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 CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS ASSOCIATION, AND CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF RESPONDENTS

JAMES R. TOUCHSTONE
SCOTT WM. DAVENPORT*
RICHARD A. LUCERO
JONES & MAYER
3777 N. Harbor Blvd.
Fullerton, CA 92835
(714) 446-1400
swd@jones-mayer.com

Attorneys for Amici Curiae California Sheriffs' Association, California Police Chiefs Association, and California Police Officers' Association

* *Counsel of Record*

120151

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Constitutional Provisions

Cited Authorities

Page

Statutes and Rules

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS

I. INTERESTS OF AMICI CURIAE[1]

Amici are the above Associations, whose members make up a vast array of law enforcement officers throughout the State of California. Amici Members represent policy making officials, management, and rank and file officers, providing a broad spectrum of law enforcement viewpoints.

A. California State Sheriffs' Association

The California State Sheriffs' Association ("CSSA") is a nonprofit professional organization that represents each of the fifty-eight (58) California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to allow for the general improvement of law enforcement throughout the State of California.

B. California Police Chiefs Association

The California Police Chiefs Association ("CPCA") represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration

1. No party or counsel for a party authored this brief, in whole or in part. No person or entity other than Amici Curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. This representation is made in compliance with Rule 37.6 of the United States Supreme Court Rules.

and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

C. California Peace Officers' Association

The California Peace Officers' Association ("CPOA") represents more than 8,000 members who are peace officers of all ranks throughout the State of California, from municipal, county, state, and federal law enforcement agencies. CPOA provides professional development and training for peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

D. Amici Curiae Interests in This Matter

This case raises important concerns for Amici, in that it will determine critical issues potentially jeopardizing the ability of Amici to intervene in dangerous situations, negatively impact officer survival, cause confusion in law enforcement use of force, and create a new theory for bringing liability claims against local governments and individual officers. Local law enforcement officers are engaged in the primary activity of combating crimes and frequently encounter dangerous situations and individuals. Amici guide their conduct and agency operations by this Court's pronouncements, and their day-to-day lives and those of the members of the communities they serve are directly impacted by such decisions.

Since Amici represent the interests of a wide variety of law enforcement, Amici provide this Court with a valuable perspective into the potential adverse effects

of the rejecting the "moment of threat" doctrine on a nationwide scale and, indeed, the benefits of applying such a doctrine universally. The underlying issues in this case have the potential for wide-ranging changes on use of force evidentiary and procedural principles at trial and also have the potential to impact important public safety concerns and law enforcement activities for all levels of criminal investigation and the corresponding law enforcement response.

Given the significant ramifications of this case, Amici respectfully submit this brief in support of Respondents. Amici's independent perspective on the issues presented in this case takes into account, in particular, the fact that the members of Amici will be tasked with the actual implementation internally and in the field of the legal principles that this Court will determine in this matter.

II. STATEMENT OF THE CASE

The initiating circumstances regarding this officer-involved shooting, while tragic, are neither unique nor uncommon. While engaged in a traffic stop based on vehicle code violations, circumstances changed in a split-second when a somewhat compliant suspect suddenly engaged in unanticipated actions which placed the officer in grave risk of imminent harm, requiring the officer to discharge his service weapon in self-defense.

Specifically, on April 28, 2016, Officer Roberto Felix, Jr., initiated a lawful traffic stop of a vehicle driven by Ashtian Barnes. Officer Felix contacted Barnes and asked for his driver's license and proof of insurance. Barnes turned off the vehicle and started "digging around" inside

the car. At this moment, Officer Felix smelled marijuana and asked Barnes to step out of vehicle.

At this point, Ashtian Barnes suddenly and inexplicably turned the car back on and sharply accelerated. Finding himself sandwiched in between Barnes' vehicle, the adjacent roadway divider, and the open door, Officer Felix jumped onto the running board, drew his weapon, and twice ordered Barnes not to move. Rather than complying, Barnes continued accelerating with Officer Felix holding on to the car for dear life. Officer Felix then fired his service weapon, striking Barnes. These horrifying events are captured on the patrol vehicle's camera, rendering them undisputed pursuant to *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Barnes' parents filed a claim under both 42 U.S.C. § 1983 and various state claims under Texas law. After the case was removed to federal court, Felix moved for summary judgment arguing that he did not violate Barnes' constitutional rights and was entitled to qualified immunity. The district court granted summary judgment, concluding that Officer Felix's actions prior to the "moment of threat"—including jumping on the door sill—had "no bearing" on the use of force. See *Barnes v. Felix*, 71 F.4th 393, 396 (5th Cir. 2024). Thereafter, the Court affirmed the grant of summary judgment, concluding that because Barnes posed a threat of serious harm to Officer Felix the moment the car began to move, Officer Felix's use of force was not excessive. *Id.*

In so ruling, the Fifth Circuit reasoned:

> As the district court explained, we may only ask whether Officer Felix was in danger "*at*

> *the moment of threat"* that caused him to use deadly force against Barnes." In this circuit, it is well-established that the excessive-force inquiry is confined to whether the officers or other persons were in danger at the moment of threat that resulted in the officers' use of deadly force. This "moment of threat" test means that the focus of the inquiry should be on the act that led the officer to discharge his weapon. Any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit. (Internal citations and quotations omitted, emphasis in original)

Id. at 397.

Concurring in the decision, Judge Patrick Higginbotham indicated that he felt constrained by the "moment of threat" doctrine, lamenting that under this doctrine, the Court was constrained from considering Officer Felix's actions in jumping on the car's running board and, instead, were limited such that their sole consideration was "the act that led the officer to discharge his weapon" rather than "what transpired up until the moment of shooting itself." *Id.* at 399 (J. Higginbotham, concurring).

Finally, the Fifth Circuit noted that the "moment of threat" doctrine represented a Circuit Split followed by the Second, Fourth, Fifth, and Eighth Circuits while the remaining Circuits did not follow such a rule. *Id.* at 400 (J. Higginbotham, concurring). This Court granted certiorari to resolve this split.

III. ARGUMENT

A. The "Moment of Threat" Doctrine is Constitutionally Sound and Does Not Represent an Unconstitutional Departure From Prior Authority

The words of the Fourth Amendment are clear: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated. . . . " (Emphasis added.)

Applying this in language in *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), this Court ruled that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. The Court noted that applying a balancing test, the focus was whether the "totality of the circumstances" justified a particular sort of search or seizure, the same balancing test that should be applied to deadly force cases. *Id.* at 9. In that case, this Court noted that where the suspect did not represent a threat to the officer—unlike the case here—the use of deadly force would be unconstitutional. *Id.* at 12.

Four years later, in *Graham v. Connor*, 490 U.S. 386 (1989), perhaps the seminal case on 42 U.S.C. § 1983, this Court said, "with respect to a claim of excessive force, the same standard of ***reasonable at the moment*** applies." *Graham*, 490 U.S. at 395 (emphasis added).

In this case, Petitioner argues that the "moment of threat" constitutes an impermissible departure from the Fourth Amendment's reasonableness standard;

and, conversely, Respondents assert that this doctrine is constitutionally permissible. As is so often the case in questions of this nature, the answer you get depends on the question you ask. See *State v. Olson*, 92 Wn.2d 134, 141, 594 P.2d 1337 (Wash. 1979) (J. Dolliver, dis.) Here, the "moment of threat" doctrine is not only constitutionally permissible, it is absolutely consistent with this Court's prior case authority.

In *Graham*, this Court noted, "The reasonableness of a particular use of force must be judged for the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Furthermore, "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.*

By this language, *Graham* concluded that judges should not be dissecting every decision an officer makes on a frame-by-frame basis. Instead, the focus of the Court's inquiry should be narrowly directed toward the suspect's threatening actions and the officer's response thereto. The ability to watch body-worn video over and over again punctuated by repeated pauses and rewinds, and debating the significance of each micro movement, deceives one into believing this is somehow possible for peace officers to engage in while involved in rapidly-evolving incidents, functioning under the pressure of not getting hurt themselves, and trying to prevent injury to a community member.

The traditional standard, as articulated in *Graham*, relies on reasonableness without the benefit of 20/20

hindsight. The question is whether an officer's actions were *reasonable*, not whether better choices could have been imagined after the fact, while not second-guessing pre-force actions, pretending that officers should have predicted all possible negative outcomes and simply avoided escalation and violence as a matter of choice. The practical implications of the approach promulgated by Petitioner here is that peace officers would be dissuaded from engaging with individuals to attempt to enforce potential violations of the law for fear of being exposed to civil liability. While this would constitute the ultimate form of "de-escalation," it is completely contrary to the jobs that all peace officers have—promoting public safety.

B. The "Moment of Threat" Doctrine Properly Focuses on a Suspect's Violent or Threatening Behavior and Preventing or Containing the Harm from that Conduct

In recent years, however, many Courts have drifted away from the plain language of the Fourth Amendment, *Garner, Graham*, and common law, and began to focus on the actions of the officers. Under this *new* theory, even though an officer's use of force may be justified at the moment of the shooting, the officer is assessed for whether they may have performed some action or inaction which "escalated" the scenario so as to convert a reasonable use of force into a constitutionally impermissible one. ***This novel theory of "officer escalation," however, was never contemplated by the framers of the Constitution***. Even worse, this trend shifts focus away from the violent conduct of the suspect and thrusts it upon the officer who, acting with limited, often times inaccurate, and constantly changing information, must omnisciently

divine unpredictable threatening actions and escalating threats in real-time. Suspects act. Peace officers react to their actions.

Under this theory of "officer escalation," if an officer's actions "unjustifiably" or "unnecessarily" created or increased the risk of a deadly confrontation—even if the subsequent force was reasonable at the time—the officer should bear civil or criminal liability. However, the problem is that for front-line officers trying to resolve a critical incident, it is often impossible to determine what will or will not later be determined to be unjustifiable or unnecessary. Pre-force tactical decisions are necessarily based on limited information, changing threat levels, and exposure to personal physical harm, while taking place in high-stress, potentially life-threatening situations. Moreover, bizarre or unexpected reactions from a suspect—such as attempting to start a car and flee from a traffic stop based on vehicle code offenses—make it impossible for officers to pre-determine all possible outcomes in any given scenario.

This trend has created a potential legal minefield where peace officers' actions are reviewed not only for their legality *at the moment* the decision to use force was made, but every single discretionary tactical choice which preceded the use of force. By engaging in such a hindsight review, judges and juries may fail to appreciate the complexities of real-time decision-making when presented with an imminent fear of death or serious bodily injury.

The notion of officer escalation threatens to undermine the standards that have long guided use-of-force evaluations. By concentrating on the "moment of threat,"

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

C. Amici Hold Accountability to the Communities they Serve as a Core Tenet of their Organizations

Amici hear and acknowledge the frustration Judge Higginbotham expressed. As an initial response, Amici remind the Court that accountability does not only occur in the environment of civil litigation. In parallel with litigation, a use of force can be subject to the internal investigation and disciplinary process, force review procedures, public disclosure of video and investigative materials, and the risk that conduct could become the basis for loss of certification to serve in the law enforcement profession. Additionally, an officer can be subject to criminal prosecution at the state or federal level.

Further, Amici point out this incident took place in 2016. In the years that have elapsed since that time, law enforcement has continued to advance the mandates of field delivery of mental health care, de-escalation, utilization of less lethal weapon systems, and meeting the needs of our diverse communities. Amici assure the Court that these efforts will continue on into the future.

Amici do not, in any way, seek to avoid liability for any errors members of their profession might commit. With this as context, Amici must express the view that the whole discussion of liability and the use of force standard in the setting of this incident, fundamentally, is unsound. Simply stated, the decision to stand on the car does not transform the reasonableness of the subsequent use of deadly force into a constitutional violation.

In *Cny. of Los Angeles v. Mendez*, 581 U.S. 420 (2017), this Court considered and rejected a similar analysis. In that case, the Los Angeles County Sheriff's Department received information that a parolee-at-large had been observed at a certain residence. While other deputies searched the main house, two deputies searched the back of the property where plaintiffs were napping inside a shack where they lived. When the deputies opened the door of the shack, one of the plaintiffs rose from the bed holding a BB gun. One deputy yelled, "Gun" and both deputies immediately opened fire, shooting the individuals multiple times. *Id.* at 423-425.

On the excessive force claim, the District Court found that the deputies' use of force was reasonable under *Graham*, but held them liable nonetheless under the Ninth Circuit's provocation rule, which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) the provocation is an independent Fourth Amendment violation. This ruling was affirmed by the Ninth Circuit, which held, in the alternative, basic notions of proximate cause would support liability even without the provocation rule. *Id.* at 425-426.

In an 8-0 opinion, this Court vacated the Ninth Circuit's judgment holding that the Fourth Amendment provided no basis for the Ninth Circuit's "provocation rule." *Id.* at 423. In so holding, this Court noted that "A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id.*

This is exactly the type of outcome which the "moment of threat" doctrine seeks to achieve. By focusing on the

threatening actions of the suspect, this analysis rightly concludes that a reasonable use of force is *not* transformed into an unreasonable use based on the pre-force actions of the officer.

D. The "Moment of Threat" Doctrine Neither Increases the Instances of Excessive Force Nor Erodes Public Trust; Rather, it Reduces the Likelihood of Harm to Victims and Law Enforcement Officers

Petitioner, as well as multiple amici curiae who have written in support of Petitioner, assert, without evidence, that if this Court were to adopt the "moment of threat" doctrine, a parade of horribles would result, including an increase of instances of excessive force and an erosion of public trust would occur. This level of distrust of our field law enforcement officers is not warranted.

A key failure with Petitioner's concentration on pre-force conduct is determining exactly which actions should be considered and what standard should apply. Should courts require that pre-force conduct be reckless, deliberate, or should mere negligent conduct which unintentionally increases a risk be considered? Such an inconsistent treatment leaves officers vulnerable to varying interpretations of their actions. It also invites absorbing subjective intent into use of force analysis, a theory that has long been rejected.

Moreover, as "officer escalation" cases have increased, officers have faced growing uncertainty about whether their conduct will be deemed lawful. This unpredictability erodes their confidence in making decisions in high-stress

situations. Simply approaching a suspect, conducting a traffic stop, or attempting to arrest someone can escalate tensions. Routine interactions like confronting and inquiring about possible criminal activity may predictably increase the risk of violence, exposing officers to liability for the very thing communities expect them to do. As an aside, Amici remain concerned that the continued societal pressure we place on our field law enforcement officers will perpetuate difficulties in attracting the best candidates to the profession and further diminish employee wellness.

Additionally, another significant concern is that the concentration on "officer escalation" fails to consider the human factors that impact law enforcement officers during high-stress scenarios. Decisions in these types of critical situations often involve split-second thinking relying on training rather than the slow and deliberate analysis that occurs in non-critical situations.

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

Simply stated, law enforcement officers are human beings, subject to the natural limitations of human performance. This understanding is bypassed when the

focus is upon pre-force tactics and alleged "escalation." And, accordingly, their conduct should be judged based on the realities of their decision-making in high-stress, rapidly evolving situations, rather than through the video playback lens of unrealistic expectations or perfect hindsight.

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

In order to fully understand the potential implications for communities that could follow from the Court's decision in this matter, one can consider a regrettably frequent request for law enforcement assistance. A department could receive a 911 call with sounds of conflict in the background but no one speaking on the phone. A subsequent call placed back to the number goes unanswered. Officers respond only to encounter what could be characterized as a cold dark building. As experienced officers, having been to the residence in the past, but recognizing their authority to move forward is not as firm as they might have hoped, they weigh the balance in favor of victim safety and enter the location. Once inside, they encounter a domestic violence victim with serious injuries and an enraged suspect armed with a weapon. At such a critical moment for everyone's safety, the patrol officers would be instantly burdened by the direction of this Court, and whether the path leading them to these grim circumstances constrained how they respond to the danger they all faced.

At the same time, under the same exact circumstances, standing in front of the location in the middle of the

night, with other calls pending, they might weigh the ambiguity of the situation, with a cognizance of the judicial instructions from this case, and feel they needed to abandon any further intervention. In so doing, the victim would be abandoned and forced to personally fend off the assailant.

E. The Universal Application of the "Moment of Threat" Doctrine to All Circuits Is Needed to Promote Consistency of Outcome

In *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), the Ninth Circuit—which does not apply the "moment of threat" doctrine—has concluded that the events leading up to the use of force, including the officers' pre-force tactics, are relevant to the reasonableness analysis. However, in the Fifth District, the opposite rule applies. See *Barnes*, 71 F.4th at 396.

Simply stated, whether a federal constitutional civil rights violation has occurred should not be determined by the zip code in which the altercation occurs. It defies common sense that whether a federal constitutional violation has occurred depends on whether one is located in Manhattan's Second Circuit or in Jersey City's Third Circuit just two miles and a short tunnel ride away. However, where Amici breaks ranks with Petitioner is in the assertion that the "moment of threat" doctrine should not be applied at all; rather, Amici submits that this Court should adopt and endorse the "moment of threat" doctrine nationwide.

Because the "moment of threat" doctrine is consistent with the United States Constitution, this Court's prior

precedent, keeps the focus on the suspect's threatening behavior rather than on officers' pre-force actions and/or alleged escalation, this Court should adopt and endorse this doctrine nationwide.

IV. CONCLUSION

Accordingly, for all these reasons, Amici respectfully request that the Court resolve the now-existing circuit split and conclude that courts should apply the "moment of threat" doctrine when evaluating excessive force claims under the Fourth Amendment. This rule recognizes the practical realities of modern day policing and ensures victim, officer, and community safety.

Respectfully submitted,

James R. Touchstone
Scott Wm. Davenport*
Richard A. Lucero
Jones & Mayer
3777 N. Harbor Blvd.
Fullerton, CA 92835
(714) 446-1400
swd@jones-mayer.com

Attorneys for Amici Curiae California Sheriffs' Association, California Police Chiefs Association, and California Police Officers' Association

* *Counsel of Record*

DATED: December 20, 2024