

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 AMICI CURIAE THE TEXAS MUNICIPAL
LEAGUE INTERGOVERNMENTAL RISK
POOL, TEXAS MUNICIPAL LEAGUE, TEXAS
CITY ATTORNEYS ASSOCIATION, NATIONAL
ASSOCIATION OF POLICE ORGANIZATIONS,
TEXAS POLICE CHIEFS ASSOCIATION, COMBINED
LAW ENFORCEMENT ASSOCIATIONS OF TEXAS,
AND TEXAS MUNICIPAL POLICE ASSOCIATION, IN
SUPPORT OF RESPONDENT ROBERTO FELIX, JR.**

LAURA O'LEARY

Counsel of Record

FRANCISCO J. VALENZUELA

FANNING HARPER MARTINSON

BRANDT & KUTCHIN, P.C.

One Glen Lakes

8140 Walnut Hill Lane, Suite 200

Dallas, TX 75231

loleary@fhmbk.com

(214) 369-1300

120136



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

*Attorneys for Amici Curiae
the Texas Municipal League
Intergovernmental Risk Pool,
Texas Municipal League,
Texas City Attorneys
Association, National
Association of Police
Organizations, Texas Police
Chiefs Association, Combined
Law Enforcement Associations
of Texas, and Texas Municipal
Police Association*

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICI CURIAE.....	1
SUMMARY	3
ARGUMENT.....	4
A. The Fourth Amendment Standard is Based on a Reasonable Officer on the Scene.....	4
B. Proper Application of the Fourth Amendment Avoids Perverse Consequences and Decreases Danger to Officers, Suspects, and the Public	5
1. Courts should not encourage officers to perform their duties timidly or to err on the side of caution.....	5
2. Courts should not encourage suspects to engage in dangerous behavior by fleeing from law enforcement officers.....	7
3. Safety risks are minimized when officers respond swiftly and routinely exercise unquestioned command of a situation.....	9

Table of Contents

	<i>Page</i>
4. Judges and juries should not second guess an officer’s on-scene, instantaneous threat assessment	9
5. The reasonable officer analysis must account for perceptual distortions officers experience during high stress use-of-force events.....	10
C. The Court Should Reject Petitioner and Her Amici’s Officer-Created Danger Theory	12
1. Petitioner’s proposed liability standard is unworkable.....	12
2. Courts may review prior segments of an incident only to determine the officer’s knowledge	15
D. Officer Felix’s Actions Complied with the Fourth Amendment	16
1. Traffic stops and associated inquiries are long standing law enforcement practices which serve important safety interests ...	17
2. Police officers face significant potential danger during traffic stops	19
E. Courts Must Consider a Suspect’s Culpability	.22
CONCLUSION24

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Adams v. Williams</i> , 407 U.S. 143 (1972).....	19
<i>Arizona v. Johnson</i> , 555 U.S. 323 (2009).....	9, 18
<i>California v. Hodari D.</i> , 499 U.S. 621 (1991).....	8
<i>Cole v. Bone</i> , 993 F.2d 1328 (8th Cir. 1993)	14
<i>Cole v. Carson</i> , 935 F.3d 444 (5th Cir. 2019).....	6
<i>Davis v. Romer</i> , 600 Fed. App'x 926 (5th Cir. 2015).....	14
<i>Davis v. Scherer</i> , 468 U.S. 183 (1984).....	6
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979).....	18
<i>Devenpeck v. Alford</i> , 543 U.S. 146 (2004).....	5
<i>Filarsky v. Delia</i> , 566 U.S. 377 (2012).....	5

Cited Authorities

	<i>Page</i>
<i>Forrester v. White</i> , 484 U.S. 219 (1988).....	5
<i>Graham v. Connor</i> , 490 U.S. 386 (1989).....	4, 10, 13, 14, 16
<i>Greenidge v. Ruffin</i> , 927 F.2d 789 (4th Cir. 1991).....	14
<i>Gregory v. Zumult</i> , 294 Fed. App'x 792 (4th Cir. 2008).....	14
<i>Hunter v. Bryant</i> , 502 U.S. 224 (1991).....	6
<i>Kansas v. Glover</i> , 589 U.S. 376 (2020).....	18
<i>Kentucky v. King</i> , 563 U.S. 452 (2011).....	13, 16
<i>Lange v. California</i> , 594 U.S. 295 (2021).....	7-9, 23
<i>Lankford v. City of Plumerville, Ark.</i> , 42 F.4th 918 (8th Cir. 2022).....	15
<i>Lemmon v. City of Akron, Ohio</i> , 768 Fed. App'x 410 (6th Cir. 2019)	14
<i>Maryland v. Wilson</i> , 519 U.S. 408 (1997).....	9, 18, 21

Cited Authorities

	<i>Page</i>
<i>Menuel v. City of Atlanta</i> , 25 F.3d 990 (11th Cir. 1994).....	7, 16
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	18
<i>Michigan v. Summers</i> , 452 U.S. 692 (1981).....	9
<i>Oakes v. Anderson</i> , 494 Fed. App'x 35 (11th Cir. 2012)	15, 16
<i>Ontiveros v. City of Rosenberg</i> , 564 F.3d 379 (5th Cir. 2009)	7
<i>Ornelas v. U.S.</i> , 517 U.S. 690 (1996).....	10, 13, 16
<i>O'Bert ex rel. Estate of O'Bert v. Vargo</i> , 331 F.3d 29 (2d Cir. 2003)	16
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106 (1977).....	9, 18, 19
<i>Plakas v. Drinski</i> , 19 F.3d 1143 (7th Cir. 1994).....	10, 13-16
<i>Plumhoff v. Rickard</i> , 572 U.S. 765 (2014).....	14, 22, 23
<i>Ramirez v. Knoulton</i> , 542 F.3d 124 (5th Cir. 2008)	14, 15

Cited Authorities

	<i>Page</i>
<i>Richardson v. McKnight</i> , 521 U.S. 399 (1997).....	5
<i>Rodriguez v. U.S.</i> , 575 U.S. 348 (2015).....	17, 18
<i>Ryburn v. Huff</i> , 565 U.S. 469 (2012).....	10, 13, 16
<i>Salim v. Proulx</i> , 93 F.3d 86 (2d Cir. 1996)	16
<i>Scott v. Harris</i> , 550 U.S. 372 (2007).....	8, 14, 22, 23
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985).....	17
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	9
<i>U.S. v. Arvizo</i> , 534 U.S. 266 (2002)	10, 13, 16
<i>U.S. v. Cortez</i> , 449 U.S. 411 (1981).....	10
<i>U.S. v. Robinson</i> , 414 U.S. 218 (1973)	19
<i>U.S. v. Sharpe</i> , 470 U.S. 675 (1985).....	15, 16

Cited Authorities

	<i>Page</i>
<i>Utah v. Strieff</i> , 579 U.S. 232 (2016).....	18
<i>Whren v. U.S.</i> , 517 U.S. 806 (1996).....	17
<i>Winzer v. Kaufman County</i> , 916 F.3d 464 (5th Cir. 2019).....	6, 13
<i>Winzer v. Kaufman County</i> , 940 F.3d 900 (5th Cir. 2019).....	6
 Constitutional Provisions	
U.S. Const. amend. IV	3-6, 8, 9, 13-18, 24
 Statutes and Other Authorities	
Sup. Ct. R. 37.....	1
TEX. PENAL CODE §38.04(b)(1)(B).....	23
Alexis Artwohl, Ph.D., <i>Perceptual and Memory Distortions During Officer Involved Shootings</i> , AELE LETHAL & LESS LETHAL FORCE WORKSHOP, 2008 Update, https:// www.aele.org/law/2008FPAUG/wb-19.pdf	11
Dept. of Justice, Bureau of Justice Statistics, B. Reaves, <i>Police Vehicle Pursuits, 2012–2013 (May 2017)</i>	8

Cited Authorities

	<i>Page</i>
FBI Releases Officers Killed and Assaulted in the Line of Duty, 2023 Special Report and Law Enforcement Employee Counts, https://www.fbi.gov/news/press-releases/fbi-releases-officers-killed-and-assaulted-in-the-line-of-duty-2023-special-report-and-law-enforcement-employee-counts ; Officers Killed and Assaulted in the Line of Duty, 2023.pdf, pages 4, 9, last visited December 17, 2024	6
The FBI’s data collection reports show that, in 2020, 60,105 officers were assaulted while on duty, and 18,568 officers were injured by assaults while performing their duties. https://www.hSDL.org/c/2020-leoka/ , last visited on December 10, 2024	20
Donovan C. Kelley, Erika Siegel, Jolie B. Wormwood, <i>Understanding Police Performance Under Stress</i> , FRONTIERS OF PSYCHOLOGY, Aug. 9, 2019, https://pmc.ncbi.nlm.nih.gov/articles/PMC6696903/	12
David A. Klinger, Rod K. Brunson, <i>Police Officers’ Perceptual Distortions During Lethal Force Situations</i> , CRIMINOLOGY & PUBLIC POLICY, Feb. 2009	11
The National Law Enforcement Officers Memorial Fund website reports 428 officer deaths in 2020 and 660 officer deaths in 2021. https://nleomf.org/memorial/facts-figures/officer-fatality-data/officer-deaths-by-year/ , last visited on December 10, 2024	20

Cited Authorities

	<i>Page</i>
Over \$40M worth of cocaine seized during traffic stop near Geneseo, ISP says, https://www.msn.com/en-us/news/crime/over-40m-worth-of-cocaine-seized-in-henry-county-illinois-state-police-say/ar-AA1v4W2C#:~:text=Around%202%3A10%20p.m.%20on%20Friday%2C%20Nov.%2029%2C%20an,and%20a%20search%20unveiled%201%2C146%20pounds%20of%20cocaine , last visited on December 2, 2024.	18
Thomas D. Petrowski, J.D., <i>Use-of-Force Policies and Training</i> , FBI LAW ENFORCEMENT BULLETIN, October, 2002, https://leb.fbi.gov/file-repository/archives/oct02leb.pdf	7
South Carolina officer rescues woman mouthing “help me” during traffic stop, https://www.cbsnews.com/news/south-carolina-officer-rescues-woman-help-me-traffic-stop-north-myrtle-beach/ , last visited on December 2, 2024.	18
Statistics on Law Enforcement Officer Deaths in the Line of Duty from January through July 2024, https://le.fbi.gov/cjis-division/cjis-link/statistics-on-law-enforcement-officer-deaths-in-the-line-of-duty-from-january-through-july-2024 , last visited on December 17, 2024.	6

INTEREST OF AMICI CURIAE¹

Amici collectively represent thousands of local governmental entities and law enforcement agencies, tens-of-thousands of citizens, and hundreds-of-thousands of police officers. Amici and their members are strongly interested in obtaining clear guidance from this Court relating to potential liability when officers use force in connection with their duties. Amici believe that clear guidance from this Court which recognizes the realities of policing in high stress encounters involving the use of deadly force will increase safety for law enforcement officers, suspects, and citizens. Amici seek to assist this Court by providing insight from the perspective of law enforcement officers and their employing agencies.

Texas Municipal League Intergovernmental Risk Pool (“TMLIRP”) is a self-insurance pool formed by over 2,500 participating governmental entities in the State of Texas, including over 930 municipalities that have law-enforcement liability coverage through TMLIRP.

Texas Municipal League (“TML”) is a non-profit association of over 1,170 incorporated cities that provides legislative, legal, and educational services to its members. Over 13,000 persons consisting of city mayors, council members, city managers, city attorneys, and department

1. No counsel for any party in this matter and no party: (1) authored this brief in whole or in part; or (2) contributed money that was intended to fund the preparation or submission of this brief. No person, other than TMLIRP, TML, TCAA, NAPO, TPCA, CLEAT, TMPA, and their members or counsel, contributed money that was intended to fund the preparation or submission of this brief. Amici submit this brief pursuant to Supreme Court Rule 37.

heads are member officials of TML by virtue of their respective cities' participation. The TML legal defense program was established to monitor major litigation that affects municipalities and to file amicus briefs on behalf of its members in cases of special significance to cities and city officials.

Texas City Attorneys Association ("TCAA"), an affiliate of TML, is an organization of over 600 attorneys who represent Texas cities and city officials in the performance of their duties.

National Association of Police Organizations ("NAPO") is a nationwide alliance of organizations committed to advancing the interests of law enforcement officers. Since NAPO's founding in 1978, it has become the strongest unified voice supporting law enforcement in the United States. The organization represents over 1,000 police units and associations, over 241,000 sworn officers, and more than 50,000 citizens mutually dedicated to fair and effective law enforcement.

Founded in 1958, Texas Police Chiefs Association ("TPCA") promotes, encourages, and advances the professional development and high ethical standards of senior police management personnel throughout Texas. TPCA's membership of 1,550 includes the law enforcement management personnel of over 330 cities and agencies representing a population served of more than 15 million.

Combined Law Enforcement Associations of Texas ("CLEAT") represents over 25,000 Police Officers, Detention Officers, and other Law Enforcement Professionals across Texas. CLEAT advocates for the fair and consistent application of the law for First Responders.

Founded in 1950, the Texas Municipal Police Association (“TMPA”) represents over 33,000 state, county, and local police officers and public safety employees across Texas. TMPA promotes professionalism in law enforcement through training, education, and representation.

SUMMARY

Reasonableness is the touchstone for Fourth Amendment use-of-force analysis. This analysis must take into account: (1) this Court’s holdings concerning officer conduct; (2) perceptual distortions and different mental processes officers experience during rapidly developing, high stress encounters; (3) the many dangers officers face—especially during traffic stops; and (4) consequences for public safety. Contrary to Petitioner’s contentions, officers are not “rewarded” for using force or “incentivized” to do so when judges focus their reasonableness analysis on the circumstances at issue at the time the officer used force.²

The Court should reject the officer-created danger theory Petitioner and her supporting amici propose because it conflicts with this Court’s precedent, disregards the realities of policing, and would severely hamper law enforcement by encouraging officers to stand down when suspects resist or flee from law enforcement. Although judges may review events leading up to the use of force to determine what the officer knew when he or she used deadly force, Petitioner and her supporting amici propose an officer-created danger theory that would ask courts

2. Pet. Br. at 28, 34.

to review prior events for the purpose of judging the officer's earlier tactics, actions, and decisions. This would improperly invite courts to second-guess a broad range of officers' conduct. The Court should provide clear guidance to constrain to its proper purpose lower courts' review of officers' earlier actions in encounters that culminated in a use of deadly force.

In making the traffic stop, asking for the driver's license, ordering the driver out of the vehicle, and taking swift and decisive action when a non-compliant suspect engaged in vehicular flight, Officer Felix complied with this Court's precedents and with the requirements of the Fourth Amendment. The Court should affirm the judgment in Officer Felix's favor.

ARGUMENT

A. The Fourth Amendment Standard is Based on a Reasonable Officer on the Scene.

Fourth Amendment use-of-force analysis applies the perspective of a reasonable *officer*, not a layperson. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (“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,” and it “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.”).

B. Proper Application of the Fourth Amendment Avoids Perverse Consequences and Decreases Danger to Officers, Suspects, and the Public.

1. Courts should not encourage officers to perform their duties timidly or to err on the side of caution.

This Court has rested its Fourth Amendment “reasonableness” analysis in part on the value of avoiding “perverse consequences.” *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004). A reasonableness analysis that would encourage officers to act with timidity, or to err on the side of caution, would create perverse consequences and would, itself, be unreasonable. Indeed, this Court has recognized that avoiding unwarranted timidity on the part of government officials is an important government interest. *Filarisky v. Delia*, 566 U.S. 377, 389–90 (2012); *Richardson v. McKnight*, 521 U.S. 399, 408–09 (1997); *see also Forrester v. White*, 484 U.S. 219, 223 (1988) (“By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties.”) (emphasis in original).

This Court has also noted that

police officers . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. . . . In these circumstances, officials should not err always on the side of caution. Officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.

Davis v. Scherer, 468 U.S. 183, 196 (1984) (citation omitted, cleaned up); *see also Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (“officials should not always err on the side of caution”) (citation omitted).

Officers should not be encouraged to err on the side of caution because, in the increasingly risky profession of law enforcement, officers’ hesitation can be deadly to officers and civilians.³ Many judges have recognized the importance of interpreting the Fourth Amendment in a manner that discourages hesitation when an officer’s use of deadly force is geared toward protecting officers and members of the public.⁴ This is especially important

3. The FBI’s data collection shows that, from 2021-2023, more officers were feloniously killed than in any other three-year period for the last twenty years. Additionally, in 2023, more than 79,000 officers were assaulted while performing their duties. [https://www.fbi.gov/news/press-releases/fbi-releases-officers-killed-and-assaulted-in-the-line-of-duty-2023-special-report-and-law-enforcement-employee-counts;Officers Killed and Assaulted in the Line of Duty, 2023.pdf](https://www.fbi.gov/news/press-releases/fbi-releases-officers-killed-and-assaulted-in-the-line-of-duty-2023-special-report-and-law-enforcement-employee-counts;Officers%20Killed%20and%20Assaulted%20in%20the%20Line%20of%20Duty,%202023.pdf), pages 4, 9, last visited December 17, 2024. The majority of officers’ felonious deaths during the first seven months of 2024 occurred when officers were engaged in investigative/enforcement activities. <https://le.fbi.gov/cjis-division/cjis-link/statistics-on-law-enforcement-officer-deaths-in-the-line-of-duty-from-january-through-july-2024>, last visited on December 17, 2024. *See also infra* at 19-21.

4. *E.g., Winzer v. Kaufman County*, 916 F.3d 464, 482 (5th Cir. 2019) (Clement, J., dissenting in part) (objecting to a holding that instructs officers to delay their responses, explaining that “when a split second is all you have, waiting itself is a decision—one that may bring disastrous consequences”); *accord Winzer v. Kaufman County*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho., J., joined by Smith, Clement, Engelhardt, JJ., dissenting from denial of rehearing en banc) (citing with approval Judge Clement’s prior dissent and reasoning); *Cole v. Carson*, 935 F.3d 444, 457 (5th Cir. 2019) (en

because “[e]mpirical data indicate that law enforcement officers responding to a threat hesitate to use force, particularly deadly force, even in the face of an imminent threat.”⁵

2. Courts should not encourage suspects to engage in dangerous behavior by fleeing from law enforcement officers.

Officers should not be motivated to stand down in response to a suspect’s non-compliance—especially during a traffic stop—because this encourages resistance and flight from law enforcement officers, which undermines officers’ authority and endangers officers and the public.

This Court recognizes the important government interest in ensuring compliance with law enforcement and the danger suspects cause when they flee from officers. *Lange v. California*, 594 U.S. 295, 324 (2021) (Roberts, C.J., joined by Alito, J., concurring in the judgment) (citing

banc) (Jones, J., joined by Smith, Owen, Ho, Duncan, and Oldham, JJ., dissenting) (noting that in the “increasingly risky profession of law enforcement,” “‘action beats reaction’ every time”) (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 384 (5th Cir. 2009)); *Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994) (praising officers for “substitut[ing] themselves for innocent bystanders and untrained and vulnerable family members as prospective objects of the decedent’s violent exertions”).

5. Thomas D. Petrowski, J.D., *Use-of-Force Policies and Training*, FBI LAW ENFORCEMENT BULLETIN, October, 2002, at 28, 31 n.18, <https://leb.fbi.gov/file-repository/archives/oct02leb.pdf> (noting that “approximately 85 percent of law enforcement officers feloniously killed in the line of duty never discharged their service weapons”).

California v. Hodari D., 499 U.S. 621, 627 (1991)). This is true even when the officer’s initial reason for engaging the suspect is a minor offense, such as toll violations. *Id.* (explaining that “[d]isregarding an order to yield to law enforcement authority cannot be dismissed with a shrug of the shoulders simply because the underlying offense is regarded as innocuous” and that “[a]ffording suspects the opportunity to evade arrest by [fleeing] rewards flight and encourages dangerous behavior”).

A suspect’s flight “always involves the ‘paramount’ government interest in public safety.” *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 383 (2007)); *see also Hodari D.*, 499 U.S. at 627 (“Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.”). This Court recognizes that “[a] fleeing suspect ‘intentionally places himself and the public in danger.’” *Lange*, 594 U.S. at 324 (quoting *Scott*, 550 U.S. at 384) (cleaned up);⁶ *see also Scott*, 550 U.S. at 382 n.9 (explaining that it was the suspect’s vehicular flight itself that posed a threat of serious physical harm to others).

The Fourth Amendment’s reasonableness standard should empower officers to ensure compliance from suspects and to protect the public from fleeing suspects.

6. Chief Justice Roberts and Justice Alito also recognize that “[v]ehicular pursuits, in particular, are often catastrophic.” *Id.* (citing Dept. of Justice, Bureau of Justice Statistics, B. Reaves, *Police Vehicle Pursuits, 2012–2013*, p. 6 (May 2017) for the proposition that the data shows an “average of about one death per day in the United States from vehicle pursuits from 1996 to 2015”).

3. Safety risks are minimized when officers respond swiftly and routinely exercise unquestioned command of a situation.

Officers need to feel confident that they can take swift action to protect themselves and the public, particularly when non-compliant suspects engage in vehicular flight. *Lange*, 594 U.S. at 307 (“We have no doubt that in a great many cases flight creates a need for police to act swiftly.”); *see also id.* at 308 (explaining that an officer may act immediately when facing an emergency, such as imminent harm to himself or others); *Maryland v. Wilson*, 519 U.S. 408, 414 (quoting with approval this Court’s statement in *Michigan v. Summers*, 452 U.S. 692, 702–703 (1981) that “[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation”); *see also Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (same).

These concerns fall neatly within a proper Fourth Amendment reasonableness analysis because “it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.” *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (quoting *Terry v. Ohio*, 392 U.S. 1, 23 (1968)).

4. Judges and juries should not second guess an officer’s on-scene, instantaneous threat assessment.

This Court has characterized as a “wise admonition” the proposition that “judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation.”

Ryburn v. Huff, 565 U.S. 469, 477 (2012) (per curiam). This is sensible in part because officers' specialized training and experience enables them to make inferences and deductions that "might well elude an untrained person." *U.S. v. Arvizo*, 534 U.S. 266, 273 (2002) (quoting *U.S. v. Cortez*, 449 U.S. 411, 418 (1981)); see also, e.g., *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996) ("a police officer views the facts through the lens of his police experience and expertise").

Courts "recognize that the decision to shoot can only be made after the briefest reflection, so brief that 'reflection' is the wrong word" and note that there is too little time for the officer to consider alternatives "and too much opportunity to second guess that officer." *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994) (relying, in part, on *Graham*, 490 U.S. at 396–97). This is certainly true in the case at bar, in which Officer Felix had but seconds to react to Barnes' non-compliance and vehicular flight. Resp. Br. at 5-12.

5. The reasonable officer analysis must account for perceptual distortions officers experience during high stress use-of-force events.

These concerns about second-guessing an officer's on-scene assessment of danger are particularly valid in light of the mental processes in effect during rapidly developing, high stress encounters, such as incidents involving lethal force. Many studies demonstrate that police officers overwhelmingly experience perceptual distortions, including visual, auditory, and time distortions, when

faced with situations that led to the use of lethal force.⁷ One researcher noted that, “it is evident that reasonable officers on the scene of police shootings are subject to experiencing substantial levels of perceptual distortion both prior to pulling the trigger and as they fire” and concluded that “after-the-fact assessments of the appropriateness of an officer’s behavior just prior to and during a shooting must be judged from the perspective of the perceptual and sensory distortions likely to occur when a ‘reasonable officer’ becomes aware of a potential threat of death or serious injury.” Klinger, *supra*, n.7, at 117.

Indeed, it appears that officers faced with lethal force situations unconsciously switch to an “experiential thinking” mode, which facilitates automatic, rapid responses and is oriented toward immediate action rather than reflection and delayed action. Artwohl, *supra*, n.7, at 19-2. Other studies show that, “when police officers feel secure in their status as an authority figure and do not believe they are being undermined by a suspect or

7. E.g., Alexis Artwohl, Ph.D., *Perceptual and Memory Distortions During Officer Involved Shootings*, AELE LETHAL & LESS LETHAL FORCE WORKSHOP, 2008 Update, at 19-4, <https://www.aele.org/law/2008FPAUG/wb-19.pdf>, (finding that, in a group of 157 police officers who were involved in shootings, 84% experienced diminished sound, 79% experienced tunnel vision, and 79% experienced time distortions during the events); *id.* at 19-3 (reviewing other studies, which identified time distortions in 61-82% of the events); David A. Klinger, Rod K. Brunson, *Police Officers’ Perceptual Distortions During Lethal Force Situations*, CRIMINOLOGY & PUBLIC POLICY, Feb. 2009, 117-40 (finding that, in a group of 80 police officers who were involved in shootings, 82% experienced diminished sound, 51% experienced tunnel vision, and 79% experienced time distortions during the events).

civilian,” their biopsychological performance and decision-making abilities are improved.⁸

Courts must recognize that, during deadly force encounters, officers are highly likely to experience perceptual distortions and “experiential thinking” oriented toward rapid, automatic responses. Proper application of the reasonable officer standard must account for these realities.

C. The Court Should Reject Petitioner and Her Amici’s Officer-Created Danger Theory.

1. Petitioner’s proposed liability standard is unworkable.

Petitioner and her supporting amici’s officer-created danger theory opens wide the door to judges and juries second-guessing, without clear standards, a broad range of officers’ actions and decisions.⁹ A vague question about whether an officer’s prior conduct created the danger justifying the use of force or caused harm to a suspect would, in contravention of this Court’s holdings, strongly motivate officers to act with caution and timidity out of fear of potential liability.¹⁰ *Supra* at 5-7.

8. Donovan C. Kelley, Erika Siegel, Jolie B. Wormwood, *Understanding Police Performance Under Stress*, FRONTIERS OF PSYCHOLOGY, Aug. 9, 2019, <https://pmc.ncbi.nlm.nih.gov/articles/PMC6696903/>.

9. Pet. Br. at 14-15, 17, 25, 27-29, 31-34, 47-48; Current and Former Law Enforcement Officials (“CFLEO”) Amicus Br. at 8, 19-20, 22-24; Color of Change (“COC”) Amicus Br. at 3, 15.

10. Judges and jurors would answer these questions from the safety of the courthouse, applying a different mode of thought,

This Court rejected a similarly standardless measure in connection with Fourth Amendment challenges to warrantless searches. *Kentucky v. King*, 563 U.S. 452, 466 (2011). The liability test at issue in *King* would have considered whether it was “reasonably foreseeable” that officers’ conduct would contribute to creation of an exigency justifying a warrantless search. This Court explained that the “reasonable foreseeability test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges” who would have to determine its applicability after the fact. *Id.* This Court explained that it would be nearly impossible for a court to determine whether the “reasonable foreseeability” threshold had been passed and concluded that the Fourth Amendment does not require such a nebulous and impractical test. *Id.* at 469. In their officer-created danger theory, Petitioner and her supporting amici present a similarly unworkable measure of liability.

All use-of-force incidents begin with an officer’s decision to take some action. “If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause.” *Plakas*, 19 F.3d

without an officer’s specialized training and experience. *Supra* at 4, 9-10; *see also, e.g., Winzer*, 916 F.3d at 482 (Clement, J., dissenting in part) (“we judges—mercifully—never face that split second. Indeed, we never have to decide anything without deliberation—let alone whether we must end one person’s life to preserve our own or the lives of those around us”). This would contravene this Court’s long-established analysis. *Graham*, 490 U.S. at 396-97; *Ryburn*, 565 U.S. at 477; *Arvizo*, 534 U.S. at 273; *Ornelas*, 517 U.S. at 699.

at 1150; *see also, e.g., Lemmon v. City of Akron, Ohio*, 768 Fed. App'x 410, 418-19 (6th Cir. 2019) (rejecting the contention that, in their Fourth Amendment use-of-force analysis, courts should consider whether officers created the circumstances that led to the harm to the suspect); *Gregory v. Zumult*, 294 Fed. App'x 792, 794 (4th Cir. 2008) (citing *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir. 1991) for the proposition that “[u]nder *Graham*, a court must focus on the moment that force was used. Actions prior to that moment are not relevant in evaluating whether the force used was reasonable, even if the suspected criminal activity is relatively minor”); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (explaining that the “Fourth Amendment prohibits unreasonable *seizures*, not unreasonable or ill-advised conduct in general,” and, consequently, courts do not scrutinize “the events leading to the seizure, for reasonableness under the Fourth Amendment”) (emphasis added).

Indeed, this Court rejected an “officer-created danger” argument when it disagreed with the district court’s reasoning that “the danger presented by a high-speed chase cannot justify the use of deadly force because that danger was caused by the officers’ decision to continue the chase.” *Plumhoff v. Rickard*, 572 U.S. 765, 776 n.3 (2014).¹¹ This Court characterized this reasoning as “irreconcilable with our decision in *Scott*.” *Id.*

11. *Accord, Davis v. Romer*, 600 Fed. App'x 926, 930 (5th Cir. 2015) (explaining that an argument that a police officer created danger by jumping onto the running board of a vehicle, instead of moving away from the car, after a driver began to move his vehicle, is “a suggestion more reflective of the peace of a judge’s chambers than of a dangerous and threatening situation on the street.”) (quoting *Ramirez v. Knoulton*, 542 F.3d 124, 130 (5th Cir. 2008) (additional citation omitted)).

2. Courts may review prior segments of an incident only to determine the officer's knowledge.

In their review, courts

judge the reasonableness of the use of deadly force in light of all that the officer knew. We do not return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer.

Plakas, 19 F.3d at 1150;¹² *see also, e.g., Lankford v. City of Plumerville, Ark.*, 42 F.4th 918, 924 (8th Cir. 2022) (rejecting conclusions of testifying officers who “were able to review dashcam footage and make a calculated, post hoc analysis,” because the officer on the scene had to make a quick decision based on information he had received, and “[w]e assess the reasonableness of deadly force for Fourth Amendment purposes from the seizing officer’s perspective at the time of the incident”) (citation omitted); *Oakes v. Anderson*, 494 Fed. App’x 35, 39-40

12. *See also Ramirez*, 542 F.3d at 129-30 (“A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.”) (quoting *U.S. v. Sharpe*, 470 U.S. 675, 686-87 (1985)).

and n.6 (11th Cir. 2012) (rejecting plaintiffs’ argument that officers “made several tactical mistakes that escalated the situation and ultimately resulted in [the suspect’s] death,” explaining that the court’s “task is not to evaluate what the officers could or should have done in hindsight”); *O’Bert ex rel. Estate of O’Bert v. Vargo*, 331 F.3d 29, 36–37 (2d Cir. 2003) (relying on *Graham*, 490 U.S. at 396, and quoting *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) for the proposition that, where officers use deadly force while attempting to make an arrest, the Fourth Amendment’s objective reasonableness inquiry “depends only upon the officer’s knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force”); *Menuel*, 25 F.3d at 997 (citing with approval *Plakas*, 19 F.3d at 1148-50, and explaining that “police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time”).

The Court should reject Petitioner’s officer-created danger theory because: (1) like the “reasonable foreseeability” test from *King*, Petitioner’s proposed test would create unacceptable and unwarranted difficulties for officers and judges; and (2) in contravention of this Court’s precedent,¹³ Petitioner’s test would invite judges, from the safety of the courthouse, to second-guess officers’ earlier tactics, actions, and decisions.

D. Officer Felix’s Actions Complied with the Fourth Amendment.

Officer Felix complied with the Fourth Amendment when he stopped the car Barnes was driving, asked for

13. *Graham*, 490 U.S. at 396-97; *Ryburn*, 565 U.S. at 477; *Arvizo*, 534 U.S. at 273; *Ornelas*, 517 U.S. at 699; *Sharpe*, 470 U.S. at 686-87.

Barnes' license, ordered Barnes out of the car, and took swift and decisive action when, after failing to comply with Officer Felix's commands, Barnes started the car and began to drive away. Resp. Br. at 5-12. The Court should reject amici's arguments challenging the constitutionality of traffic stops and associated inquiries.

1. Traffic stops and associated inquiries are long standing law enforcement practices which serve important safety interests.

Amici's arguments about traffic stops and associated inquiries illustrate the problems with an amorphous *post hoc* inquiry into officers' conduct prior to a use of deadly force. COC Amicus Br. at 4-14. Contrary to their contentions, Officer Felix's actions complied with the Fourth Amendment. Amici's arguments disregard this Court's long-established precedent and the inherent dangers of traffic stops.

This Court unanimously rejected a challenge to pretextual traffic stops, recognizing that traffic stops are not only constitutionally permissible, but they are "a cornerstone of law enforcement practice." *Whren v. U.S.*, 517 U.S. 806, 810 (1996).¹⁴ During a traffic stop, it is reasonable for an officer to check the driver's license, determine whether the driver has outstanding warrants, and inspect the vehicle's registration and proof of insurance. *Rodriguez v. U.S.*, 575 U.S. 348, 355 (2015). Traffic stops and associated license and warrant checks

14. "We would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." *Tennessee v. Garner*, 471 U.S. 1, 19 (1985).

serve important law enforcement and safety interests.¹⁵ This Court has long recognized that states have a vital safety interest in “ensuring that only those qualified to do so are permitted to operate motor vehicles...and hence that licensing...requirements are being observed.” *Delaware v. Prouse*, 440 U.S. 648, 658 (1979).¹⁶ Routine warrant checks are a precaution for officer safety,¹⁷ particularly in the context of traffic stops, which “are ‘especially fraught with danger to police officers.’” *Rodriguez*, 575 U.S. at 356 (quoting *Johnson*, 555 U.S., at 330); see also *Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (same); *infra* at 19-21.

Ordering a driver to step out of his car during a traffic stop, even one for a minor offense, is reasonable under the Fourth Amendment. *Mimms*, 434 U.S. at 108–11; see also *Wilson*, 519 U.S. at 411–12; *id.* at 414 (the fact that evidence of a more serious crime might be uncovered during a traffic stop raises the possibility of a violent

15. For example, recent traffic stops for minor offenses resulted in: (1) interception of a major cocaine smuggling operation; and (2) the rescue of a woman who had been kidnapped at gunpoint. <https://www.msn.com/en-us/news/crime/over-40m-worth-of-cocaine-seized-in-henry-county-illinois-state-police-say/ar-AA1v4W2C#:~:text=Around%202%3A10%20p.m.%20on%20Friday%2C%20Nov.%2029%2C%20an.and%20a%20search%20unveiled%201%2C146%20pounds%20of%20cocaine;https://www.cbsnews.com/news/south-carolina-officer-rescues-woman-help-me-traffic-stop-north-myrtle-beach/>, last visited on December 2, 2024.

16. See also *Kansas v. Glover*, 589 U.S. 376, 381 (2020) (noting that drivers with revoked licenses frequently continue to drive and pose safety risks to others, including risks of motor vehicle fatalities).

17. *Utah v. Strieff*, 579 U.S. 232, 241 (2016) (citing *Rodriguez*, 575 U.S. at 355).

encounter, and ordering a vehicle's occupants to step out of the vehicle denies them access to any possible weapon that might be in the vehicle).¹⁸

2. Police officers face significant potential danger during traffic stops.

The concern for officer safety in connection with traffic stops “is both legitimate and weighty,” and this Court has “specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile.” *Mimms*, 434 U.S. at 110 (explaining that “[a]ccording to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile”) (quoting *Adams v. Williams*, 407 U.S. 143, 148 n. 3 (1972)). Indeed, this Court has “expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations,” noting instead that “it appears ‘that a significant percentage of murders of police officers occurs when the officers are making traffic stops.’” *Id.* (quoting *U.S. v. Robinson*, 414 U.S. 218, 234 and n.5 (1973)).

Interactions with suspects are highly dangerous to law enforcement officers. Indeed, during 2016, the year when Officer Felix stopped Barnes, while performing their

18. Barnes did, in fact, have a gun in the glove compartment of the vehicle he was driving. Resp. Br. at 49. Although Officer Felix did not know this at the time, the fact that Barnes had a gun within reach in the vehicle underlines the danger officers face even during traffic stops for minor offenses and highlights the threat occasioned by Barnes' refusal to step out of the vehicle when Officer Felix directed him to do so. Resp. Br. at 2, 6, 49; *see also id.* at 35, 50-51.

duties, well over 100 officers were killed, more than 57,000 officers were assaulted, and more than 16,500 officers were injured by assaults.¹⁹ These dangers have continued and have grown.²⁰

Every year, police officers are feloniously killed in connection with traffic stops. For instance, from November 4, 2024 to December 15, 2024, at least four officers were killed in connection with traffic stops.²¹ Additionally, police officers making traffic stops face potential death or injury from vehicles. Each year from 2019 to 2024, between fourteen and thirty police officers lost their lives in struck-

19. <https://ucr.fbi.gov/leoka/2016/home>, last visited on December 2, 2024 (noting that, during 2016, 118 officers who fell within the FBI's data collection were killed, 57,180 officers were assaulted, and 16,535 officers were injured by assaults while performing their duties); <https://nleomf.org/memorial/facts-figures/officer-fatality-data/officer-deaths-by-year/>, last visited on December 2, 2024 (identifying 182 officer deaths during 2016—three and a half officer deaths every week).

20. The National Law Enforcement Officers Memorial Fund website reports 428 officer deaths in 2020 and 660 officer deaths in 2021. <https://nleomf.org/memorial/facts-figures/officer-fatality-data/officer-deaths-by-year/>, last visited on December 10, 2024. The FBI's data collection reports show that, in 2020, 60,105 officers were assaulted while on duty, and 18,568 officers were injured by assaults while performing their duties. <https://www.hsd1.org/c/2020-leoka/>, last visited on December 10, 2024.

21. <https://www.odmp.org/officer/27230-police-officer-jacob-candanoza>; <https://www.odmp.org/officer/27245-sergeant-elio-diaz>; <https://www.odmp.org/officer/27221-police-officer-cooper-dawson>; <https://www.odmp.org/officer/27209-police-officer-enrique-martinez>, last visited December 17, 2024.

by-vehicle accidents.²² These numbers do not account for near-misses and injuries, sometimes severe, which officers suffer in connection with traffic stops. Officer Felix faced significant danger when he approached Barnes' car and stood in a narrow median of a heavily trafficked highway, sandwiched between Barnes' car and a short barrier separating Officer Felix from heavy on-coming traffic. https://www.youtube.com/watch?v=9gbM_22fUbY, at 14:44:17 to 14:45:54; *Wilson*, 519 U.S. at 412 (noting the danger to officers while standing by a driver's door during a traffic stop).

Barnes' sudden flight also endangered members of the public who were driving at highway speeds past the vehicles in the median. Nationwide, tens-of-thousands of people are killed and millions of people are injured in motor vehicle incidents annually. In 2016, the year Officer Felix stopped Barnes, 37,461 traffic fatalities occurred in United States, and 2,443,000 traffic injuries occurred nationwide.²³

Officer Felix reasonably perceived significant danger to himself throughout his encounter with Barnes and to the innocent motorists passing by at highway speeds. Officer Felix acted as a reasonable officer when he instinctively stepped onto Barnes' vehicle and deployed deadly force when Barnes disregarded Officer Felix's orders, started the car, and began driving away. Resp. Br. at 5-12.

22. <https://www.respondersafety.com/news/struck-by-incidents/yearly-fatality-reports/>, last visited on December 17, 2024; *see also* <https://www.odmp.org/officer/27220-deputy-sheriff-ignacio-dan-diaz>, last visited December 17, 2024.

23. <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812451>, last visited on December 2, 2024.

E. Courts Must Consider a Suspect's Culpability.

Notably absent from Petitioner and her amici's briefs is: (1) any explanation of how Officer Felix could have reasonably de-escalated the situation when Barnes turned on the car and, disobeying multiple commands, began driving away from the traffic stop; and (2) any acknowledgement of Barnes' relative culpability for the danger he created through his non-compliance and vehicular flight from the traffic stop. Instead, Petitioner and amici advocate a standard that, contrary to this Court's precedents, would disregard a suspect's relative culpability and require officers to stand down in response to non-compliant suspects who create danger by engaging in vehicular flight. Pet. Br. at 40-43; CFLEO Amicus Br. at 13-22.

In determining the reasonableness of a use of lethal force, it is appropriate to take into account relative culpability of those whose lives are at risk, including the suspect's decision to engage in vehicular flight, and police officers need not simply cease pursuit of a fleeing suspect and hope for the best. *Scott*, 550 U.S. at 384-85; *see also id.* at 384 n.10 (“Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.”) (emphasis in original).

In *Scott*, this Court declined to require police officers to allow fleeing suspects to get away whenever they drive recklessly and endanger others' lives, “concluding that the Constitution ‘assuredly does not impose this invitation to impunity-earned-by-recklessness.’” *Plumhoff*, 572 U.S.

at 776 n.3 (quoting *Scott*, 550 U.S. at 385-86). This Court explained that such a requirement would create obvious perverse incentives encouraging suspects to engage in dangerous vehicular flight. *Scott*, 550 U.S. at 385-86.²⁴

Reasonable officers would understand the need for immediate, vigorous action for the officer’s protection and for public safety when a noncompliant driver started his car and began to flee on a heavily trafficked highway. *Supra* at 19-21. A swift and strong response to a suspect’s vehicular flight is justified even when the underlying reason for the stop was minor, because the question is not whether the underlying violation presents risks to public safety, “but whether *flight* does so. And flight from the police is never innocuous.” *Lange*, 594 U.S. at 331 (emphasis in original); *id.* (explaining that, “the fact that a suspect flees when suspected of a minor offense could well be indicative of a larger danger, given that he has voluntarily exposed himself to much higher criminal penalties in exchange for the prospect of escaping or delaying arrest”).

Petitioner and amici’s protestations about the unimportance of the underlying reason for the traffic stop—unpaid tolls—fall flat in the face of Barnes’ non-compliance and attempted vehicular flight. The Court should reject Petitioner and amici’s arguments which disregard Barnes’ relative culpability.

24. In Texas, vehicular flight is recognized as a violent felony. TEX. PENAL CODE §38.04(b)(1)(B).

CONCLUSION

The Fourth Amendment's reasonable officer standard must account for the realities of policing, dangers to officers and citizens, and a suspect's relative culpability. This Court should clarify that judges may review segments of an event which precede the use of deadly force only for the purpose of determining the officer's knowledge, not to second-guess an officer's prior tactics, actions, or decisions. Officer Felix complied with the Fourth Amendment in connection with his encounter with Barnes. The Court should affirm the judgment in favor of Officer Felix.

Respectfully submitted,

LAURA O'LEARY

Counsel of Record

FRANCISCO J. VALENZUELA

FANNING HARPER MARTINSON

BRANDT & KUTCHIN, P.C.

One Glen Lakes

8140 Walnut Hill Lane, Suite 200

Dallas, TX 75231

loleary@fhmbk.com

(214) 369-1300

*Attorneys for Amici Curiae
the Texas Municipal League
Intergovernmental Risk Pool,
Texas Municipal League,
Texas City Attorneys
Association, National
Association of Police
Organizations, Texas Police
Chiefs Association, Combined
Law Enforcement Associations
of Texas, and Texas Municipal
Police Association*