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.,
AND THE COUNTY OF HARRIS, TEXAS,

Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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The National Sheriffs' Association respectfully submits this amicus curiae brief.[1]

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The NATIONAL SHERIFFS' ASSOCIATION (the "NSA") is a non-profit association formed under 26 U.S.C. 501(c)(4). Formed in 1940 the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States and in particular to advance and protect the Office of Sheriff throughout the United States. The NSA has over 13,000 members and is the advocate for 3,083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in the judicial process where the vital interests of law enforcement and its members are affected.

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[1] Amicus curiae notified all counsel of record of its intent to file this brief more than 10 days before the due date. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

This Court has consistently analyzed law enforcement use of force cases under *Graham v. Connor*. That analysis considers 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. Under the *Graham* analysis, the officer's actions in the present case were objectively reasonable.

A minor traffic violation did not prompt the use of deadly force in this case. Decedent's endangering the life of Respondent officer by disobeying a lawful order to stop the vehicle while the officer was attached is what caused the fatal encounter. The severity of the crime in this case was the attempted murder of a police officer by taking off in the vehicle with the officer attached. This obviously presented an immediate threat to the safety of the officer. Further, the decedent was obviously resisting arrest and attempting to evade arrest by flight. Accordingly, the use of force was objectively reasonable under the *Graham* analysis.

This Court has repeatedly held that courts cannot manufacture liability of an officer for a shooting that was itself objectively reasonable because the officer's alleged reckless or deliberate conduct created a situation requiring deadly force. The theory of officer-created jeopardy threatens to undermine the standards that have long guided use-of-force evaluations. As outlined by this Court in *Graham v. Connor*, the federal standard of reasonableness is essential because it

recognizes the difficult, imperfect, high-pressure decisions officers must make.

Invoking a "Provocation Doctrine" or "Officer-Created Jeopardy" theory to create officer liability will discourage officers from proactively protecting the public in potentially dangerous situations that may result in use of force. Such a doctrine threatens effective policing.

In addition, Petitioner has failed to identify a single precedent finding a Fourth Amendment violation under similar circumstances. Accordingly, Respondent officer is entitled to qualified immunity because he did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

I. The Officer's Use of Force Was "Reasonable" Under a *Graham* Analysis.

Petitioner emphasizes that a minor traffic violation led to a fatal shooting. However, a minor traffic offense did not result in a fatal shooting. The fatal shooting was prompted by an attempted murder of a police officer by disregarding lawful orders to stop the vehicle and taking off in a vehicle with an officer attached to it. That is the offense that resulted in the shooting, not the traffic offense.

If a traffic offender is pulled over by an officer and the offender pulls a weapon on the officer, it is not the traffic offense that may cause a fatal shooting. It is the act of endangering the life of the officer that is the cause of a potential fatal shooting. To couch the argument that a traffic offense was the cause of the shooting in the instant case is disingenuous.

In the instant case, an analysis of the shooting under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) proves that the use of deadly force was reasonable. Under *Graham*, because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, its proper application 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. 490 U.S. at 396. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.* "With respect to a claim of excessive force, the same standard of reasonableness at the moment applies. . . . " (Emphasis added.) The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Id*. at 396-397.

The severity of the crime in the instant case was the attempted murder of an officer by taking off in the vehicle with the officer attached while being ordered to stop. Further, the decedent obviously posed an immediate threat to the life of the officer by taking off in the vehicle while the officer was attached. In addition, the decedent was obviously resisting arrest or attempting to evade arrest by flight. Accordingly, under a *Graham* analysis, the use of deadly force was reasonable under the circumstances. "The framework

for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all." *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 (May 30, 2017).

II. Respondent Officer Is Entitled to Qualified Immunity.

The doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Tahlequah*, 595 U.S. at 12, *citing*, *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). As this Court has explained, qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Tahlequah*, 595 U.S. at 12, *citing*, *District of Columbia v. Wesby*, 583 U.S. ___, ___-___, 138 S. Ct. 577, 199 L. Ed. 2d 453, 456 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

This Court has repeatedly told courts not to define clearly established law at too high a level of generality. *Tahlequah*, 595 U.S. at 12, *citing*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Tahlequah*, 595 U.S. at 12, *citing*, *Wesby*, 583 U.S., at ___, 138 S. Ct. 577, 199 L. Ed. 2d 453, at 467 (quoting *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Such specificity is "especially important in the Fourth Amendment context," where it is "some-

times difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Tahlequah*, 595 U.S. at 12-13, *citing*, *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam) (internal quotation marks omitted).

In the present case, Petitioner has failed to identify a single precedent finding a Fourth Amendment violation under similar circumstances. Accordingly, Respondent officer is entitled to qualified immunity.

III. An Officer Placing Himself in a Dangerous Situation Does Not Divest Him of His Right to Protect His Life.

Officers place themselves in dangerous situations every day in this country for public safety purposes and to enforce the law. Police run to danger, not away from it. This Court, in a *per curiam* opinion, has already decided a case similar to the instant case where claimant alleged that officers violated the Fourth Amendment by creating a deadly force situation by placing themselves in a dangerous situation in *City of Tahlequah v. Bond*, 595 U.S. 9 (October 18, 2021). There, this Court held that officers did not violate any clearly established law and were entitled to qualified immunity.

In *Tahlequah*, on August 12, 2016, Dominic Rollice's ex-wife, Joy, called 911. Rollice was in her garage, she explained, and he was intoxicated and would not leave. Joy requested police assistance; otherwise, "it's going to get ugly real quick." 981 F. 3d 808, 812 (CA10 2020). The dispatcher asked whether

Rollice lived at the residence. Joy said he did not but explained that he kept tools in her garage.

Officers Josh Girdner, Chase Reed, and Brandon Vick responded to the call. All three knew that Rollice was Joy's ex-husband, was intoxicated, and would not leave her home.

Joy met the officers out front and led them to the side entrance of the garage. There the officers encountered Rollice and began speaking with him in the doorway. Rollice expressed concern that the officers intended to take him to jail; Officer Girdner told him that they were simply trying to get him a ride. Rollice began fidgeting with something in his hands and the officers noticed that he appeared nervous. Officer Girdner asked if he could pat Rollice down for weapons. Rollice refused.

Police body-camera video captured what happened next. As the conversation continued, Officer Girdner gestured with his hands and took one step toward the doorway, causing Rollice to take one step back. Rollice, still conversing with the officers, turned around and walked toward the back of the garage where his tools were hanging over a workbench. Officer Girdner followed, the others close behind. No officer was within six feet of Rollice. The video is silent, but the officers stated that they ordered Rollice to stop. Rollice kept walking. He then grabbed a hammer from the back wall over the workbench and turned around to face the officers. Rollice grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers backed up, drawing their guns. At this point the video is no longer silent, and the officers can be heard yelling at Rollice to drop the hammer.

He did not. Instead, Rollice took a few steps to his right, coming out from behind a piece of furniture so that he had an unobstructed path to Officer Girdner. He then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers. In response, Officers Girdner and Vick fired their weapons, killing Rollice.

Rollice's estate filed suit against, among others, Officers Girdner and Vick, alleging that the officers were liable under 42 U.S.C. § 1983, for violating Rollice's Fourth Amendment right to be free from excessive force. The officers moved for summary judgment, both on the merits and on qualified immunity grounds. The District Court granted their motion. *Burke v. Tahlequah*, 2019 U.S. Dist. LEXIS 165858, 2019 WL 4674316, *6 (ED Okla., Sept. 25, 2019). The officers' use of force was reasonable, it concluded, and even if not, qualified immunity prevented the case from going further. *Ibid.*

A panel of the Court of Appeals for the Tenth Circuit reversed. 981 F. 3d, at 826. The court began by explaining that Tenth Circuit precedent allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force. *Id.*, at 816.

Just like in the Tenth Circuit case, in the present case, Petitioner claims Respondent is liable for a shooting that was itself objectively reasonable because the officer's alleged reckless or deliberate conduct created a situation requiring deadly force. The Tenth Circuit in *Tahlequah*, applying that rule, concluded that a jury could find that Officer Girdner's initial step

toward Rollice and the officers' subsequent "cornering" of him in the back of the garage recklessly created the situation that led to the fatal shooting, such that their ultimate use of deadly force was unconstitutional. *Id.*, at 823.

Although this Court in *Tahlequah* held that it need not, and did not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment, the Court found that officers plainly did not violate any clearly established law and were entitled to qualified immunity. *Tahlequah*, 595 U.S. at 12.

If this Court in *Tahlequah* did not feel it necessary to determine whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment, then determining whether Responded officer "recklessly created a situation that requires deadly force" is not warranted. This Court has also rejected the similar notion that circumstances "provoking" a deadly force encounter can turn a reasonable use of deadly force into an unreasonable one.

IV. An Officer Cannot "Provoke" a Deadly Encounter

This Court in *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539 (May 30, 2017), clearly held that the "provocation rule" adopted by the court below cannot be used to analyze a claim of excessive use of force. Specifically, this Court held, "[T]hat the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id.* at 1544.

In *Mendez*, deputies from the Los Angeles County Sheriff's Department were searching for a parolee-at-large named Ronnie O'Dell. A felony arrest warrant had been issued for O'Dell, who was believed to be armed and dangerous and had previously evaded capture. Deputies received word from a confidential informant that O'Dell had been seen on a bicycle at the home of Paula Hughes. Deputies were informed that a man named Angel Mendez lived in the backyard of the Hughes home with Jennifer Garcia.

When the officers reached the Hughes residence, they learned that O'Dell was not in the house. Deputies searched the rear of the residence which included a one-room shack made of wood and plywood. The shack had a single doorway covered by a blue blanket.

Unbeknownst to the officers, Mendez and Garcia were in the shack and were napping on a futon. The deputies did not have a search warrant and did not knock and announce their presence. When Deputy Conley opened the wooden door and pulled back the blanket, Mendez thought it was Ms. Hughes and rose from the bed, picking up the BB gun so he could stand up and place it on the floor. As a result, when the deputies entered, he was holding the BB gun, and it was pointing towards Deputy Conley. Deputy Conley yelled, "Gun!" and the deputies immediately opened fire. Mendez and Garcia were shot multiple times and suffered severe injuries. O'Dell was not in the shack or anywhere on the property.

Mendez and his wife filed suit under 42 U.S.C. § 1983 against petitioners, the County of Los Angeles and Deputies Conley and Pederson. As relevant here, they pressed three Fourth Amendment claims. First, they claimed that the deputies executed an

unreasonable search by entering the shack without a warrant (the "warrantless entry claim"); second, they asserted that the deputies performed an unreasonable search because they failed to announce their presence before entering the shack (the "knock-and-announce claim"); and third, they claimed that the deputies effected an unreasonable seizure by deploying excessive force in opening fire after entering the shack (the "excessive force claim"). 137 S. Ct. at 1545.

After a bench trial, the District Court ruled largely in favor of respondents. The court found Deputy Conley liable on the warrantless entry claim, and the court also found both deputies liable on the knock-and-announce claim. But the court awarded nominal damages for these violations because "the act of pointing the BB gun" was a superseding cause "as far as damage [from the shooting was] concerned." *Id.*

The District Court then addressed respondents' excessive force claim. The court began by evaluating whether the deputies used excessive force under *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The court held that, under *Graham*, the deputies' use of force was reasonable given their belief that a man was holding a firearm rifle threatening their lives. *Mendez*, 137 S. Ct. 1539, 1545 (2017). But the court did not end its excessive force analysis at this point. Instead, the court turned to the Ninth Circuit's provocation rule, which holds that "an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." Based on this rule, the District Court held the deputies liable

for excessive force and awarded respondents around $4 million in damages. *Id.*

The Court of Appeals affirmed in part and reversed in part. Contrary to the District Court, the Court of Appeals held that the officers were entitled to qualified immunity on the knock-and-announce claim. But the court concluded that the warrantless entry of the shack violated clearly established law and was attributable to both deputies. *Id.* Finally, and most important for present purposes, the court affirmed the application of the provocation rule. The Court of Appeals agreed with the conclusion that the shooting was reasonable under *Graham*; instead, like the District Court, the Court of Appeals applied the provocation rule and held the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting by entering the shack without a warrant in violation of clearly established law. 137 S. Ct. at 1545-1546.

The Court of Appeals also adopted an alternative rationale for its judgment. It held that "basic notions of proximate cause" would support liability even without the provocation rule because it was "reasonably foreseeable" that the officers would meet an armed homeowner when they "barged into the shack unannounced." *Id*. at 1546. This Court granted certiorari.

In *Mendez*, this Court explained that the Ninth Circuit's provocation rule permits an excessive force claim under the Fourth Amendment "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation." *Id.* at 1546. The rule comes into play after a forceful seizure has been judged to

be reasonable under *Graham*. Once a court has made that determination, the rule instructs the court to ask whether the law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure. If so, that separate Fourth Amendment violation may "render the officer's otherwise reasonable defensive use of force unreasonable as a matter of law." 137 S. Ct. at 1546.

This Court in *Mendez* was adamant that the provocation rule, which has been 'sharply questioned' outside the Ninth Circuit, *City and County of San Francisco v. Sheehan*, 575 U.S. ___, ___, n. 4, 135 S. Ct. 1765, 191 L. Ed. 2d 856, 869 (2015), is incompatible with this Court's excessive force jurisprudence. *Mendez*, 137 S. Ct. 1539, 1546. "The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." *Id*.

In *Sheehan*, officers were confronted with a barricaded mentally ill suspect armed with a knife. They first made entry into the room where she was located, but when she attacked officers, they quickly exited the room. Concerned that she may escape out a window or further arm herself, officers made entry again. The suspect attacked officers again holding a knife and officers were forced to shoot her. There, the Ninth Circuit attempted to invoke the "provocation rule" to hold officers liable. This Court reversed and remanded the case. 135 S. Ct. 1765 (2015).

This Court in *Mendez* explained that the reasonableness of the use of force is evaluated under an objective inquiry that pays careful attention to the facts and circumstances of each particular case. *Mendez*, 137 S. Ct. 1539, 1546, *citing*, *Graham*, at

396, 109 S. Ct. 1865, 104 L. Ed. 2d 443. And the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Mendez*, 137 S. Ct. 1539, 1546. "Excessive force claims are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred. *Id*. at 1546-1547 (Emphasis added). That inquiry is dispositive: When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. *Id*. at 1547.

This Court in *Mendez* reasoned that "[t]he basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable." *Id*. "Specifically, it instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim." *Id*.

Using a common-sense approach, this Court in *Mendez* provided, "This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Further, "[a]n excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth

Amendment violation such as an unreasonable entry." *Id.*

In *Mendez*, this Court concluded that the Ninth Circuit was "wrong" to apply the "provocation rule." *Id.* at 1547. Further, this Court made clear the framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all. *Mendez*, 137 S. Ct. 1539, 1547.

V. Invoking a "Provocation Doctrine" to Find Officer Liability Will Discourage Officers From Proactively Protecting the Public.

This Court should use this opportunity to clearly and finally put to rest the idea that the "provocation doctrine" or any its variations has any place in Sec. 1983 and constitutional jurisprudence. The potential precedent of imposing liability on peace officers for doing what our society asks them to do-protect and serve- in fact will cause them, as a result of fear of civil liability, to do exactly the opposite of protecting our citizens. Instead of "running to the sound of the guns" as we expect our law enforcement protectors to do, acceptance of the provocation doctrine builds a powerful incentive into our civil justice system to do nothing until the crime has been fully committed and the perpetrator leaves the scene.

An officer can always avoid being held liable under the provocation doctrine simply by doing nothing. If one does not even begin to engage in an interaction with a criminal suspect, one cannot be found to escalated or provoked a situation that, in turn, later requires an act of self-defense or defense of another that results in the use of force. If our law enforcement

officers "sit it out," maybe that means the bank robber, rapist, assaulter or murderer gets away and there are crime victims that could have been saved from harm or death, but at least the criminal will not have been subjected to the use of force when the officer attempted to intervene. To the advocates of the provocation doctrine, it is worth the resulting civil liability to the officer when the officer does risk his life and intervene to enforce the law or save the victim. Amicus, as a representative of the largest groups of elected law enforcement officials, rejects that idea and urges this Honorable Court to do so as well in a clear and unequivocal voice.

VI. An Officer-Created Jeopardy Liability Theory Threatens Effective Policing.

Recently, a peer review article was published by Force News, a private company who provides expert support to assist attorneys, judges, jurors, review board members, investigators, and others involved in the determination of the appropriateness of an officer's response during a force encounter with the objective of providing individuals a better understanding of the scientific realities surrounding the event. *Officer-Created Jeopardy: A Legal Theory That Threatens Effective Policing—Will the Supreme Court Restore Limits*?, Oct. 28, 2024, By Von Kliem, JD, LL.M, FORCE SCIENCE NEWS 16. The Force Science company is staffed by a world-class team of physicians, psychologists, behavioral scientists, attorneys, and other leading professionals, and is dedicated to the unbiased application and further study of 150 years of existing scientific research on a wide range of areas associated with human factors, including the intricacies of human movement, action/reaction times, how the mind works

during rapidly unfolding events, and decision-making under stress. In that article, experts on human factors involved in an officer-involved shooting explained the flaws of an officer-created jeopardy theory.

An officer-created theory of liability invites hindsight bias and outcome-driven judgments that challenge the Fourth Amendment's objective reasonableness standard. For officers experiencing a critical incident, the difficulty lies in determining what will later be deemed unjustifiable or unnecessary. Pre-seizure tactical decisions are shaped by limited information, evolving threats, and high-pressure environments, making it nearly impossible for officers to predict all possible outcomes in the moment.

The traditional federal standard, as outlined in *Graham v. Connor*, relies on reasonableness without the benefit of hindsight. The question is whether an officer's actions were reasonable, not whether better choices could have been imagined after the fact. However, the growing trend of applying officer-created jeopardy demands second-guessing, pretending that officers should have predicted the negative outcome and simply avoided escalation and violence as a matter of choice.

One of the most troubling aspects of officer-created jeopardy is the increasing effort to criminalize officers' discretionary tactical decisions. Officers are trained to rely on their admittedly imperfect judgment in chaotic and evolving situations. Yet, this controversial theory opens the door to criminal prosecution if, in hindsight, different tactics could have arguably de-escalated the situation. This trend shifts accountability from the suspect, who should be held responsible for their violent or threatening behavior, to the officer, who

is now expected to predict and mitigate the suspect's unpredictable actions and escalating threats.

In federal civil cases, qualified immunity protects officers, shielding them from liability unless their actions violate established legal standards. Qualified immunity recognizes that officers must make difficult, split-second decisions in unpredictable situations. Unless the excessive quality of force would have been obvious to any reasonable officer—meaning beyond debate—officers are shielded from civil liability. However, state criminal prosecutions can bypass these protections, subjecting officers to liability based on jurors or judges second-guessing their tactics, even when those tactics are consistent with generally accepted police practices.

The theory of officer-created jeopardy threatens to undermine the standards that have long guided use-of-force evaluations. As outlined in *Graham v. Connor*, the federal standard of reasonableness is essential because it recognizes the difficult, imperfect, high-pressure decisions officers must make. It allows for disagreement among reasonable people, reflecting the reality that decisions made at the moment are merely educated, but imperfect, judgments.

If officer-created jeopardy is allowed to expand unchecked, officers will face growing uncertainty about whether their conduct will be deemed lawful. This unpredictability erodes their confidence in making decisions in high-stress situations. Simply approaching a suspect, conducting a traffic stop, or attempting to arrest someone can escalate tensions. Routine interactions like confronting and inquiring about possible criminal activity may predictably increase the risk of

violence, exposing officers to liability for the very thing communities expect them to do.

One of the most significant concerns is that officer-created jeopardy analysis fails to consider the human factors that affect officers during critical incidents. Decision-making in high-stress situations often involves fast, intuitive, heuristic thinking rather than the slow, deliberate, and analytical thinking that occurs in less stressful circumstances.

Expecting officers to engage in optimal, rational decision-making in real-time disregards the perceptual and cognitive performance issues they can face under stress, including tunnel vision, auditory exclusion, and stress hypervigilance. Courts and juries, using post-event analysis, apply slow, analytical thinking, which does not reflect the reality of human performance during life-threatening events. Failing to account for these human factors may result in standards that exceed what is realistically achievable.

The Supreme Court's review of the instant case presents a critical opportunity to reaffirm the long-standing legal recognition that officers are imperfect human beings, subject to the natural limitations of human performance. This understanding has traditionally shaped the reasonable officer standard that governs police conduct, ensuring officers are judged based on the realities of decision-making in high-stress, rapidly evolving situations rather than through the lens of unrealistic expectations or perfect hindsight.

Expecting officers to predict every possible outcome of their tactical decisions—and those of their colleagues—could have a chilling effect, leading to hesitation in life-or-death situations, which would

endanger both officers and their communities. Officers could fail to take action timely for fear of civil liability. The community expects officers to run to danger, not away from it. Holding officers liable for quick, decisive action in spit-second critical situations will certainly discourage quick action by officers for fear of being second-guessed later by courts. And if officers hesitate to defend themselves for fear of liability, officer injuries and death will certainly result.

CONCLUSION

An officer-created jeopardy liability theory or "provocation doctrine" threatens effective policing and challenges the Fourth Amendment's objective reasonableness standards as firmly established by this Court in *Graham*. This Court's review of the instant case presents a critical opportunity to reaffirm the long-standing legal recognition as established in *Graham*, *Tahlequah*, *Sheehan*, and *Mendez* that the reasonableness of an officer's use of force is to be judged at the moment of threat and cannot be based on an officer-created jeopardy or "provocation doctrine."

Respectfully submitted,

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