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., et al.,

*Respondents*.

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

## BRIEF OF WISCONSIN COALITION OF LAW ENFORCEMENT, COUNTIES AND LOCAL GOVERNMENT INTEREST GROUPS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Other Authorities**

## STATEMENT OF INTEREST[1]

This coalition comprises the largest Wisconsin stakeholders concerned with public safety and risk management. The Wisconsin Counties Association ("WCA"), statutorily created in 1935, is committed to protecting the interests of Wisconsin counties and promoting better county government. WCA represents interests common to Wisconsin's counties, including to monitor and participate in legal developments affecting county governments.

The League of Wisconsin Municipalities (League) is a non-profit, nonpartisan association of cities and villages whose current membership consists of 189 of Wisconsin's 190 cities and 403 of Wisconsin's 417 villages.

The Badger State Sheriffs' Association comprises all 72 Wisconsin county sheriffs, promoting statewide law enforcement and public safety initiatives and providing sheriffs with resources and training to fulfill their constitutional responsibilities. The Wisconsin Chiefs of Police Association, formed in 1907, also supports and improves local law enforcement. Its mission includes being the public voice on professional issues for law enforcement, facilitating training and providing representation for

[1] No counsel for a party authored this Brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this Brief. No other person, other than these interested parties, their members, or their counsel, contributed money that was intended to fund preparing or submitting this Brief.

the general good of law enforcement at the local, state, and federal levels.

Many Wisconsin local governments share risk management, insurance and other services with four organizations who also join this Brief. Wisconsin Municipal Mutual Insurance Company serves 15 counties and three cities (Madison, La Crosse and Eau Claire). The remaining counties in Wisconsin receive such services through Wisconsin County Mutual Insurance Corporation. The League of Wisconsin Municipalities Mutual Insurance and Cities and Village Mutual Insurance Company service over 400 cities and villages (except City of Milwaukee). These entities are not-for-profit and managed by their member municipalities.

This is an important case to these parties because Wisconsin court treatment of use of force, like in other areas of the Country, has become highly unpredictable and inconsistent.

## SUMMARY OF THE ARGUMENT

An officer's prior attempts to warn the suspect, deescalate the situation, moderate the use of force, or gain control of a subject are part of the overall factual context in any use-of-force scenario. However, the Petitioner and her amici seek to cherry-pick a single pre-force moment and elevate it — placing it on equal footing, or even above, the immediate threat an officer faces when dealing with actively resistive subjects. The problem with Petitioner's and her amici's proposed "totality of circumstances" standard is what it doesn't say or do. It's a backward-looking negligence assessment that places special weight on

any perceived officer error at any point in time, relies heavily on viewpoints of the subject and his civil litigation counsel, ignores facts of active resistance and its legal repercussions and disregards consistency in the Rule of Law. Their unprincipled and malleable "totality of circumstances" test presents the same "basic problem" this Court found with the "provocation rule" in *County of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017), where it held such rules are "incompatible" with the "settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment" under *Graham v. Connor*, 490 U.S. 386 (1989). The question of whether an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case," such as the severity of the crime, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting or evading arrest. *Id.* at 396.

While the Court in *Graham* did not explain how to weigh these factors, it never said these factors have equal weight, and it certainly never said the severity of the crime, warnings, de-escalation, alternatives, or other hindsight-laden theories could ride roughshod over the threat posed to officers or the need to gain control of actively resisting suspects.

Litigants around the Country have so thoroughly muddled the *Graham* factors – often in ways plainly inconsistent with the actual facts captured on video or otherwise rationalizing active resistance – leading to widely disparate results, not

just among the Circuits, but panel decisions therein and even between district courts in the same State.

The Court should not allow litigants to continue to look at *Graham* as a grab bag of amorphous factors that can foster unlimited second-guessing and disparate results. The factors were secured to several foundational principles that comport with history and tradition and this Court's jurisprudence, such as "[t]he '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*. at 396. And, "[t]he 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 396–97. Additionally, the "validity of the claim" is judged under the Fourth Amendment, "rather than to some generalized 'excessive force' standard." *Id*. at 394. Finally, the "reasonableness" inquiry is not a negligence inquiry, but one balancing "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id*. at 396. These foundational principles, and other common-sense legal norms like superseding cause, are important attributes to revitalizing this area of law to bring it in line with the founder's understanding and this Court's precedents so the Rule of Law "key to our democracy — thrives on legal standards that foster stability, facilitate consistency, and promote

predictability." *United States v. Rahimi,* 602 U.S. 680, 746 (2024) (Jackson, J., concurring).

## ARGUMENT

### I. REASONABLENESS OF ANY USES OF FORCE, AS FORMULATED BY THIS COURT AND ROOTED IN THE COMMON LAW, IS ALWAYS FOCUSED ON THE TWIN PILLARS OF "WHETHER THE SUSPECT POSES AN IMMEDIATE THREAT TO THE SAFETY OF THE OFFICERS OR OTHERS" OR "WHETHER HE IS ACTIVELY RESISTING ARREST OR ATTEMPTING TO EVADE ARREST BY FLIGHT."

No matter where the officer is along the continuum of force, officers need to gain control of the arrestee swiftly for officer or public safety and to fulfill the public's expectation of criminal law enforcement. Common law history, and this Court's precedents, have repeatedly placed paramount importance on those interests.

#### A. Rules Governing Use of Force Have Always Considered the Moment of Threat as Having Paramount Importance.

One pillar stands above all others: "Police officers may not use deadly force unless they reasonably believe that a suspect poses a significant threat of death or serious injury to the officers or others." *Lombardo v. City of St. Louis*, 143 S. Ct. 2419, 2421 (2023) (Sotomayor, J., dissenting) (citing

*Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). The "threat of death or serious injury to the officers or others" is *the* paramount factor, outshining pre-force conduct.

Although the United States has softened its position since *Mendez*, Resp. Br. p.4, it cannot ask the Court to overlook the obvious – "the circumstances at the moment that force is used will generally have *primary significance* in the analysis." U.S. Br. 7 (emphasis added). "While the situation at the moment force is used will have *paramount importance* in many cases," *Id*. p. 9 (emphasis added), and while such "in-the-moment facts thus may have *preeminent* – but not isolated – importance," *Id*. at 13 (emphasis added), the Petitioner and the government repeatedly revert to elevating the multi-factor test in such a way that it equalizes, if not wipes out, the paramount factor and its underlying principles. The law should not place the in-the-moment threat on the top shelf but then place all the directional signs to focus on the lower shelves' pre-force conduct; doing so invites over-litigating all uses of force in all scenarios.

In their view of "totality," the Petitioner and her amici look away from another important pillar: whether an officer in the moment needs to control the subject who is actively resisting. Even if they say it's an ingredient in the "totality of circumstances," it is nevertheless obscured by their over-emphasis on "reasonableness" as a "factbound morass" that must be "sloshed" through from the non-officer perspective from the first moment officers initiate an encounter.

While Justice Scalia observed "we must still slosh our way through the factbound morass of

'reasonableness,'" *Scott v. Harris*, 550 U.S. 372, 383 (2007), neither those remarks nor the decision substituted "sloshing" through facts as replacing settled precedent regarding the "threat of death or serious injury to the officers or others" or the need to gain control of actively resisting subjects. To the contrary, the Court still focused on the threat to officers and public of paramount importance, rejected theories officers violated the Fourth Amendment by mishandling various "pre-conditions" as if they were a "magic on/off switch" and balanced the individual's interest against the importance of the governmental interests. *Id*. at 383-84.

This Court's other use of force cases revolved around whether the facts in the moments of controlling or stopping resistive subjects warranted either qualified immunity or tighter scrutiny by the lower court. Even in *Lombardo v. City of St. Louis*, 594 U.S. 464, 467 (2021) (per curiam), which involved decentralizing a resistive pretrial detainee and placing him in a prone position, the Court merely questioned whether the Eighth Circuit applied the correct legal standard by not considering whether officers made any effort "to temper or to limit the amount of force" while using the prone position. The legal implications were the facts surrounding the prone position. In contrast, the "totality" test advocated by Petitioner and her amici would shift focus to much earlier events in the sequence — such as whether the jail officers should have left him alone, called crisis workers, or handled the disturbance differently – creating a massive liability change.

The unprincipled "totality" rule sought by Petitioner and her amici allows gamesmanship with actual facts and their full context. The sequence of events here involved a lawful traffic stop based on reasonable suspicion, a lawful detention to continue the investigation and lawful directions to the suspect including commands to exit the car for officer safety and to not drive off. Then – in the tense moments that followed, whether measured by one, two or five seconds – the suspect *actively resisted* by accelerating his vehicle into moving traffic on a highway while the officer was precariously positioned (whether forcefully pinned or awkwardly positioned) between the inside of the driver's door, swinging vehicle door and the close concrete freeway median. Whereas the "basic problem with the provocation rule" was it "failed to stop" at the moment the officer acted based on what he knew at the time, instead creating a rule that "provides a *novel and unsupported path to liability* in cases in which the use of force was reasonable," *Mendez*, 581 U.S. at 428 (emphasis added), the rule sought here re-engineers the common law, *Graham* and its precedent to make officers liable for *any* alleged negligent act. Such rule creates perverse incentives; an officer in the future might consider a "turn-a-blind eye" tactic – not making the stop, detention, investigation or arrest. Fortunately, this Court long ago rejected that policy choice as discussed in Section II.B below. See also *Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

Any litigant can easily dress up a garden-variety negligence theory based on a perceived tactical error. But, this Court should demand a legal rule that does not and should not minimize the fact the officer acted lawfully during the entire sequence of events and faced active resistance causing him to make an "in-the-moment" decision to maintain control or, in those rare cases, potentially save his own life when in peril.

As in many cases the Court has seen, the suspect here turned the tables on the officer, transforming a lawful and peaceful encounter into one that posed a serious risk of harm to the officer. Because excessive force claims are evaluated for objective reasonableness based on information officers had when the conduct occurred, "[t]hat inquiry is dispositive" and "there is no valid excessive force claim." *Mendez*, 581 U.S. at 428.

### B. The Ability of Officers to Use Force When Faced With a Threat is Consistent with the Founding Generation's Understanding that Due Administration of the Law Allows Officers Leeway to Use Force as Necessary to Gain Custody and Control or Protect Themselves and Requires a Person Confronted by Lawful Authority to Follow Instructions Rather than Actively Resist.

This Court looks "to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity." *Garner*, 471 U.S. at 13. Local sheriffs are constitutional officers, "part of the machinery of the state government,"

*Preface to* William L. Murfree, Sr., *A Treatise on the Law of Sheriffs and Other Ministerial Officers*, at v (1884), whose duties – along with other peace officers, constables, justices of the peace, coroners or other ministerial officers – were the "*principalis conservator pacis* within the county, which is the life of the commonwealth, *vitae reipublicae pax*." *Id*., § 2, at 2 (citing Lord Coke). "For the due administration of justice," there were three ingredients: "wise and salutary" laws; "learned and impartial" judges; and "the third, hardly less essential, that the officers who execute them, and carry into effect the judgments of courts, should be faithful and efficient." *Id*., § 1, at 2.

An influential 17th century English jurist, Matthew Hale, structured use of force around the principle of necessity and the contrast of force between "private nature" versus the public context involving "public justice and safety." Matthew Hale, 1 History Placitorum Coronae 478 (Payne 1778). Peace officers were granted greater leeway to use force given their role as public agents of the law. Whether the peace officer was a jailer or sheriff faced with resistance, they were not "bound to give back to the wall," i.e., retreat, but could respond with force, including deadly force, because "they are mini[s]ters of justice, and under a more [s]pecial protection in the execution of their office, than private persons." *Id.* at 481. "The [s]ame law is of a con[s]table, that commands the king's peace in an array, and is re[s]i[s]ted. …[I]if the per[s]on [s]o charged re[s]i[s]ts or flies, and cannot be otherwi[s]e taken, tho perchance he be innocent, for the rea[s]on before given; and this, either before or after the arre[s]t." *Id.* at 494.

While the common law "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon," *Garner*, 471 U.S. at 12 (discussing 4 William Blackstone, Commentaries on the Laws of England), and while the Court in *Garner* did not fully embrace that rule given the evolution of legal norms surrounding felonies and misdemeanors, the Court still recognized the constitutionality to use force where an officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3. See also *Clark v. Ziedonis*, 513 F.2d 79, 81 (7th Cir. 1975) (tracing the general rule to, among other sources, 4 Blackstone Commentaries 184 (Lewis' ed. 1897 at 1582)).

In civil actions in the late 17th century and early 18th century, individuals alleging excessive force by officers would bring assault and battery claims. Defending officers needed to show either: (1) the force was minimal and necessary for the arrest (*molliter manus imposuit*, or "gently lay hands upon"), or (2) the arrestee actively resisted or attempted to evade arrest. See *Chaney-Snell v. Young*, 98 F.4th 699, 717 (6th Cir. 2024). But, the focus on "totality" never lost sight of the forest for the trees, as shown in several cases. In *Truscott v. Carpenter*, 91 Eng. Rep. 1050 (K.B. 1697), officers seized a plaintiff for failing to pay a debt. The King's Bench held, while the authority to imprison implies the right to commit a battery, it is not an unlimited right where no resistance was evident. *Id.* at 1050. "[T]he defendant ought to go on, and shew that he arrested the plaintiff, and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him." *Id.* Likewise,

in *Williams v. Jones*, 95 Eng. Rep. 193 (K.B. 1736), the plaintiff trespassed and stole seven horses. The stable-owner obtained a *capias ad respondendum* (summons) from the Court of Common Pleas and delivered to the London sheriff. *Id.* The arresting officer held the plaintiff for six hours resulting in a battery claim. *Id*. The court held the arrest justified physical harm if necessary to overcome resistance, clarifying "a battery cannot be justified by shewing an arrest barely; but that in order to make it good, something further should be shewn: as ... that the plaintiff made resistance, and was going to rescue himself, and by reason of that he beat him to take him." *Id.* at 194.

This framework of focusing on necessity in-the-moment continued through the post-Civil War era. By then, most of the states "made an offence against the law to resist or obstruct an officer in the discharge of his duty." Murfree, § 83, at 48. Peace officers should "gently lay hands upon" an individual to address a situation, but that rule never sacrificed the risk posed to the peace officer who could use "roughness" or "force sufficient to effect his purpose" if the circumstances warranted the same, *State v. Mahon*, 3 Del. 568, 569 (1842), up to deadly force if he could "justify his conduct by proof showing that he acted under the pressure of an irresistible necessity." *State v. Durham*, 141 N.C. 741, 53 S.E. 720, 725 (1906) (citing Murfree, § 148).

Using the "necessary" amount of force in the moment did not lead to an elastic "totality of circumstances" rule that segmented pre-force conduct, allowing civil claims for some pre-force error

by the officer. Rather, the focus was on the active resistance faced by officers and their role in securing the commonwealth's laws for the public health, safety and welfare. "If he is resisted he may repel force with force, and even take life when it is made absolutely necessary by the resistance of the party sought to be arrested, and those aiding and abetting him." Murfree, § 1164, at 632 (citing Hale's Pleas of the Crown). For example, in *Murdock v. Ripley*, 35 Me. 472 (1853) the plaintiff resisted an officer's aid's attempts to arrest him upon a warrant. But, the legal rule focused on the moment, not the warrant: "[T]he officer was bound to serve the warrant, and to use as much force as was necessary to enable him to execute it," and "they had a right; if resisted, to perform their duty with a strong hand." *Id*. at 474. The appellate court agreed, providing a full picture of the respect an officer was entitled to: "The highest interests of every citizen require a prompt and efficient execution of the laws, especially in criminal process, and that resistance to officers should be speedily and effectively suppressed." *Id.* at 474. See also *Mesmer v. Commonwealth*, 67 Va. 976, 984-85 (1875) (alleged assault of plaintiff "was made in the discharge of his official duty [] as chief of police of the city ..and that no more force was employed …than was necessary to secure the arrest …"); *Beaverts v. State,* 4 Tex. App. 175, 177 (Tex. App. 1878) ("An officer having lawful authority to make arrests may, on meeting with resistance, employ such force as may be necessary to overcome such resistance.").[2]

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[2] Like some common-law courts, *Graham* left open the door to consideration of an officer's good faith. 490 U.S. at 399 n. 12 (in

Nor did common-law courts weigh the severity of the crime in the "totality" as advocated by Petitioner and her amici. Many of the cases, such as *Murdock*, involved service of writs. This did not mean officers could act rashly or in excess of their authority, but it also did not mean the individual had a cause of action simply because physical force was used in a situation involving mere service of court papers. In *Hager v. Danforth*, an officer went to the plaintiff's house with process and having found the door open, entered peaceably. 20 Barb. 16, 16 (1854). The officer was met with resistance by the subject's wife and was ordered to leave. *Id.* The officer used physical force and "threw her back against the catch of a door, and slightly bruised her." *Id.* The trial court instructed, "after [the subject's wife] had ordered the [officer] out, the subpoena was not a justification or protection to him in pressing forward and, when resisted in his advance, using force to serve it." *Id.* The appellate court reversed, reasoning:

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assessing officer credibility, factfinder may assess evidence "the officer may have harbored ill-will toward the citizen."); *Murdock*, 35 Me. at 473-74 (among other factors, "[i]n suppressing [illegal acts] and in overcoming resistance to officers, all that can be required, is good faith and honest purpose."). In *Kingsley v. Hendrickson*, 576 U.S. 389, 399 (2015), the "difficult undertaking" of jail operation and penological concerns for officer safety and order, "the use of an objective standard adequately protects an officer *who acts in good faith*." (emphasis added). The same should be true here. Law enforcement officers often serve between jails or patrol. There is overlap in their initial and ongoing training on common issues like force. Like their jail counterparts, patrol officers have a difficult undertaking with maintaining safety and order.

> Deriving his authority to be there from the law, and not from the consent of the plaintiffs, he was under no obligation to obey [the subject's wife] when she ordered him to leave. …I know of no duty which bound him to desist from the execution of the lawful purpose which had brought him there. …To the extent, therefore, that the force used by the [officer] was necessary to overcome the unlawful resistance he met in the service of the subpoena, it was lawful.

*Id.* at 17. See also *Gilbert v. Rider*, 1 Kirby 180, 181 (Conn. Super. Ct. 1786) (constable had a writ of execution against plaintiff for an unpaid debt. "[The plaintiff] peremptorily refused to go any other way; his obstinacy obliged the officer to bind him, and compel him to go by force; he used no greater force than was necessary."); *Kreger v. Osborn*, 7 Blackf. 74 (Ind. 1843) (constable served a writ issued by a court to bring plaintiff, who alleged the sheriff "assaulted, seized, violently pulled and dragged about, struck with many blows, and imprisoned the plaintiff." The court held, "[t]o justify these acts resistance to the officer was necessary").

These amici do not ask the Court to usher any harsh sentiments of the common-law courts into modern America. Rather, the history does not support a generalized "totality of circumstances" test that prioritizes a single slice from pre-force conduct. The founding generation's copius history and tradition afforded officers the ability to swiftly enforce

the community's laws, control resistive subjects and defend themselves.

## II. THE COURT SHOULD REINVIGORATE *GRAHAM* FROM DEVOLVING FURTHER INTO NEGLIGENCE AND INCONSISTENT JUDICIAL TREATMENT.

The Court has rejected attempts to shift the analysis away from the Fourth Amendment. *Graham* rejected analysis of excessive force claims under the Fourteenth Amendment's substantive due process standard, instead moving it under the Fourth Amendment's reasonableness standard where uses of force would be evaluated through the eyes of an objectively reasonable officer on the scene, accounting for what officers knew, observed and acted on. *Graham,* 490 U.S. at 396. *Mendez* also rejected changing the framework. The Court should reinvigorate *Graham* – by emphasizing the twin pillars as discussed above, as well as the governmental interests, superseding cause and the prohibition against hindsight evaluation from the viewpoint of the suspect – as hard guardrails that do not allow negligence to seep in.

### A. The countervailing governmental interests should not be forgotten.

The Fourth Amendment considers an individual's liberty against "the importance of the governmental interests alleged to justify the intrusion." *Scott*, 550 U.S. at 383. Perhaps because "there is no obvious way to quantify the risks on either side," *id*. at 383–84, litigants frequently

overlook the government interest with heavy emphasis on pre-force conduct.

In *Graham*, the government interests can be seen in some factors: (1) "whether the suspect poses an immediate threat to the safety of the officers or others," (2) "the severity of the crime at issue," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. While the "severity of the crime at issue" can be minor, more often force arises when the suspect graduates his conduct and commits more significant crimes such as obstruction, assault/battery to an officer, flight, or other active resistance.

The government's interest lies in discouraging citizens from actively resisting and ensuring officers resolve situations swiftly and effectively. As much can be gleaned from the common law history above, as well as this Court's precedent, which illuminates the need to stop a threat or gain control of actively resisting subjects. See, e.g., *Mullenix v. Luna*, 577 U.S. 7, 16 (2015) (stopping a fleeing vehicle with lethal force, before vehicle hit spike strips, to protect nearby officers); *Scott*, 550 U.S. at 385-87 (policy implications of creating use of force rules that would discourage officers from gaining control of a fleeing subject); *City & Cnty. of San Francisco v. Sheehan,* 575 U.S. 600, 612 (2015) (officers acted constitutionally where subject had "not been disabled" and "delay could make the situation more dangerous," officers' additional efforts to gain control of the subject including by re-opening the door to her room and attempting pepper spray); *Plumhoff v. Rickard*, 572 U.S. 765, 776-77 (2014) (finding

reasonable multiple efforts to gain control of suspect's continued flight, unlike a situation where suspect had "ended any threat" or "clearly given himself up."); *Washington v. Chrisman*, 455 U.S. 1, 10 (1982) (following arrest, an officer may accompany the arrestee back into his residence upon arrestee's request "to protect himself and maintain control over his arrestee."). After all, officers enforce laws by acting on warrants or probable cause, and courts respect that balance by expecting officers to gain control, bring suspects into custody and leave the sifting and winnowing to the courts.[3]

"Active resistance" remains undefined by this Court. For most courts, it is one of degree, not a binary concept: flight or drawing a weapon on an officer. Active resistance includes physically struggling, threatening, and even disobeying officers. See, e.g., *Dockery v. Blackburn*, 911 F.3d 458, 467 (7th Cir. 2018) (examples include: "'kicking and flailing'; declining to follow instructions while acting in a belligerent manner; and swatting an arresting officer's hands away while backpedaling.")(citations omitted); *Eldridge v. City of Warren*, 533 F. App'x 529, 533–35 (6th Cir. 2013) (surveying case law to find force justifiable in response to "some outward manifestation—either verbal or physical—on the part

[3] Where there is probable cause for an arrest, the Constitution allows officers to "leave the sifting of competing claims and inferences" to the criminal justice system, i.e., prosecutors, judges, and juries. *See Askew v. City of Chi.*, 440 F.3d 894, 896 (7th Cir. 2006). Public policy supports this: "If states think that this gives accused persons insufficient protection, they are free to enact statutes either staying the officers' hand or providing recompense to those exonerated in the criminal process." *Id.*

of the suspect had suggested volitional and conscious defiance…" and something more than "mere noncompliance" such as "a verbal showing of hostility" or "a deliberate act of defiance using one's own body…or some other mechanism, such as [a vehicle] …".). See also *Jones v. Vill. of Highland Hills*, 2021 WL 5589313, at *10 (N.D. Ohio Nov. 30, 2021) ("A deliberate act of defiance can include 'refusing to comply with the officers' demands that the [plaintiff] roll over and by physically attempting to stand up.'") (quoted sources omitted).

When litigants try to parse facts into *Graham*'s three buckets, they often lose sight of the broader government interest principles. The common law history and tradition recognized the reasonableness of meeting "force with force" given officers' role in the commonwealth's criminal justice system. Historically, courts never looked away from the need to enforce society's laws and officers' role therein. The same should hold true today.

A common drumbeat in lower courts is officers should turn away, leave, stop, never arrive or just let the suspect go when they encounter resistance, a point advocated by Petitioner during the Fifth Circuit arguments where it was stated Officer Felix should have just stood there while Mr. Barnes enjoyed his "constitutional right" to flee.[4] The Court has never laid down such a rule and should emphatically reject it as being contrary to the government interest. See *Scott*, 550 U.S. at 385 ("[W]e are loath to lay down a

[4] Oral Argument at 13:53, No. 22-20519 (5th Cir. Oct. 2, 2023), ca5.uscourts.gov/OralArgRecordings/22/22-20519_10-2-2023.mp3.

rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger.") (emphasis in original). "The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Id.* at 385–86. This drumbeat fails to consider the public interest at large and the role of law enforcement, for "unless they are protected by the law, neither the public peace, nor the preservation and protection of life, person, and property, can be secured in this community." *State v. Dennis*, 16 Del. 433, 434 (1895). Public peace is neither antiquated nor subservient. The *Scott* Court's calculus of the government interest included consideration of the suspect's "relative culpability" versus the "entirely innocent." 550 U.S. at 384.

### B. Even under a totality of circumstances approach, superseding cause should have a role in order to develop more consistent outcomes.

The Petitioner's rule – the reasonableness of an officer's use of force should be analyzed by the "totality of the circumstances" such that "sloshing" through the "factbound morass" of reasonableness allows a litigant to single out any pre-force fact, Pet. Br. 1-2, 13, 24 – results in the same "vague" and "murky" casual standard the Court rejected in *Mendez*, 581 U.S. at 430, 432. Petitioner's rule makes a Fourth Amendment violation, not because of any of the preceding conduct by which the officer acted lawfully and the suspect acted unlawfully, but because the officer kept his position within the door frame to maintain control of the subject, causing him

to jump onto the sill as the vehicle moved away. Pet. Br. 47. Whether one calls this "jumping" on a "moving" vehicle, or whether one views the sequence as one or several seconds, it is a simplistic connect-two-dots litigation strategy that assures litigants will always be able to show officer liability for any and all uses of force.

*Graham* never envisioned a Fourth Amendment standard that invited litigants to turn tactical errors into an expressway of lawsuits. One critical gatekeeping rule has been lost: even if an officer's actions arguably contributed to use of force, very often the suspect's own conduct is the intervening and superseding cause. "Only in narrow circumstances have we concluded that an officer acted unreasonably because he created a situation where deadly force became essentially inevitable." *Est. of Biegert by Biegert v. Molitor*, 968 F.3d 693, 698 (7th Cir. 2020). Two examples were offered: jumping in front of moving vehicles, and executing search warrants under highly questionable circumstances (such as forcibly entering a dwelling in plain clothes causing the occupant to arm himself thinking intruders are entering). In those situations, officers created the need to use force because "the officers acted so far outside the bounds of reasonable behavior that the deadly force was almost entirely a result of the officers' actions." *Id*. The botched raid involving Breonna Taylor illustrates the second example. See Resp. Br. 28. If Petitioner is correct this case is a jumped-on-the-vehicle causing lethal force, it merely illustrates the first example. Such examples are the exception, not the rule.

Proximate cause focuses on scope of risk and foreseeability. *Paroline v. U.S.*, 572 U.S. 434, 445 (2014). When an injury is foreseeable but the causal link is attenuated or broken by a superseding event, proximate cause is not present. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 (Am. Law Inst. 2010). When the intervening cause is so unforeseeable that it is outside the scope of the risk created by the initial actor, the intervening cause becomes a superseding cause and the original actor is not liable. *Id.* at § 34.

Revitalizing *Graham* warrants inclusion of these causation principles in order to produce consistency and predictability regarding when a suspect's threatening behavior and/or active resistance constitutes a superseding cause that breaks the chain of causation between the officer's pre-force conduct and the use of force.[5]

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[5] For example, in *Hundley v. District of Columbia*, 494 F.3d 1097 (D.C. Cir. 2007) (Kavanaugh, J.)., an off-duty officer observed unlawful activity in a parked car and tapped the window. *Id.* at 1099-100. Irritated, the driver attempted to run the officer over; the officer jumped out of the way, drew his firearm, and ordered the occupants out. *Id.* Once outside, the driver made a threatening movement, whereupon the officer shot the driver. *Id.* The plaintiff argued the same thing Petitioner does: if the officer acted unreasonably in initiating the encounter, he would necessarily be liable for the shooting, even if it was done in self-defense. The court rejected the argument, holding the suspect's threatening movement was a superseding cause. *Id.* at 1104-05. "As a matter of law, it is not ordinarily reasonable to foresee that a citizen will react to a police stop by attacking the detaining officer, thereby triggering a situation that requires the officer to use deadly force in self-defense. On the contrary, citizens have a duty to obey a police officer's orders, and officers are entitled to

### C. The Court should stop the degeneration of the Fourth Amendment and Section 1983 litigation into hindsight-laden negligence and litigation manufactured theories, especially when video exists of active resistance.

Petitioner asserts there is a Circuit divide where some have created a special "moment-of-the-threat" rule, and the Respondents assert Circuits are in alignment except the Ninth and Tenth Circuits. However, judicial treatment is far more muddled around the Country as litigants and courts increasingly treat incidents as opportunities for negligence theories masquerading as constitutional law.

Across the Circuits, panel decisions tout different rules. The Ninth and Tenth Circuit are said to allow the "officer-created-danger rule." But the panel decisions in those Circuits reveal a potpourri of standards and tests. See, e.g., *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) (consider police conduct that created the need to use lethal force as part of the totality of the circumstances); *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) ("[O]nly reckless and deliberate conduct that is

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assume that citizens will comply with their orders." *Id*. at 1105. See also *Johnson v. City of Philadelphia*, 837 F.3d 343, 352-53 (3d Cir. 2016) ("[A]s a matter of law [the suspect's] violent, precipitate, and illegal attack on [the officer] severed any causal connection between [the officer's] initial actions and his subsequent use of deadly force during the struggle on the street." *Pauly v. White*, 874 F.3d 1197, 1207 (10th Cir. 2017) (officers may be held liable for shooting if suspect's actions were not a superseding act).

'immediately connected to the seizure will be considered. Mere negligence or conduct attenuated by time or intervening events is not to be considered."); *Napouk v. Las Vegas Metro. Police Dep't*, 2024 WL 5051193, at *4 (9th Cir. Dec. 10, 2024) (whether the suspect posed an immediate threat to the safety of officers or others is the "most important" factor); *Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019) (factors include whether the officer was "simply responding to a preexisting situation," or instead "create[d] the very emergency he then resort[ed] to ... force to resolve.").

Notably, some lower courts have departed from well-established rules about the danger to an officer by improperly considering whether alternatives were available (whatever force used).[6] See, e.g., *Glen v. Wash. Cnty.*, 673 F.3d 864, 872 (9th Cir. 2011) ("[O]ther relevant factors include the availability of less intrusive alternatives to the force employed…."); *Chew v. Gates*, 27 F.3d 1432, 1440 n.5 (9th Cir. 1994) ("[T]he availability of alternative methods of capturing or subduing a suspect may be a factor to consider"); *Estate of Heenan v. City of Madison*, 11 F. Supp. 3d 929, 942 (W.D.Wis. 2015) ("The failure to use an alternative, non-deadly force is not dispositive, although whether such an alternative existed is a factual question that *may* weight on a trier of facts' ultimate determination of objective reasonableness.");

[6] The Fourth Amendment does not require an officer to exhaust all other alternatives before using force, including lethal, or to use the least intrusive means. Rather, the Fourth Amendment allows an officer to use any reasonable means under the circumstances. See *Garner*, 471 U.S. at 7-9; *Graham*, 490 U.S. at 394-96; *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994).

*Kelley v. O'Malley*, 787 F. App'x 102, 106 (3d Cir. 2019) ("Critically here, there are fact questions about why the officers did not attempt to use alternative, less lethal means of force before gun fire erupted.").

This Court has made several points that have been side-stepped by lower courts, from the principles about 20/20 vision, getting into officers' shoes, authorizing force when facing danger and others like the following:

- "[E]ven if [the officers] misjudged the situation, [the claimant] cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" *Sheehan*, 575 U.S. at 615.
- "[S]o long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly force confrontation was imprudent, inappropriate, or even reckless." *Id.*; see also *Saucier v. Katz*, 533 U.S. 194, 216, n. 6, (2001) (Ginsburg, J., concurring in judgment) (no second-guessing an officers' "life and death decisions," even with a litigation expert).

Yet lower courts are awash in litigation deviating from these core principles, permitting mere disagreement, full-blown hindsight evaluations, speculation, expert opinions on ultimate legal questions and negligence-based theories to seep into and commandeer the Fourth Amendment framework.

Cemented facts on video showing resistance are side-stepped by shifting analysis to some earlier point in time, a litigation tactic to avert a common-sense rule from *Scott*: "[w]here opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for the purposes of ruling on a motion for summary judgment." 550 U.S. at 376. When video is lacking (in whole or in part, for whatever reason), any fact purportedly occurring during any moment is always urged as being material. Perhaps so in the moment, but it should not be so pre-force.

The *Graham* rules, which place litigants and courts in the moment and in the shoes of the officers, have neither quelled litigation nor made outcomes predictable, even when the situations involved officers addressing very disturbing threats to the community. The creative after-the-fact negligence building is demonstrated by the bomb-versus-officer case in *Ardo v. Pagan*, 652 F. Supp. 3d 545 (E.D. Penn. 2023), where responding officers were portrayed as the offenders. There, a mother called the police and reported that her son (Mr. Ardo) was suicidal, he came to the house earlier contrary to a restraining order, and she wanted him to be involuntarily committed. Two troopers went to the house and waited for him to arrive. *Id.* at 549. Mr. Ardo agreed to come home but warned he would place an "improvised explosive device" around his neck and detonate it if he noticed any officers. *Id.* Upon arrival Mr. Ardo saw the troopers and threatened to "ignite this thing." *Id.* at 552-53. Fearing an explosion in a heavily populated area, the troopers parked their

squads around Mr. Ardo's vehicle to block him and prevent him from leaving. *Id.* at 553. The troopers exited their squad cars with their firearms drawn, walked closer to Mr. Arlo's vehicle with their firearms pointed down, and ordered him to show his hands and exit the vehicle. *Id.* When one of the troopers came within several feet, Mr. Arlo "turned toward [the trooper] with a 'maniacal smile,' lit up a lighter, and began to light a fuse attached to a device near his neck." *Id.* After seeing the lit lighter, the trooper fired two shots while rapidly retreating away in case a blast occurred. *Id.* at 554. Other troopers also fired, all out of a belief their lives and others in danger. *Id.*

The court recognized such deadly force could be reasonable as a matter of law *if* the court did not parse out the troopers' pre-force conduct. "After all, such an explosion could have presented a threat to not only Mr. Ardo's life, but to the Troopers' lives as well." *Id.* at 558. Still, the court latched onto the unprincipled "totality" rule sought here. The litigant argued, and the court accepted, officer liability could be based on the following pre-force conduct: dealing with an emotionally disturbed person, failure to use de-escalation techniques, approaching the vehicle too quickly and giving Mr. Ardo "competing demands." *Id.* Paying lip-service to the rule against "20/20 vision of hindsight," the court found "practices such as calm communication, maintaining distance, and avoiding a threatening demeanor when dealing with an emotionally disturbed person" should have been considered. *Id.*

Some, but not all, lower courts have embraced the rule that when a suspect threatens an officer with

a firearm or similar weapon, the officer is justified in using force, up to deadly force where necessary, regardless of his prior conduct. Those courts have rejected theories – and this Court should too – that the officer should allow the suspect to make the first move, should wait to see if the warning is heeded, or should have planned more before arriving.[7]

Experts put hyper-technical focus on whether an officer's conduct leading up to the use of force was imprudent, inappropriate, and/or unreasonable, but not whether the officer faced a resistive subject and acted reasonably in the moment. For example, in

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[7] *See Caraway v. City of Pineville*, 111 F.4th 369, 382 (4th Cir. 2024) ("'pointing, aiming, or firing [a] weapon,' … are all sufficient—but not necessary—movements to constitute such a threat" to warrant the use of deadly force); *Whitlow v. City of Louisville*, 39 Fed. Appx. 297, 306-07 (6th Cir. 2002) (deadly force justified where suspect pointed firearm at officer after officers entered even though criticisms existed regarding how officers tactically planned to enter suspect's residence to execute an arrest warrant); *Conlogue v. Hamilton*, 906 F.3d 150, 157 (1st Cir. 2018) ("When possible, a warning is required before a police officer resorts to the use of deadly force. …When—as in this case—a gun is pointed toward officers during a standoff between an armed man and law enforcement, a warning to disarm would seem to imply that deadly force may be used if the warning is not heeded."); *Sanzone v. Gray*, 884 F.3d 736, 740 (7th Cir. 2018) (officer did not act unconstitutionally by defending himself and others once the suspect pointed a gun. "While the Estate contends that [the suspect's] warning shot would have been fired straight up in the air, we will not assume that. …[Officer] Gray did not need to wait and hope that [the suspect] was a skilled marksman before taking action to shut down [his] threat."); *Partlow v. Stadler*, 774 F.3d 497, 502–03 (8th Cir. 2014) (deadly force reasonable against suspect who refused commands to drop the gun and moved his shotgun in a way leading officers to believe he was aiming at them).

*Knight v. Miami-Dade County*, 2014 WL 11813876 (S.D. Fla. May 14, 2014), the officers were involved in a deadly shooting and sought to exclude the plaintiff's use of force expert, who concluded, among other things, the defendants' actions "created the alleged need for deadly force" and violated police procedures. *Id.* at *5. The court allowed the expert to provide testimony and opinions regarding whether the officers' "alleged noncompliance with [the] Department's policies created the alleged need for deadly force" because such testimony was "probative" to the issue of "whether [the] Defendant Officers' use of deadly force was objectively reasonably." *Id.* at *6. See also *Est. of Robinson v. City of Madison*, 2017 WL 564682, at *10 (W.D. Wis. Feb. 13, 2017) ("The court will not strike [expert's] opinions regarding [officer's] pre-seizure conduct simply because that conduct cannot itself give rise to a separate Fourth Amendment violation."); *Devine v. Middletown Twp.*, 2016 WL 1728372, at *5 (E.D. Pa. Apr. 29, 2016) (allowing police practices expert to testify on "whether the officers should have taken different steps, based on their observations of the Decedent and the totality of the circumstances they faced prior to the use of deadly force."); *Est. of DiPiazza v. City of Madison*, 2017 WL 1910055, at *8 (W.D. Wis. May 8, 2017) ("Although 'pre-seizure conduct' cannot itself be the basis for an independent, unplead Fourth Amendment violation, it may be considered as part of the 'totality of circumstances' that render the officers' use of force was reasonable or unreasonable. Therefore, evidence of pre-seizure conduct, including as relied upon by experts, will not be excluded simply because it cannot give rise to a separate violation.");

*Cox v. Wilson*, 2016 WL 11260309, at *4 (D.Colo. 2016) (expert's opinion that officer's "field tactics unreasonably escalated a common police field encounter to a deadly force incident" is relevant, as are expert's "discussions of the preferred field tactics themselves.").

The time has come for *Graham* to be revitalized for consistency and predictability in the lower courts. Meritless excessive force claims drag officers past early dismissal motions, costly discovery and summary judgment practice, and through appeal. See, e.g., *Donahue v. Wihongi*, 948 F.3d 1177 (10th Cir. 2020) (pulling arrestee up, and pulling his arms back for handcuffing, did not constitute excessive force); *Zivojinovich v. Barner*, 525 F.3d 1059 (11th Cir. 2008) (officer who escorted guest from hotel after complaints of disturbance, and who had probable cause, did not use excessive force by pulling his arm up at an uncomfortable angle while escorting him; use of uncomfortable hold to escort uncooperative and potentially belligerent suspect was reasonable); *Gasser v. Vill. of Pleasant Prairie,* 2022 WL 898743, at *3 (7th 2022) (plaintiff's excessive force allegations were "very different" than video evidence; officer merely put his hands on her shoulder to have her sit down on a bench while she was under arrest awaiting a sobriety tests); *Legg v. Pappas*, 383 F. App'x 547 (7th Cir. 2010) (officers acted reasonably in transporting intoxicated detainee from residence to squad car by grabbing a bicep and wrist).

"Totality of circumstances" as visioned by Petitioner devolves the *Graham* factors into ordinary negligence concepts where even similar cases have

different outcomes based on litigation tactics. The Court should resist "malleable standards" that have a way of "turning into vehicles for the implementation of individual judges' policy preferences." *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting).

## CONCLUSION

Bedrock principles involving threat to the officer and citizen cooperation should guide the Court to revitalize the *Graham* use of force standards so the rule of law is consistent, predictable, practical, and in accord with settled legal norms that have long roots in the common law.

Respectfully submitted,

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