” force.<sup>2</sup> In *Graham v. Connor*, this Court held that reasonableness depends on “the totality of the circumstances.”<sup>3</sup> But in the decision below, the court of appeals truncated this Court’s required inquiry, applying a “moment of the threat” test which omits the events that precede the alleged threat to the officer’s safety. This is inconsistent with how modern law enforcement departments have trained their officers to perceive and respond to the conduct of people they are trying to apprehend.

Specifically, the “moment of the threat” doctrine fails to deter officers from using excessive force in nonviolent situations. This continued misuse of force not only erodes community trust in law enforcement but also discourages crime reporting, undermining both the proper functioning of law enforcement and the rule of law.

By rejecting the “moment of the threat” doctrine, as it must, this Court can rebuild public trust in law enforcement and deter the unconstitutional use of force by those sworn to protect the public.

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<sup>2</sup> U.S. Const. amend. IV.

<sup>3</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation marks omitted).

## ARGUMENT

### I. The Totality of the Circumstances Test Helps Officers to Safeguard the Public Effectively

“The highest duties of government, and therefore the police, are to safeguard freedom, to preserve life and property, to protect the constitutional rights of citizens and maintain respect for the rule of law by proper enforcement thereof, and, thereby, to preserve democratic processes.”<sup>4</sup> To uphold these duties, this Court established that police must consider the “facts” and “circumstances” confronting them prior to their use of force.<sup>5</sup>

Through its creation of the “totality of the circumstances” inquiry in *Graham v. Connor*,<sup>6</sup> this Court designed a universal standard for use-of-force determinations. According to this Court, any use of force must be objectively reasonable “in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”<sup>7</sup>

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<sup>4</sup> *Police Function: Standard 1-2.4(a)*, A.B.A. (last visited Nov. 15, 2024), [https://www.americanbar.org/groups/criminal\\_justice/resources/standards/police-function/](https://www.americanbar.org/groups/criminal_justice/resources/standards/police-function/).

<sup>5</sup> See *Graham*, 490 U.S. at 396-397; *Overview of Police Use of Force*, NAT'L INST. OF JUST. (Mar. 5, 2020), <https://nij.ojp.gov/topics/articles/overview-police-use-force>; U.S. Dep't of Just., Just. Manual § 1-16.100 (2022).

<sup>6</sup> See *Graham*, 490 U.S. 386, 396-7 (1989).

<sup>7</sup> *Id.* at 397.

The “totality of the circumstances” inquiry has been used as the basis for the United States Department of Justice’s (“DOJ”) Policy on Use of Force.<sup>8</sup> Like most enforcement agencies, the DOJ’s policy provides that “[o]fficers may use force only when no reasonably effective, safe, and feasible alternative appears to exist and may use only the level of force that a reasonable officer on the scene would use under the same or similar circumstances.”<sup>9</sup>

Consistent with this policy, most current police practices allow for “the amount of force necessary to mitigate an incident, make an arrest, or protect themselves or others from harm.”<sup>10</sup> Likewise, police forces have incorporated the totality of the circumstances inquiry into their trainings.<sup>11</sup> These trainings: (a) reduce public harm,<sup>12</sup> (b) provide officers with guidelines on the proper and effective use of

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<sup>8</sup> U.S. Dep’t of Just., *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Overview of Police Use of Force*, *supra* note 5.

<sup>11</sup> See e.g., Joanna C. Schwartz, *Qualified Immunity’s Boldest Lie*, 88 U. CHI. L. REV. 635-657 (2021).

<sup>12</sup> Jeremy Pollack, *7 Positive Impacts of Police De-Escalation Training*, PEACEFUL LEADERS ACADEMY (Apr. 29, 2024), <https://peacefulleadersacademy.com/blog/positive-impacts-of-police-de-escalation-training/>.

force,<sup>13</sup> and (c) reinforce appropriate tactics to control a situation.<sup>14</sup>

Police forces have also incorporated the totality of circumstances inquiry into their written policies and standards. For example, the New Orleans Police Department of Operations Manual guides officers to “use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.”<sup>15</sup> Further, “[w]hen feasible based on the circumstances, officers will use de-escalation techniques, disengagement; area containment; surveillance; waiting out a subject; summoning reinforcement; and/or calling in specialized units . . . in order to reduce the need for force, and increase officer and civilian safety. Moreover, the officers shall de-escalate the amount of force used as the resistance decreases.”<sup>16</sup>

Likewise, the Use of Force Policy from the Office of the Attorney General of the State of New Jersey enumerates core principles, including that

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<sup>13</sup> Lexipol, *Police Use of Force: Safer Communities Through Sound Policies*, (Nov. 2023), <https://info.lexipol.com/Use-of-Force-Policy-Position-Summary>.

<sup>14</sup> Jane Clayton, *State Police Use of Force Legislation and Public Safety*, NATIONAL POLICE ACCOUNTABILITY PROJECT 3 (Nov. 15, 2024), <https://engage.nlg-npap.org/node/156768>.

<sup>15</sup> *New Orleans Police Department Operations Manual*, NEW ORLEANS POLICE DEPT. 5 (Dec. 2015), [nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf/](https://nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-3-Use-of-Force.pdf/).

<sup>16</sup> *Id.*

officers “shall make every effort to preserve and protect human life and the safety of all persons”; and “force shall only be used as a last resort when necessary to accomplish lawful objectives that cannot be reasonably achieved through verbal commands, critical decision making, tactical deployment or de-escalation techniques.”<sup>17</sup> Their policy maintains that, “deadly force shall only be used as an absolute last resort,”<sup>18</sup> and that prior to resorting to force, an officer “shall exhaust all other reasonable means to gain compliance” including “verbal commands, critical decision making, tactical deployment and de-escalation techniques to gain voluntary compliance, if feasible.”<sup>19</sup>

Departments use varying language around when use of force is acceptable, but two tenets are consistent across agencies and departments: (1) use of force must be proportional and objectively reasonable;<sup>20</sup> and (2) deadly force is only to be used when absolutely necessary “in the most extreme

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<sup>17</sup> *Use of Force Policy*, OFF. OF THE ATT’Y GEN. OF THE STATE OF N.J. (Apr. 2022), <https://www.nj.gov/oag/force/docs/UOF-2022-0429-Use-of-Force-Policy.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *Deadly Force*, BALT. POLICE DEPT., <https://www.baltimorepolice.org/resources-and-reports/understanding-use-force> (last visited Nov. 11); *Metropolitan Police Academy 5.1 Use of Force Overview*, METRO. POLICE DEPT. 14 (Dec. 18, 2023); *Use of Force Policy*, *supra* note 17, at 2.; U.S. Dep’t of Just., *supra* note 5.

circumstances”<sup>21</sup> and where “lesser means of force have failed or could not be reasonably used.”<sup>22</sup>

Ruling for Petitioner both promotes these basic tenants of law enforcement and supports the Court’s core holding in *Graham*. Officer Felix should have used objectively reasonable force in line with what his duties required. In the scenario at hand, each escalation of force by Officer Felix should have been essential to accomplish his lawful objectives, proportional, reasonable, and performed with “sound judgment based on reverence for human life.”<sup>23</sup> Focusing solely on the final moments of the encounter ignores Officer Felix’s responsibilities leading up to the point where he pulled the trigger, and sets aside the duties required of him throughout his three-minute interaction with Ashtian Barnes.

## **II. The “Moment of the Threat” Fails to Deter Officers from Using Excessive Force in Non-Violent Situations**

As previously noted by Justice Alito, “where the police officer jumps in front of a car and doesn’t allow

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<sup>21</sup> *Deadly Force*, *supra* note 20; *See also Metropolitan Police Academy 5.1 Use of Force Overview*, *supra* note 20; *Use of Force Policy*, *supra* note 17, at 2.

<sup>22</sup> *Deadly Force*, *supra* note 20; *See also Metropolitan Police Academy 5.1 Use of Force Overview*, *supra* note 20; *Use of Force Policy*, *supra* note 17, at 2.

<sup>23</sup> *LSP Changes and Initiatives*, LA. ST. POLICE, <https://lsp.org/about/leadershipsections/superintendent/strategic-support/professional-standards-compliance/changes-and-initiatives> (last visited Nov. 15, 2024). *See also New Orleans Police Department Operations Manual*, *supra* note 15.



the driver enough time to stop. And then as the driver is approaching the police officer, the police officer shoots. That’s a seizure. And so you look at the entire seizure, the jumping in front of the car, plus the ultimate shooting to determine whether it’s reasonable.”<sup>24</sup>

By ignoring the rest of the seizure phases and scoping the focus of all potential liability on the precise moment when an officer feels “threatened,” an officer can easily escalate an interaction, place themselves in danger (i.e., create the “threat”), and then use force in response. This is especially problematic when an officer’s own creation of a “threatening” situation leads to death.

As Judge Higginbotham explains, “an officer's role in bringing about the ‘threat’ . . . 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.’”<sup>25</sup>

Importantly, this Court has held that police officers who make reasonable mistakes in the line of duty will not face liability under a “totality of the circumstances” approach.<sup>26</sup> Along these lines, this Court has explained that the proper application of the

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<sup>24</sup> Transcript of Oral Argument at 34, *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017) (No. 16-369).

<sup>25</sup> *Barnes v. Felix*, 91 F.4th 393, 398 (5th Cir. 2024) (Higginbotham, J., concurring) (quoting *Abraham v. Raso*, 183 F.3d 279, 288 (3d Cir. 1999)).

<sup>26</sup> See *Est. of Biegert by Biegert v. Molitor*, 968 F.3d 698 (7th Cir. 2020); *Heien v. North Carolina*, 574 U.S. 54, 66 (2014).

reasonableness test requires 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.”<sup>27</sup>

Police officers are increasingly likely to adopt more reasonable approaches and de-escalation techniques as a first-line strategy for resolving conflict if they know that their conduct leading up to the application of force would be considered among the “totality of the circumstances” by a court, and that they could face liability for escalating that force.<sup>28</sup>

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<sup>27</sup> See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

<sup>28</sup> See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 471 (2004) (“As 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.”).

### **III. Rejecting the “Moment of the Threat” Doctrine is Crucial to Deterring the Excessive Use of Force, Ensuring Accountability and Restoring Public Trust**

#### **A. A Significant Trust Deficit Exists Between the Police and the Public**

The excessive use of force by police has “weighed heavily on police-community relations.”<sup>29</sup> For instance, in 2020, during the wake of several high-profile incidents of police violence, the public’s confidence in police fell to 48%, its lowest level since longitudinal polling began in 1993 and in contrast to the high of 64 percent in 2004.<sup>30</sup> Additionally, in 2023, only 39% of Americans were confident that law

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<sup>29</sup> James Craven et al., *How Qualified Immunity Hurts Law Enforcement*, CATO INST. (Feb. 15, 2022), <https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement>; see St. John BARNED-SMITH, *Protesters Rally After Deputy is Cleared in Beltway Driver’s Death*, HOUS. CHRON. (Aug. 31, 2016) (describing how community members protested after grand jury decision to not indict officer responsible for Ashtian Barnes’s death).

<sup>30</sup> Kevin J. Strom & Sean E. Wire, *The Impact of Police Violence on Communities: Unpacking How Fatal Use of Force Influences Resident Calls to 911 and Police Activity*, RTI PRESS 1 (Jan. 2024), <https://doi.org/10.3768/rtipress.2024.rr.0050.2401>.

enforcement was adequately trained to avoid excessive force, down from 54% in 2014.<sup>31</sup>

The use of excessive force extends beyond high-profile incidents. One survey of national police reports determined that police officers use force against one person per every 1,000 residents in their jurisdiction.<sup>32</sup> In absolute terms, these reports suggest that police use force against at least 300,000 people per year, injuring approximately 100,000 of them.<sup>33</sup> Of those 100,000 people, approximately 1,000 ultimately die from their injuries.<sup>34</sup>

In many of these cases, the encounters started as traffic stops or without any allegations of violence

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<sup>31</sup> Lindsey McLendon et al., *Improving Public Safety Through Better Accountability and Prevention*, AM. PROGRESS (May 16, 2024), <https://www.americanprogress.org/article/improving-public-safety-through-better-accountability-and-prevention/>; Gary Langer, *Confidence in Police Practices drops to a New Low: POLL*, ABC NEWS (Feb. 3, 2023), <https://abcnews.go.com/Politics/confidence-police-practices-drops-new-low-poll/story?id=96858308>.

<sup>32</sup> *Initial Findings*, MAPPING POLICE VIOLENCE (Sept. 9, 2024), <https://policedata.org/findings>.

<sup>33</sup> Sam Levin, *US Police Use Force on 300,000 People a Year, With Numbers Rising since George Floyd: 'Relentless Violence'*, GUARDIAN (Aug. 28 2024), <https://www.theguardian.com/us-news/article/2024/aug/28/police-use-of-force-violence-data-analysis>.

<sup>34</sup> *Police Shootings Database*, WASH. POST (Nov. 6, 2024), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

or serious crime.<sup>35</sup> Recall the death of Daunte Wright, pulled over for driving with an air freshener hanging from his rearview mirror and expired registration tags,<sup>36</sup> or Philando Castile, pulled over for a broken taillight,<sup>37</sup> or Tyre Nichols, pulled over for speeding up to catch a yellow light,<sup>38</sup> *all minor traffic violations, and all resulting in their deaths*. Deaths that could have been avoided if they had not encountered police officers for a minor traffic infraction.

Among local communities, following a police officer's use of excessive force, the impact is more stark than national polls would reflect.<sup>39</sup> For instance, after a highly publicized excessive use of

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<sup>35</sup> Sam Levin, *'Hunted': One in Three People Killed by US Police Were Fleeing, Data Reveals*, GUARDIAN (Jul. 2022), <https://www.theguardian.com/us-news/2022/jul/28/hunted-one-in-three-people-killed-by-us-police-were-fleeing-data-reveals>.

<sup>36</sup> *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>.

<sup>37</sup> Mark Berman, *What the Police Officer who Shot Philando Castile Said About the Shooting*, WASH. POST, (Jun. 21, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/>.

<sup>38</sup> Emily Cochrane, *What to Know About the Trial Over Tyre Nichols's Death*, N.Y. TIMES, (Oct. 3, 2024), <https://www.nytimes.com/article/tyre-nichols-memphis-police-dead.html>.

<sup>39</sup> See Strom & Wire, *supra* note 30 at 2, 9; Matthew Desmond et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOCIO. REV. 857, 867-68 (2016), [https://scholar.harvard.edu/files/mdesmond/files/american\\_sociological\\_review-2016-desmond-857-76.pdf](https://scholar.harvard.edu/files/mdesmond/files/american_sociological_review-2016-desmond-857-76.pdf).

force by police against a man in Milwaukee, local citizens placed approximately twenty percent fewer 911 calls over the course of a year.<sup>40</sup> This police misconduct “powerfully suppress[ed] one of the most basic forms of civic engagement: calling 911 for matters of personal and public safety.”<sup>41</sup>

This phenomenon was not isolated to this single event. After a Black man was fatally shot in a “mid-sized city in the Southeastern United States” in 2016, impacted communities placed significantly fewer 911 calls during the following year.<sup>42</sup> This decline in police calls provides a “clear indicator of a breakdown in trust and the perceived legitimacy of the police,” as these incidents of excessive force “reduce[] voluntary and proactive crime reporting to law enforcement.”<sup>43</sup>

Not only did the impacted communities retreat from initiating contact with the police, but the police also sharply reduced their discretionary patrols in the impacted communities.<sup>44</sup> Thus, the victimization of a community caused by the police’s use of excessive force may perversely “undermine public safety and [law enforcement’s] ability to hold criminal offenders accountable.”<sup>45</sup>

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<sup>40</sup> Desmond et al., *supra* note 39.

<sup>41</sup> *Id.* at 857.

<sup>42</sup> Strom & Wire, *supra* note 30, at 2.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 7, 10.

<sup>45</sup> *Id.* at 9.

A lower level of confidence in the police is also accompanied by a reluctance of witnesses to cooperate with police investigations.<sup>46</sup> This reluctance to cooperate in turn has contributed to low crime clearance rates.<sup>47</sup> Difficulties arising from low crime clearance rates are compounded by low crime reporting rates. A Pew Research Center study found that since 2022, fewer than half of crimes in the United States have been reported.<sup>48</sup> Of those that are reported, only one in eight property crimes are cleared and only a third of violent crimes are cleared largely due to communities' mistrust in officials.<sup>49</sup>

With communities increasingly disengaging with law enforcement, it is more likely that crimes go

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<sup>46</sup> Rylan Simpson & Lacey N. Pappas, *Public perception of courts and cooperation with police*, 13 CRIME SCI. 1, 2, 6 (2024), <https://crimesciencejournal.biomedcentral.com/articles/10.1186/s40163-024-00207-9> (citing five previous research papers that found a positive relationship between a positive view of the police by the public and the public's willingness to cooperate with the public).

<sup>47</sup> See Lindsey McLendon et al., *supra* note 31.

<sup>48</sup> John Gramlich, *What the Data Says About Crime in the U.S.*, PEW RSCH. CTR. (April 24, 2024), <https://www.pewresearch.org/short-reads/2024/04/24/what-the-data-says-about-crime-in-the-us/> (stating that "cleared" does not necessarily mean "solved" as the FBI "clears" a case when there is an arrest, charging and referral of a suspect for prosecution or due to "exceptional circumstances such as the death of a suspect or a victim's refusal to cooperate with a prosecution.").

<sup>49</sup> *Id.*

unsolved.<sup>50</sup> This is further supported by the US Justice Policy Center’s finding that in communities where relationships with local law enforcement have been shaken, less than half of community members are willing to volunteer their time to help solve a crime or find a suspect.<sup>51</sup> Making matters worse, these unsolved crimes impact a “key police crime-control mechanism: deterrence.”<sup>52</sup> As such, the breakdown in community trust represents a significant challenge to the proper functioning of law enforcement and the rule of law.

### **B. Police Accountability Impacts Public Confidence in Police**

Law enforcement officials have long recognized how community support is “crucial” to law

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<sup>50</sup> See Lorraine Mazerolle et al., *Procedural Justice and Police Legitimacy: A Systematic Review of the Research Evidence*, 9 J. EXPERIMENTAL CRIMINOLOGY 245 (2013) (stating that improved public perception of police legitimacy is an important precursor for improving the capacity of policing to prevent and control crime).

<sup>51</sup> Nancy La Vigne et al., *How Do People in High-Crime, Low-Income Communities View the Police*, JUST. POL’Y CTR. 8, 13 (Feb. 2017) (finding that among impacted communities in six cities, only 42.5% of residents believe police are legitimate authorities and only 47.3% would volunteer their time to help the police solve a crime or find a suspect).

<sup>52</sup> Anthony A. Braga, *Improving Police Clearance Rates of Shootings: A Review of the Evidence*, MANHATTAN INST. (July 20, 2021), <https://manhattan.institute/article/improving-police-clearance-rates-of-shootings-a-review-of-the-evidence> (citing Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013)).



enforcement's effectiveness,<sup>53</sup> as “community trust is the cornerstone of successful policing.”<sup>54</sup> The International Association of Chiefs of Police notes that this trust must be built on a system that “holds individuals accountable.”<sup>55</sup> Accountability can be achieved through various methods, including internal affairs investigations,<sup>56</sup> civilian review boards,<sup>57</sup>

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<sup>53</sup> Stephen J Gaffigan & Phyllis P. McDonald, *Police Integrity – Public Service With Honor*, U.S. DEP'T OF JUST. 61 (Jan. 1997).

<sup>54</sup> *Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement*, U.S. DEP'T OF JUST. 3 (Oct. 2009).

<sup>55</sup> *Id.* at 8.

<sup>56</sup> See Tiffany Morey & Kate McLean, *Police Accountability: Internal Affairs and Discipline*, INTRODUCTION TO THE U.S. CRIMINAL SYSTEM (Kate McClean et al. 2019) (“Internal Affairs (IA) divisions exist to hold officers accountable for their actions.”).

<sup>57</sup> See Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1039 (2016) (stating that effective civilian review boards would enable police officers to be held accountable for wrongdoing that otherwise would go unaddressed); *Police Oversight by Jurisdiction (USA)*, NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF L. ENFORCEMENT, [https://www.nacole.org/police\\_oversight\\_by\\_jurisdiction\\_usa](https://www.nacole.org/police_oversight_by_jurisdiction_usa) (last visited Nov. 14, 2024) (listing the existence of civilian review boards in 127 jurisdictions). *But see* Ofer, *supra* note 57, at 1052 (noting that despite “a weak civilian review board [being] worse than no[t having a] civilian review board” as it can breed community resentment, only Detroit had, in 2016, a sufficiently empowered civilian review board).

independent police auditors,<sup>58</sup> the widespread use of body camera technology,<sup>59</sup> early intervention systems,<sup>60</sup> and civil lawsuits.

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<sup>58</sup> See, e.g., *About Us*, FAIRFAX CTY. INDEP. POL. AUDITOR, <https://www.fairfaxcounty.gov/policeauditor/about-us> (stating its mission is to “bolster trust between the citizens of Fairfax County and the Fairfax County Police Department by providing accountability ...”); *Officer-Involved Shooting*, CITY OF SAN JOSE, <https://www.sanjoseca.gov/your-government/appointees/independent-police-auditor/officer-involved-shooting> (stating that Independent Police Auditor is only able to review an internal affairs investigation if a citizen files a complaint about the officer-involved shooting incident).

<sup>59</sup> See Carol A. Archbold, *Police Accountability in the USA: Gaining Traction or Spinning Wheels?*, 15 POLICING: J. POL’Y & PRAC. 1665, 1666 (2021), <https://doi.org/10.1093/police/paab033> (finding that “[m]any municipal police agencies have also employed body cameras to increase officer accountability.”); Shelley S. Hyland, *Body-Worn cameras in Law Enforcement Agencies, 2016*, BUREAU OF JUST. STATISTICS 1 (Nov. 2018) (nearly half (47%) of the 15,328 general-purpose law enforcement agencies in the United States had acquired body-worn cameras). *But see Research on Body-Worn Cameras and Law Enforcement*, NAT’L INST. OF JUST. (2022) (cautioning that “[r]esearch does not necessarily support the effectiveness of body-worn cameras”).

<sup>60</sup> See Samuel Walker et al., *Early Warning Systems: Responding to the Problem Police Officer*, NAT’L INST. OF JUST. 1 (2001) (describing early intervention systems as “a data-based police management tool designed to identify officers whose behavior is problematic and provide a form of intervention to correct that performance.”). *But see Police Use of Force: An Examination of Modern Policing Practices*, U.S. COMM’N C.R. 138 (2018), <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf> (Noting that many departments do not have early warning procedures in place to alert supervisors or command staff of potential personnel issues).

But this system is rife with opportunities for accountability to be shirked, as has been made most apparent in recent reporting. According to a 2020 New York Times report, in 71% of New York City misconduct charges where an independent review board recommended the highest level of discipline—suspension or dismissal from the force—the New York Police Department ignored these recommendations and instead gave lesser punishments or none.<sup>61</sup>

Similarly, a September 2024 investigation of the New Jersey State Police’s Internal Affairs unit revealed that certain members of the police force were protected from punishment due to favoritism, while others had weaponized the internal affairs investigations system against disfavored officers.<sup>62</sup>

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<sup>61</sup> Ashley Southall et al., *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, N.Y. TIMES (Nov. 15, 2020), <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html> (noting how NYPD “regularly ignored the [independent oversight agency]’s recommendations, overruled them, or downgraded the punishments, even when police officials confirmed that the officers had violated department regulations”).

<sup>62</sup> Letter from OPIA Special Investigations Bureau, to Matthew J. Platkin, Attorney General, New Jersey, 2-3, 6 (Sept. 22, 2024), [https://www.nj.gov/oag/newsreleases24/2024-0924\\_OPIA-Memo-Nitti--Summary--Redactions-Applied.pdf](https://www.nj.gov/oag/newsreleases24/2024-0924_OPIA-Memo-Nitti--Summary--Redactions-Applied.pdf); see Press Release, New Jersey Office of the Attorney General, Attorney General Platkin Calls for Immediate Reforms and Releases Two Reports on the New Jersey State Police (Sept. 24, 2024), <https://www.njoag.gov/attorney-general-platkin-calls-for-immediate-reforms-and-releases-two-reports-on-the-new-jersey-state-police/>.

In this environment, internal affairs investigations “should be but one component of a systemic approach to” maintaining “ethical conduct” among law enforcement, as acknowledged by the National Association of Chiefs of Police.<sup>63</sup>

Despite these worrying trends, police can take—or be required to take—actionable steps to rebuild public trust as, according to the International Association of Chiefs of Police, “the integrity of the police will always dictate the level of community trust.”<sup>64</sup>

### **C. Civil Litigation Provides a Critical Form of Accountability that is Undermined by the “Moment of the Threat” Doctrine**

Where internal affairs investigations fail or are perceived as inadequate,<sup>65</sup> civil litigation can result in

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<sup>63</sup> *Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement*, *supra* note 54.

<sup>64</sup> *Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement*, *supra* note 54.

<sup>65</sup> Emily Ekins, *Policing in America: Understanding Public Attitudes towards the Police. Results from a National Survey*, CATO INST. 4 (Dec. 7, 2016), <https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national> (finding that 46% of Americans say police are “generally not” held accountable for misconduct).

important changes to policies and practices that serve to shore up law enforcement’s integrity.<sup>66</sup>

For instance, the lawsuit stemming from Breonna Taylor’s death resulted in a settlement that required reforms to police accountability and the provision of search warrants.<sup>67</sup> Similarly, Las Cruces, New Mexico, settled a lawsuit with the estate of Antonio Valenzuela—who died from a police chokehold—by, in part, agreeing to “ban all chokeholds and fire any officer who violates the new policy” and “adopt a warning system involving officers who use excessive force.”<sup>68</sup>

Thus, civil lawsuits can plug a gap in police accountability and offer an avenue through which changes can be implemented to prevent misconduct and rebuild public trust. To facilitate a rebuilding of trust, justice must be administered to impacted individuals, or their families, in a neutral forum where the judiciary consistently applies this Court’s standards.

By rejecting the “moment of the threat” doctrine and reaffirming the “totality of the circumstances” standard, this Court can protect individuals from the excessive use of force, ensure that victims and their families have a meaningful

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<sup>66</sup> Emily Gottlieb, *Civil Lawsuits Lead to Better, Safer Law Enforcement*, CTR. FOR JUST. & DEMOCRACY 1 (Dec. 2020).

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.* at 3-14 (listing eighteen further lawsuits that resulted in settlements requiring policy changes).

opportunity to seek justice, and restore the public's trust in law enforcement.

### CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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