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 THE NATIONAL FRATERNAL ORDER OF POLICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ROBERTO FELIX, JR., *et al.*

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INTEREST OF THE *AMICUS CURIAE*[1]

"Provocation rule," "moment of threat doctrine," or "officer created danger" are all phrases that lawyers and judges have attached to analyzing an officer's use of force. The National Fraternal Order of Police will not squabble over doctrine nomenclature. Our interest is only in promoting the safety of law enforcement and preserving the protections afforded by *Graham v. Connor*.

The Fifth Circuit's decision protects law enforcement in a manner that is consistent with *Graham* and its progeny in the circumstances encountered by Sergeant Felix. Any decision by this Court which has the potential to erode the protections of *Graham* warrants our full attention. This Court will benefit from the perspective of the boots-on-the-ground officers that comprise the National FOP's membership. We ask those officers to protect us, sometimes with force. In the circumstances confronting Sergeant Felix, he did just that—reasonably and appropriately.

The ability of police officers to wield force in high-pressure situations is literally a matter of life and death for those who put their safety at risk every day to keep our communities safe. This Court has repeatedly cautioned against considering constitutionally irrelevant pre-seizure conduct in Fourth Amendment analyses. Yet, that is what

1. In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief.

Petitioner and its amici ask this Court to do here. Officers cannot afford to be caught second-guessing in scenarios that require split-second actions to save lives, including their own or those of innocent bystanders travelling along a highway.

The National Fraternal Order of Police ("FOP") is the world's largest organization of sworn law enforcement officers, with more than 374,000 members in more than 2,100 lodges across the United States. The FOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and public safety nationwide. The FOP offers its service as *amicus curiae* when important police and public safety interests are at stake, as in this case. It is with these concerns and interests in mind that the FOP and its membership respectfully request to be heard.

SUMMARY OF ARGUMENT

The question before this Court is when to begin analyzing the reasonableness of an officer's use of force under *Graham v. Connor* in order to determine if a Fourth Amendment violation has occurred? Petitioner argues that the Fifth Circuit (and Second, Fourth, and Eighth Circuits) never allow for prior events to inform a reasonable officer's perspective and their assessment of the danger they faced. That is a myopic read of the decision and certainly not the National FOP's position. The focus must be on the correct application of *Graham*. The evaluation of what the officer knew, the severity of the threat, and the reasonableness of the officer's actions must focus on the critical moment when force was

applied. Otherwise, courts get to play Monday morning quarterback and make an assessment with the benefit of 20/20 hindsight.

An objectively reasonable use of force in the face of an immediate—and potentially deadly—threat in order to save lives should never be considered unreasonable under the Constitution. Sergeant Felix's actions fall squarely into this category. He conducted a routine traffic stop along a busy Texas highway. After observing questionable behavior by the driver, which included shuffling around inside the vehicle, emitting the smell of marijuana, disobeying commands, and opening the trunk in response to the driver's claim that his license was located inside, Sergeant Felix asked the driver to get out of the car. The driver did not comply. After turning on the vehicle and accelerating forward while Sergeant Felix was between the open door and the driver, Sergeant Felix ordered the driver to stop accelerating. The driver did not comply.

At that point Sergeant Felix was faced with a split-second decision. He could jump backwards and risk being run over or falling over the concrete barrier into oncoming traffic. Or he could stay still and risk being crushed between the car and the concrete barrier. Instead, he stood on the door sill and hung onto the car as it continued into traffic where cars were travelling in excess of 65 miles per hour. When the driver refused to stop accelerating, Sergeant Felix feared for his own life and others. So, he fired his pistol twice killing the driver. The car came to a stop. This all occurred within the span of five seconds.

Sergeant Felix's actions were reasonable and appropriate pursuant to *Graham*. He did not violate the

driver's constitutional rights. He did not commit any crimes. He did not violate department policy or procedure. Judge Higginbotham suggests in his concurring opinion that the court should further consider Sergeant Felix's "role in escalating the encounter" when assessing the reasonableness of his actions—specifically, his decision to step onto the door sill of the vehicle. That sort of Monday morning quarterbacking from the comfort of a judge's chambers underscores the National FOP's concern and interest in this matter.

Traffic stops, though routine, are among the most dangerous tasks police officers perform due to the unpredictable nature of each encounter. Officers face a range of variables, including the location of the stop, the potential presence of weapons, and the behavior of vehicle's occupants. Non-compliance from drivers, particularly those under the influence or involved in criminal conduct, adds to the risk as officers frequently encounter individuals who refuse commands or evade questions. The tactical disadvantage of approaching an unknown vehicle, with limited visibility and unpredictable threats, further heightens the danger.

Given these inherent risks, assessing the use of force during traffic stops requires adherence to the *Graham v. Connor* standard, focusing on objective reasonableness under the circumstances rather than hindsight analysis. Courts must avoid adopting subjective or backward-looking standards, as doing so would undermine officers' ability to respond to immediate threats. Expecting officers to retrospectively justify their actions would lead to hesitation during rapidly evolving situations, endangering both officers and the public.

In addition to the legal considerations, traffic stops are a vital public safety tool. These encounters often result in the apprehension of criminals or the prevention of larger threats. Discouraging proactive policing by imposing unrealistic scrutiny on officers' decisions would undermine their confidence and compromise community safety. Courts should recognize the split-second decisions required during high-stakes encounters and refrain from applying standards that could discourage officers from engaging in necessary interventions.

Finally, qualified immunity shields public officials, including police officers, from personal civil liability when their conduct does not violate clearly established rights that a reasonable person would know. It is not an absolute defense and does not protect officers who knowingly violate the law, commit criminal acts, or fail to perform ministerial duties. Nor does it prevent lawsuits against governmental entities.

The Petitioner's proposal to mandate an expanded analysis of whether a constitutional right was violated conflicts with the Supreme Court's guidance in *Pearson v. Callahan*, 555 U.S. 223 (2009). Requiring lower courts to address constitutional questions would unnecessarily waste judicial and party resources, especially when the right in question is not clearly established and the case outcome would remain unchanged. Fact-specific cases, like those involving use of force, rarely provide clear guidance for future disputes and are more likely to create confusion rather than clarity.

Moreover, prematurely deciding constitutional issues based on incomplete briefing or hindsight can lead

to flawed rulings that fail to account for the real-time decisions officers must make in rapidly evolving situations. Encouraging courts to focus on tactical judgments made by police officers risks undermining qualified immunity's purpose by chilling effective policing and overburdening judicial resources with academic inquiries that do not affect case outcomes. Expanding such analysis is unnecessary and would harm the integrity and practical application of the doctrine.

For these reasons, the National FOP respectfully requests that the Fifth Circuit's judgment be affirmed.

ARGUMENT

I. The Fifth Circuit correctly applied *Graham* and its progeny to the facts of this case.

A. The Proper Application of *Graham*.

Law enforcement officers learn *Graham* at the police academy. Before they are assigned their first patrol, officers understand that if circumstances arise which necessitate using force, it must be objectively reasonable for them to do so at that moment and under those circumstances. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The Fifth Circuit correctly applied *Graham* to the scenario confronting Sergeant Felix.

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

Id. In examining the totality of circumstances, what matters most is what the officer faced the moment force was used. Surely considerations regarding the events leading up to the use of force are not inappropriate nor foreclosed, but they must not give way to finding an otherwise appropriate use of force unconstitutional. That is the risk here. A reversal will invite the "open-ended and ill-defined" approach to examining a use of force that the United States cautioned against in its amicus brief in *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420 (2017). *Brief of Amicus Curiae for the U.S. in Support of Petitioners* at 23, *Mendez* (No. 16-369).

Petitioner and the amici in support present a straw man argument. They misrepresent the Fifth Circuit and Respondent's approach by asserting that the decision below categorically excludes circumstances leading up to the moment force was used, such as an officer's prior conduct. Not so. Respondent and the FOP are not insisting that courts must disregard any prior conduct entirely and focus on nothing but the use of force in the literal second in which shots were fired. Courts certainly can and do take into account circumstances that speak to the reasonableness of the officer's perception that the suspect posed a serious threat—e.g., whether the suspect had been issued any warnings, or whether the suspect was retreating. *See, e.g.*, *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc) (affirming denial of summary judgment where officers "had the time and opportunity to give a warning" before using lethal force but did not); *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011) (affirming denial of qualified immunity where officer fired as suspect was complying with command to lower his gun); *Est. of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020)

(affirming denial of qualified immunity where officer fired at suspect who was retreating from altercation and not pointing his weapon at anyone*); cf. Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003) (upholding instruction that allowed jury to consider whether warning was given before shooting).

But there is a fundamental difference between examining facts that speak to the reasonableness of the perception that the suspect posed a serious threat, ***and examining the reasonableness of the officer's actions before the threat materialized***. Perhaps unreasonable actions that give rise to a situation where the use of deadly force is reasonable may raise issues under state tort law, but they are not the province of a Fourth Amendment excessive-force claim. As the majority of circuits have correctly explained, under the Fourth Amendment, "we consider the officer's reasonableness under the circumstances he faced at the time he decided to use force. . . . We do not scrutinize whether it was reasonable for the officer 'to create the circumstances.'" *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017) (emphasis added); *Hale v. City of Biloxi*, 731 F.App'x 259, 263 (5th Cir. 2018); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992); *Frederick v. Motsinger*, 873 F.3d 641, 645 (8th Cir. 2017); *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995); *Gysan v. Francisko*, 965 F.3d 567, 570 (7th Cir. 2020); *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992).

B. *Graham* applies to the facts of this case.

Here, Sergeant Felix, a law enforcement officer with more than twenty years of experience, conducted a traffic stop along a Texas highway. The driver pulled over on the

left side, where a concrete barrier divided the two sides of the highway. Cars travelled in excess of 65 miles per hour in both directions, across multiple lanes.

Sergeant Felix approached the driver side of the vehicle. He explained why he pulled over the driver and asked for his driver's license and proof of insurance. He immediately smelled marijuana and asked the driver to stop digging around in the car at least three times. The driver told Sergeant Felix that his license might be in the trunk. The driver turned off the car and opened the trunk. These actions immediately had Sergeant Felix on high alert. Most drivers do not keep their license in the trunk and his attention was being diverted away from what was happening inside the vehicle. Sergeant Felix ordered the driver to step out of the vehicle. The driver did not comply.

The driver then opened the driver's side door while also reaching down by his seat. He then grabbed the keys and turned on the ignition. With the door open, Sergeant Felix reached into the car in an attempt to prevent the driver from driving away. At that moment, the left half of Sergeant Felix's body was positioned inside the vehicle when the driver accelerated.

At this point, Sergeant Felix perceived that backing away would put him at risk of being run over by the vehicle, crushed between the concrete barrier and vehicle, or toppling back over the barrier into oncoming traffic. Remaining still, on the other hand, would put him at risk of being pinned by the door and dragged away. Thus, he quickly jumped onto the door sill and held on.

Now, Sergeant Felix's life was in danger, as well as the other drivers on the highway. He yelled for the driver to stop moving, but the driver continued to accelerate and merge back onto the highway. Fearing for his life and concerned for public safety, Sergeant Felix fired his pistol twice inside the vehicle. The car came to a stop. The above actions occurred in the span of five seconds.

Sergeant Felix's actions during these five seconds were objectively reasonable as he struggled with the driver. Any attempt to second-guess his decision by considering the entire stop, as suggested by Respondent and the amici, would undermine the gravity of the life-threatening circumstances he faced. And Judge Higginbotham's concurring opinion underscores this major concern of the FOP. Namely, judges using hindsight to criticize the actions of an officer after the fact. As Judge Higginbotham stated, the Fifth Circuit panel did not consider "Felix's role in escalating the encounter"—specifically, Sergeant Felix's decision to step onto the door sill of the driver's car. What were his other options? Approaching the vehicle from the passenger side was not feasible because the driver pulled over on the left side of the highway. Allowing the driver to get away was equally not an option. His choices were limited to risking being run over or dragged away with the car. Or, if he backed away, he risked being pinned against or falling over the concrete barrier. Sergeant Felix acted as any reasonable officer should when left with no other option, a noncompliant driver, and given the rapidly evolving circumstances along a busy highway.

C. The Fifth Circuit's decision promotes officer safety during traffic stops.

1. Why traffic stops are so dangerous.

Although enforcing traffic laws is one of the most common tasks a police officer performs, it is also one of—if not the most—dangerous. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (noting traffic stops are "especially fraught with danger to police officers"). Officers have no idea who or what they are approaching when they stop a vehicle, and they must contend with countless variables in each stop: the location, i.e., the neighborhood/surrounding area or a high traffic roadway; other occupants in the vehicle; oncoming traffic; one-officer patrol cars; the presence of weapons; the possibility of an impaired driver; and so on. *See* Dean Scoville, The Hazards of Traffic Stops, POLICE MAG. (Oct. 19, 2010), https:// www.policemag.com/340410/the-hazards-of-traffic-stops; *see also* Anatomy of a Traffic Stop, CITY OF PORTLAND OREGON, https://www.portlandoregon.gov/police/article/258015 (last visited June 19, 2019) ("[O]fficers usually have little idea if [they] are stopping a Dad on his way to work or someone who just robbed a bank, willing to do whatever it takes to escape."); Tyler Emery, Police Officers Say No "Routine Stop" is Ever Routine, WHAS11 (Dec. 27, 2018, 7:09 PM), https://www.whas11.com/article/news/local/police-officers-say-no-routinetraffic-stop-is-ever-routine/417-ebebf708-273b-4129-bdbea096068474d2 ("[Officers] have to worry about where the vehicle is stopped, how much traffic is there, is it an interstate, is it an isolated area where backup [is] not close.").

In addition to the many unknowns, several other factors contribute to the danger of traffic stops for

law enforcement officers. For example, the driver may be unwilling to cooperate with the officer's requests or answer the officer's questions. Police1 completed a survey on traffic stops ran from April 22, 2021, to May 4, 2021, with a total of 1,036 police officers responding on questions about non-compliance. The highest levels of non-compliance came from people suspected of being under the influence of drugs or alcohol, and or those suspected of criminal conduct. The most prevalent non-compliant driver behavior was not following the officer's commands (42%), followed by not responding to the officer's questions (24%). Non-Compliance During Traffic Stops: The Main Concerns of Police Officers Regarding Their Safety, Kustom Signals, Inc., https://kustomsignals.com/blog/non-compliance-during-traffic-stops-the-main-concerns-of-police-officers-regarding-their-safety.

Moreover, in any traffic stop, officers are at a tactical disadvantage, as their position and movements are relatively predictable. Whereas approaching a vehicle presents unpredictable risks because of unknown persons inside who could be armed, with various compartments that could conceal weapons. Furthermore, depending on the vehicle, the officer is likely approaching it from the back and without a clear view inside.

2. The Fifth Circuit's decision protects officers.

The majority of traffic stops are for relatively minor offenses, i.e. speeding, expired tags, or unpaid toll fees. Still, the perils described above are always present. With that in mind, how do we assess the objective reasonableness of a use of a force occurring during a traffic

stop? Under *Graham*, we are to view the use of force from the perspective of an objectively reasonable police officer in those circumstances. Every reasonable officer will appreciate the danger of a traffic stop regardless of the reason for the stop. Officers do not ignore it and courts should not either.

The Fifth Circuit correctly analyzed this case under *Graham*. The Petitioner proposes that we should look back in time to see if Sergeant Felix approached the situation in a manner he knew or should have known would result in an *escalation* of that danger. This has never been the standard and should not be adopted by this Court. The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances. There is no space for the subjective concepts that Petitioner suggests. Indeed, as this Court has recognized, an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor will an officer's good intentions make an objectively unreasonable use of force constitutional. *Graham*, 490 U.S. at 397.

Any ruling that encourages courts to retrospectively evaluate officers' tactical decisions during quickly evolving, high-stakes encounters will have an undesirable chilling effect on policing. Officers do not have the benefit of pausing to reflect on how they got there. And in many instances, they do not even have a second to hesitate. They must be laser-focused on the immediate threat they are facing and the safety of those in the immediate vicinity.

By shifting the focus to preceding events, officers would be forced to second-guess every decision made in dynamic and rapidly unfolding situations, where hesitation

can mean the difference between life and death. The fear of being scrutinized for actions taken prior to the moment of force—especially in hindsight—would discourage proactive policing, limit officers' willingness to engage in necessary interventions, and erode their confidence in making critical decisions under pressure. This fear would discourage proactive enforcement of traffic laws, as officers may choose to avoid stopping vehicles they suspect of criminal activity or hesitate in responding to escalating threats during a stop.

Such hesitation could have dire consequences. As cited by the Major County Sheriffs' Association in their amicus brief to this Court in *Mendez*, one study demonstrated an officer who is "faced with a complex decision-making process . . . will take an average of anywhere from .46 to .70 second(s) to begin" his or her response. W. Lewinski, et al., Ambushes Leading Cause of Officer Fatalities—When Every Second Counts: Analysis of Officer Movement from Trained Ready Tactical Positions, 15 Law Enforcement Executive Forum 1, 2 (2015). In comparison, a suspect in the driver's seat during a traffic stop can draw a weapon and fire at an officer in as little as .23 seconds, with an average time of .53 seconds. *Id.*

Consider Sergeant Felix. He asked the driver to get out of the vehicle. The driver did not comply. He asked the driver to stop accelerating. The driver did not comply. He was along a busy highway and circumstances that quickly changed in less than five seconds. He did not have time to weigh the pros and cons of his "options," as each choice presented a risk to his own life and the safety of others.

Traffic stops are a cornerstone of public safety, often leading to the detection of serious crimes such as

drug trafficking, stolen vehicles, or the apprehension of dangerous individuals. If officers are discouraged from engaging fully in this essential policing activity, public safety will be compromised, and our communities and roadways will bear the cost.

II. A reversal of the Fifth Circuit's decision will lead to an erosion of the doctrine of qualified immunity.

Qualified immunity does not protect police officers that knowingly violate the law. Qualified immunity does not protect police officers from criminal charges, internal investigations, or employer discipline. Qualified immunity does not apply to the ministerial acts or duties of law enforcement. Qualified immunity does not prohibit suits against the city, municipality, or any other governmental entity.

The defense applies only when the officer's conduct does not violate clearly established rights of which a reasonable officer would have known. It only protects the officer from personal, civil liability. It is not absolute, and it is not unlimited. It is available not only to police officers, but also to teachers, firefighters, city officials, and school administrators.

The Petitioner is asking this Court to mandate that lower courts expand the analysis of the constitutional question (i.e., was the individual's right to be free from excessive force under the Fourth Amendment violated). The result will be lower courts engaging in the rigid procedure that this Court warned against in *Pearson v. Callahan*, 555 U.S. 223, 237-38 (2009). Substantial expenditure of scarce judicial resources will be spent on

difficult questions that have no effect on the outcome of the case. As this Court explained:

> There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.

Pearson, 555 U.S. at 237.

The unnecessary litigation over whether a constitutional right was violated will also waste the parties' resources. Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The purpose of the doctrine is not served when the parties must endure additional burdens such as the costs of litigating constitutional questions when the suit otherwise could be disposed of more readily because there is no clearly established law. Many cases, like this one, are so fact bound that a decision regarding the constitutionality of conduct provides little guidance for future cases. *See Scott* v. *Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (counseling against the *Saucier* two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity"); *Buchanan* v. *Maine*, 469 F.3d 158, 168 (1st Cir. 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts").

Furthermore, there are circumstances where encouraging the lower courts to weigh in on the constitutional question where it is otherwise unnecessary may create a risk of bad decision making. The lower courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate. *See Lyons v. City of Xenia*, 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring) (noting the "risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented"). The risk in cases that involve reviewing the actions of law enforcement with the benefit of hindsight is that judges may be insufficiently thoughtful and rash in their pronouncements of what actions they deem are appropriate or unconstitutional, even though such determinations play no role in the ultimate adjudication of the case.

Cases involving use of force can be a close call. Petitioner is asking this Court to make a pronouncement that will inevitably lead to the lower courts spending more time assessing the tactical choices of a police officer in tense, rapidly evolving scenarios. It is unnecessary and will lead to unintended results at the peril of the doctrine of qualified immunity.

CONCLUSION

Traffic stops are inherently dangerous, requiring courts to evaluate officers' actions under the standard of objective reasonableness without the distortion of hindsight. *Graham* is appropriately applied here. Sergeant Felix's actions were objectively reasonable under the circumstances he faced. When a non-compliant driver attempted to flee on a busy highway, he was not required to act in any way that risked himself being run over or pinned against a barrier. For the foregoing reasons, this Court should affirm the decision of the lower court.

Respectfully submitted,

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