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.; COUNTY OF HARRIS, TEXAS,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The tragic facts of this case underscore the deep legal problems with the decision below. Officer Felix pulled over Ashtian Barnes for a toll violation. Felix feared that Barnes intended to drive away. At that point, Felix was standing to the side of Barnes's car—in no danger. As Officer Felix testified, he drew his weapon to prevent Barnes from "leaving the scene." JA 71. Felix simultaneously lunged toward the passenger cabin and jumped onto the door sill. Two seconds later, Felix shot and killed Barnes. Below, the Fifth Circuit applied the "moment of threat doctrine" and evaluated *only* the two seconds in which Felix was "hanging on to the moving vehicle" to determine if the Constitution was violated. Pet. App. 2a, 8a. The Fifth Circuit did not evaluate "any of" Felix's "actions leading up to the shooting." *Id*. (quotation marks and capitalization omitted).

The moment of the threat doctrine is impossible to square with constitutional text, precedent, and common law. That is presumably why Respondents no longer defend it. Instead, in an astonishing act of chutzpah, Respondents (at 17) accuse Petitioner of making up the doctrine—which the Fifth Circuit applied by name—and deride (at 19) Judge Higginbotham's concurrence (and the acknowledged twelve-circuit split on the question presented) as "fiction." Respondents offer various justifications for what they think the Fifth Circuit *really* meant, none of which has any basis in the decision below.

The Court should reject Respondents' gambit and decide the question before this Court: Should courts apply the "moment of the threat" doctrine, or should they apply *Graham* v. *Connor*, 490 U.S. 386 (1989),

and analyze the totality of the circumstances? The answer is straightforward. There should be no special "moment of the threat doctrine." That is all this case asks the Court to decide. Petitioner is not seeking a special "officer-created danger rule." Petitioner asks this Court to hold that the "moment of the threat" doctrine is inconsistent with *Graham*, vacate the judgment, and remand for the lower court to evaluate the totality of the circumstances.

A remand is particularly appropriate following Respondents' abrupt change in position. In their Brief in Opposition, Respondents embraced and defended the moment of the threat doctrine. *See, e.g.*, BIO at 10-11, 17-19, 24, 31. In the Response Brief, Respondents assert (at 20) that courts should evaluate "preseizure events"—the very thing the Fifth Circuit *did not do* in this case. Respondents suggest (at 20, 27) that courts should determine whether an officer provided "a warning" or "failed to identify himself" before pulling the trigger—which is prohibited by the moment of the threat doctrine. And Respondents now argue (at 34) that courts must determine whether an officer was an "aggressor" prior to using force, including whether the officer jumped in front of a moving car and shot the driver—an inquiry that is again contrary to the moment of the threat doctrine. Respondents thus agree that the same totality of the circumstances inquiry that applies in other Fourth Amendment cases applies in deadly force cases. That resolves the legal question before this Court.

In this Court, Respondents (at 4) have presented an account in which Officer Felix was defending "himself against Barnes's aggression," and Respondents ask this Court to decide whether Felix's actions were

reasonable. That is a question for remand. To be clear, however, Respondents' misleading narrative is wrong. Barnes did not intentionally endanger Felix. As the video shows, when Barnes prepared to drive away, Officer Felix was standing back from the passenger cabin and was not in danger. *See* App. 3a-4a. To prevent Barnes from fleeing, Felix jumped onto the car. Felix then shot Barnes within two seconds—so quickly that according to Felix's expert Barnes had no time to react. *See infra* p. 17. Judge Higginbotham concurred in his own opinion to underscore that, under "the totality of the circumstances," "Officer Felix" violated the "Fourth Amendment." Pet. App. 16a (Higginbotham, J., concurring).

Contrary to Respondents' scaremongering, officers will not "cower in the face of threats" if this Court rules for Petitioner. Response Br. 47. The majority of circuits and major law enforcement agencies already reject the moment of the threat doctrine. Nor will ruling for Petitioner mean officers must be "perfectly diligent." *Id*. at 3. *Graham* affords officers leeway to make mistakes under pressure. And even where an officer violates a plaintiff's Fourth Amendment rights, the officer may still be entitled to qualified immunity. In contrast, ruling for Respondents will undermine the fundamental "right of the people to be secure in their persons"—a right denied to Ashtian Barnes. U.S. Const. amend. IV.

ARGUMENT

I. RESPONDENTS ABANDON THE MOMENT OF THE THREAT DOCTRINE.

The Fifth Circuit considered one sole fact when analyzing whether Barnes's Fourth Amendment rights

were violated: "Officer Felix was" "hanging on to the moving vehicle when he shot Barnes." Pet. App. 8a. The court deliberately did not analyze "[a]ny" of Felix's "actions leading up to the shooting"—no matter how unreasonable—including Felix's decision to move toward the passenger cabin and jump onto the car to prevent Barnes from driving away. *Id*. (quotation marks omitted).

In his concurrence, Judge Higginbotham explained that the panel's hands were tied, but if he had been permitted to evaluate the totality of the circumstances, he would have found Barnes's Fourth Amendment rights were violated. *Id*. at 10a-16a (Higginbotham, J., concurring). Although Respondents cite (at 19-20) a handful of Fifth Circuit cases they claim applied the totality of the circumstances approach, as Judge Higginbotham detailed, "references to" the "totality of circumstances" in Fifth Circuit cases "are merely performative," given the circuit's directive to consider only the fact that an officer faced a threat at the instant he pulled the trigger. Pet. App. 15a. That is why Judge Higginbotham asked this Court to resolve a twelve-circuit split on the moment of the threat doctrine—a split Respondents did not contest in their Brief in Opposition. *Id.* at 13a-14a & n.13 (collecting cases).[1]

Before this Court at the certiorari stage, Respondents supported the Fifth Circuit's application of the moment of the threat doctrine. Respondents argued

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[1] For examples of cases rejecting the moment of the threat doctrine, see: *Kirby* v. *Duva*, 530 F.3d 475, 482-483 (6th Cir. 2008); *Abraham* v. *Raso*, 183 F.3d 279, 291-292 (3d Cir. 1999); *St. Hilaire* v. *City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995); *Est. of Starks* v. *Enyart*, 5 F.3d 230, 233-234 (7th Cir. 1993).

that the Fifth Circuit correctly excluded from consideration *everything* that occurred before Felix pulled the trigger—including Barnes's actions prior to the shooting that Respondents think justified Officer Felix's use of force. *See* BIO at 17-19; Respondents' Fifth Cir. Br. 15 (arguing "[t]he Fifth Circuit has narrowed the" *Graham* "test"); D. Ct. Dkt. 67 (same).

Respondents have abruptly changed course. They now claim the moment of the threat doctrine does not exist after all. In an attempt to save the decision below, Respondents variously argue the doctrine is merely a rule that "force can be reasonable *even if* officers make some mistakes" (at 15); a "self-defense doctrine" that turns on whether the officer committed "aggression" prior to using force (at 32-33); a rule under which a court examines whether an officer's preseizure actions violate "any legal duty or right" (at 36); and an application of the principle of superseding cause (at 34). None of this appears in the Fifth Circuit's decision.

Strikingly, Respondents now say (at 26) that under their preferred legal rule, "pre-force circumstances are not categorically off the table"—the exact opposite of the Fifth Circuit's approach below. According to Respondents (at 40), a court *should* consider the "suspect's preceding conduct." And according to Respondents, courts *should* examine what an "officer" "did before using force," including how quickly the officer resorted to force, whether the officer had an "opportunity to give a warning" before shooting, and whether the officer "failed to identify himself." Response Br. 15, 20, 27, 37 (quotation marks omitted).

Perhaps most critically, Respondents now argue that an officer acts unreasonably if he is an

"aggressor" *prior to the moment* he faces an "immediate danger." Response Br. 33-34. It is unclear what constitutes "aggression" under Respondents' test. *Id*. at 32. But Respondents state an officer who "jumps in front of a car" is an aggressor who acts unreasonably if, seconds later, he shoots the driver hurtling toward him. *Id*. at 32-33.

All this mish-mosh gives up the game, and underscores why vacatur and remand is appropriate. Respondents agree that the moment of the threat doctrine is wrong. Under circuit precedent, the Fifth Circuit could not analyze whether Felix was the aggressor, or whether Barnes's actions were a superseding cause. *See infra* pp. 16-19. The Fifth Circuit asked "only" "whether Officer Felix was in danger *at the moment of the threat*." Pet. App. 7a (quotation marks omitted). The Fifth Circuit does not evaluate "any of the officer['s] actions" prior to that instant—including the many factors Respondents now agree courts must consider. *Harris* v. *Serpas*, 745 F.3d 767, 772 (5th Cir. 2014); *see, e.g.*, *Crane* v. *City of Arlington*, 50 F.4th 453, 466 (5th Cir. 2022) (officer's actions "cannot be considered"); *Manis* v. *Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (the threat is "the *only* fact material"). Under Respondents' preferred framework, the Fifth Circuit erred.

Respondents suggest (at 36) that, if one squints hard enough, "context" shows the Fifth Circuit applied the "*Graham* standard." That is make believe. Neither court below examined the totality of the circumstances. This Court should reject Respondents not-so-subtle request to do that work in the first instance, and instead remand "for reconsideration" "under the

proper Fourth Amendment standard." *Graham*, 490 U.S. at 399; *see* U.S. Br. 23.

On remand, Petitioner will present strong evidence that Felix acted unreasonably. Because the case is at summary judgment, the facts are viewed "in the light most favorable" to Petitioner. Pet. App. 7a. As Judge Higginbotham explained—and as the images in the Appendix to this brief demonstrate—Felix's "use of lethal force" "preceded any real threat to Officer Felix's safety." *Id*. at 16a (Higginbotham, J. concurring).

Respondents suggest Felix jumped onto the door sill to avoid being dragged by the vehicle, and include (at 7) a highly misleading image *after* Felix had moved into the passenger cabin. But as the Appendix to this brief shows, *see* App. 3a-4a, Felix initially stood back from the passenger cabin and was not in any plausible danger from the "car door," Response Br. 8; *see* JA 159 (testimony in which Felix cannot articulate danger).[2] Felix lunged toward the passenger cabin and jumped onto the door sill *after* he became concerned that Barnes was "leaving the scene," JA 71—and immediately shot Barnes before Barnes had any time to react,

[2] Contrary to Respondents' current narrative, Felix's expert found the door did not close until *after* Felix jumped. D. Ct. Dkt. 42-5 at 63.

see infra p. 17.[3] That was unreasonable.[4]

To be clear: This Court should not analyze the totality of the circumstances in the first instance. The Court should instead reject the moment of the threat doctrine, vacate the judgment, and remand for further proceedings.

II. THE MOMENT OF THE THREAT DOCTRINE IS WRONG.

Despite abandoning the moment of the threat doctrine, Respondents offer a grab bag of arguments ostensibly in support of it. These arguments only underscore that the doctrine and the decision below are wrong.

A. The Moment Of The Threat Doctrine Conflicts With Precedent.

1. Start with precedent. This Court evaluates an officer's use of force based on the "totality of the circumstances." *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985). That standard flows from the concept of

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[3] Reasonable officers do not reach into vehicles because doing so "can place an officer in grave danger." City of Columbus, Div. of Police, Directive 2.01(II)(B) (rev. June 30, 2023). Felix testified he was thinking about "videos in training where an officer" was dragged by a car after being "caught up on a seatbelt or the vehicle itself." JA 88. But Felix nevertheless *reached into the car* "to try to keep [Barnes] from" "driving off" with unpaid tolls. Response Br. 7 (quoting JA 168); *see Lombardo* v. *City of St. Louis*, 594 U.S. 464, 467-468 (2021) (per curiam) (training is relevant); Law Enforcement Officials Br. 17 (same).

[4] Felix provided "inconsistent testimony," and even claimed that he shot Barnes because Barnes attempted to disarm him. Pet. App. 27a, 29a n.3. Felix's account is not "depicted" on the video and would have required Barnes to act with "near stuntman proportions," casting doubt on Felix's credibility. *Id*. at 29a n.3.

"reasonableness," "the ultimate touchstone of the Fourth Amendment." *Lange* v. *California*, 594 U.S. 295, 301 (2021) (quotation marks omitted). There is no "magical on/off switch" or "easy-to-apply legal test." *Scott* v. *Harris*, 550 U.S. 372, 382-383 (2007). In each case, a court must evaluate whether the officer's "actions were reasonable," *id*. at 383, applying "ordinary ideas of causation" to identify those facts relevant to the use of force. *Abraham*, 183 F.3d at 292.

The moment of the threat doctrine, in contrast, imposes the kind of rigid rule those precedents forbid. Under that doctrine, courts cannot balance the "need for" the seizure against the "intrusion." *Garner*, 471 U.S. at 7-8. Nor may judges consider "relative culpability." *Scott*, 550 U.S. at 384. This kind of legal amnesia is anathema to *Garner*, *Graham*, and their progeny. And the results are deeply unjust: An officer may act unreasonably—including by jumping onto or in front of a moving vehicle—over a minor infraction and then immediately use deadly force, even *against a fleeing misdemeanant*. *But see Garner*, 471 U.S. at 11 (officer cannot kill non-threatening fleeing felon).

Consider how the moment of the threat doctrine would have underenforced the Fourth Amendment in two real-world cases, *Starks* and *Sledd*. As then-Judge Barrett explained, the officers in *Starks* and *Sledd* "acted unreasonably" under the totality of the circumstances. *Est. of Biegert by Biegert* v. *Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (Barrett, J.). But the moment of the threat doctrine would have failed to hold each officer accountable for violating the Constitution.

Starks presented facts similar to this case. An officer "stepped in front of" a "rapidly moving" car,

"leaving" the driver "no time to brake" before the officer shot and killed him. *Starks*, 5 F.3d at 234. The Seventh Circuit explained that the officer's shooting was unreasonable, even though the car posed a threat to the officer, because the officer "unreasonably created the encounter that ostensibly permitted the use of deadly force." *Id*.

Under the moment of the threat doctrine, however, the Seventh Circuit would have been unable to consider the officer's unreasonable pre-shooting actions, *i.e.*, jumping in front of the speeding car. Respondents (at 33) disavow that troubling result, but that only underscores why the decision below is indefensible. Indeed, the totality of the circumstances show that Officer Felix acted like the officer in *Starks*. Felix lunged toward the moving car, jumped onto it, and (as explained below) shot before Barnes had any time to react. *See infra* p. 17.

In *Sledd*, police officers entered a home without identifying themselves. *Sledd* v. *Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996). An occupant grabbed a firearm to defend himself, and officers shot him. The Seventh Circuit explained that the officers used unreasonable force because—in failing to identify themselves—the officers "unreasonably created the encounter that led to the use of force." *Id*. at 288. Once again, that analysis would have been forbidden under the moment of the threat doctrine, which ignores an officer's failure to identify himself prior to a shooting. *See, e.g.*, *Cass* v. *City of Abilene*, 814 F.3d 721, 731-732 (5th Cir. 2016) (per curiam). That result undermines both the Second and Fourth Amendments. Opening Br. 34-35.

2. Respondents' handful of arguments regarding precedent and doctrine do not move the needle.

Respondents argue (at 37) that the Fifth Circuit properly ignored everything prior to the shooting because Felix's "jump was a separate act from the" "seizure that occurred when Felix discharged his firearm." But this Court does not slice-and-dice government conduct so finely, nor does it analyze reasonableness based solely on an officer's conduct the instant a Fourth Amendment violation occurs. Opening Br. 45-46. In Fourth Amendment search cases, for example, the Court asks whether the officers knocked "prior to entering." *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995). In response, Respondents assert (at 30) that the Court examines only "the moment of entry" in search cases. Not so. The knock must occur before entry and bears on the reasonableness of the subsequent search. *See Wilson*, 514 U.S. at 931.

Nor does it matter whether Felix's decision to jump on the car independently violated a "legal duty or right," as Respondents contend (at 36). An officer standing outside a door has no legal duty to knock. But that same officer violates the Fourth Amendment when he fails to knock and executes a search. *See Wilson*, 514 U.S. at 931. So too here: Whether or not Felix violated the Fourth Amendment by jumping onto the car, his decision to jump on the car *and then kill Barnes* violated Barnes's Fourth Amendment rights. Similarly, in *Starks*, the officer's jumping in front of the car may not have violated the driver's rights. But the decision to jump *and then kill the driver* was a Fourth Amendment violation. *Starks*, 5 F.3d at 234.

Contrary to Respondents' repeated assertions, Petitioner is not asking for a special "officer-created

danger doctrine." Petitioner agrees that officers do not act unreasonably if they make "split-second judgments" that later prove "mistaken." *Graham*, 490 U.S. at 396-397. That is not the question before the Court. The question here is whether courts may consider only the moment of the threat, or whether they may ever consider the officer's actions immediately prior to the shooting as part of the totality of the circumstances.

Nor is Petitioner asking this Court for a test that permits hindsight bias. Petitioner is asking for the same totality of the circumstances test this Court has applied for decades. In arguing otherwise, Respondents (at 43) selectively misquote a handful of appellate decisions. For example, Respondents accuse the Ninth Circuit in *S.R. Nehad* v. *Browder* of finding a Fourth Amendment violation and holding an officer liable for "poor judgment." 929 F.3d 1125, 1135 (9th Cir. 2019). In that case, an officer shot a non-threatening suspect *without identifying himself or providing a warning*—pre-seizure conduct Respondents now agree (at 20, 27) courts should consider when evaluating reasonableness.[5]

In car chase cases, this Court examines the entirety of the chase, something the moment of the threat doctrine forbids. *See Plumhoff* v. *Rickard*, 572 U.S. 765, 776 (2014); *Scott*, 550 U.S. at 384. As they must, Respondents acknowledge the Court's decisions "recounted pre-shooting facts." Response Br. 40.

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[5] Even if this Court disagrees with the outcome of a few appellate decisions, it does not save the moment of the threat doctrine. Law enforcement officers do not have a right to be forgotten. The whole point of the Fourth Amendment's reasonableness inquiry is to examine the events that actually occurred.

Respondents now suggest that the Fourth Amendment is a one-way ratchet in which only the "suspect's preceding conduct" can be considered, but not an officer's conduct. *Id*. According to Respondents, this is because the suspect's actions inform "what the officer knew at the moment he decided to use deadly force." *Id*. But as the United States explains, just as an officer knows about the suspect's prior actions, an officer is similarly aware of his "own previous conduct," including his own unreasonable conduct. U.S. Br. 14; *see* Seth Stoughton Br. 8. Fourth Amendment reasonableness is not "a one-way ratchet," where a suspect's acts matter, but an officer's unreasonable actions do not. U.S. Br. 14; *see* Rutherford Inst. Br. 12.

Respondents cite footnote 3 of *Plumhoff*, but it does not support the moment of the threat doctrine. *See* Response Br. 39. That footnote explains that police may pursue dangerous suspects even if suspects drive "so recklessly" upon being pursued "that they put other people's lives in danger." *Plumhoff*, 572 U.S. at 776 n.3 (quoting *Scott*, 550 U.S. at 385). That makes sense: The State has a strong interest in neutralizing willfully dangerous suspects. In this case, however, there was no "importan[t]" "governmental interest[]" justifying an officer jumping onto a moving car over a minor infraction and opening fire. *Garner*, 471 U.S. at 7 (quotation marks omitted).

Finally, Respondents are wrong (at 40-44) about *County of Los Angeles* v. *Mendez*, 581 U.S. 420 (2017), which they claim effectively decided the question presented. The opposite is true. Justice Alito's opinion in *Mendez* intentionally reserved judgment on the question presented here because it was so different from the issue presented in *Mendez*. *See id*. at 429

n.*. The logic of the Court's decision in *Mendez*, however, confirmed that courts construing the Fourth Amendment should look to ordinary causation principles. *Id*. at 431. That is what Petitioners seek, what the totality of the circumstances approach facilitates, and what the Fifth Circuit's doctrine forbids. *See infra* pp. 16-17.

B. The Moment Of The Threat Doctrine Conflicts With Common Law.

The moment of the threat doctrine is profoundly inconsistent with common law. At common law, an officer's use of force was "not justifiable" absent "absolute necessity." 4 William Blackstone, Commentaries *180. Officers were required to act in ways that reduced "violence and bloodshed." *Bellows* v. *Shannon*, 2 Hill 86, 92 (N.Y. Sup. Ct. 1841). Those who "misbehave[d]" "in the discharge of their duty" faced civil and criminal liability. Sir Michael Foster, *Crown Law* 319 (3d ed. 1792). The cases Respondents cite (at 24) confirm the common law's "great" "regard for human life." *Head* v. *Martin*, 3 S.W. 622, 623 (Ky. 1887). To protect the suspect's life, common law courts evaluated preseizure conduct—including whether the officer identified himself, *see, e.g.*, *State* v. *Bryant*, 65 N.C. 327, 329 (1871), and whether the officer otherwise brought the "peril upon himself" through an "unlawful act." Harvey Cortlandt Voorhees, *The Law of Arrest in Civil and Criminal Actions* 111 (1904); *see* Cato Br. 4-9; Restore the Fourth Br. 11-15.

Respondents do not respond directly. Instead, they assert (at 27) that "this is not a case where Felix failed to identify himself." Respondents miss the point: Common law cases in which an officer failed to identify himself prove that courts did not ignore an

officer's unreasonable pre-seizure actions. Rather, a court evaluating the lawfulness of the officer's use of force took into account the officer's unreasonable prior conduct, *e.g.*, a failure to identify oneself that caused the suspect to resist. *See Frost* v. *Thomas*, 24 Wend. 418, 419 (N.Y. Sup. Ct. 1840); *Starr* v. *United States*, 153 U.S. 614, 621 (1894) (cited by Respondents). The moment of the threat doctrine excludes that pre-seizure conduct from the calculus. *Cass*, 814 F.3d at 731-732.

Respondents (at 27) assert that the common law distinguished between an "unlawful arrest" and the officer's conduct during a "lawful" "arrest." That is inaccurate. Even where the officer had a warrant *authorizing arrest*, the officer's unreasonable failure to identify himself *during the arrest* rendered his use of force unlawful. *See Bellows*, 2 Hill at 91; *Frost*, 24 Wend. at 419. The officer's misconduct "in making the arrest" deprived the officer of a claim to "self-defence." Voorhees, *supra*, at 111.

Respondents minimize (at 25, 27) the fleeing felon rule by asserting Felix could meet "force with force" in self-defense. But Barnes in no way intentionally used force *against* Felix, nor did the Fifth Circuit suggest that Barnes did so. Rather, Felix lunged toward the passenger compartment, jumped onto the door sill, and shot before Barnes even had time to react. As this case shows, the Fifth Circuit's approach permits an officer to act unreasonably—*i.e.*, jumping onto a moving vehicle—and immediately kill a fleeing *misdemeanant*. That result is profoundly inconsistent with the common law. Opening Br. 30-32; Cato Br. 6.

In short, basic common law principles decisively refute the moment of the threat doctrine.

C. The Law Of Self-Defense And Superseding Cause Confirm The Moment Of The Threat Doctrine Is Wrong.

In a last-ditch effort, Respondents (at 24-26) seek to support the Fifth Circuit's erroneous ruling based on the principle of superseding cause and the law of self-defense. Their arguments, however, quickly backfire. Both legal principles require analyzing pre-seizure conduct that the Fifth Circuit ignored. Again, this Court should not resolve Respondents' new factual arguments. It should merely hold that the moment of the threat doctrine is wrong, and allow the lower courts to consider Respondents' arguments when evaluating the totality of the circumstances.

1. Start with the law of superseding cause. An *intervening act* "actively operates in producing" the harm "after" the defendant's act "has been committed." Restatement (Second) of Torts § 441(1) (1965). Under "one facet of" "proximate causation," an intervening act is a *superseding cause* if it is "of independent origin that was not foreseeable." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 837 (1996) (quotation marks omitted); *see Johnson* v. *City of Philadelphia*, 837 F.3d 343, 352-353 (3d Cir. 2016). Respondents argue that Barnes's failure to brake after Felix ordered him to stop constituted a superseding cause because Barnes "resisted with force" and intentionally "put" Felix "in harm's way" by "ignor[ing] Felix's call to stop the vehicle." Response Br. 25, 28, 50.

Once again, that is not the basis of the decision below. At no point did the Fifth Circuit suggest Barnes intentionally threatened Felix. And the Fifth Circuit did not ask whether Barnes's failure to stop the car broke "the causal chain" between Felix's decision to

jump onto the car and the danger Felix faced. Response Br. 25. To decide that question, the Fifth Circuit would have needed to first acknowledge that it was *relevant* whether Officer Felix acted unreasonably by jumping onto the car—something the moment of the threat doctrine forbids.

Indeed, the Fifth Circuit never determined whether Felix—like the officer who acted unreasonably in *Starks*, 5 F.3d at 234—left Barnes "without" "time to stop the car" before shooting. If Felix did not provide Barnes time "to stop voluntarily," *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989), Barnes's foreseeable failure to brake was "primarily of [Felix's] own making," and certainly not a superseding cause. *Biegert*, 968 F.3d at 698 (Barrett, J.).

This Court should not decide that question. On remand, however, Petitioner will have a strong argument that Felix did not provide Barnes time to react. According to Felix's expert, "the average reaction time of an individual driving a motor vehicle is between 1.5 to 2 to 2.3 seconds."[6] Felix jumped onto the car, " 'shoved' his gun into Barnes's head, pushing his head hard to the right," and then shot Barnes in the abdomen, *within two seconds*. Pet. App. 4a. It is to Barnes's credit that after being shot, he nevertheless brought the car to a controlled stop.

2. Respondents' arguments regarding the law of self-defense similarly demonstrate why the Fifth Circuit's approach was flawed. Respondents argue (at 17) that "Felix had the right to defend himself against Barnes's use of force." But the law of self-defense looks to context and prior acts. For example, a key

[6] D. Ct. Dkt. 42-5 at 52.

limit is that an aggressor "who brings about the difficulty with the other" cannot claim self-defense. 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(e) (3d ed. 2024 update). Although the contours of Respondents' theory are unclear, Respondents say (at 32-33) an officer qualifies as an aggressor if he jumps in front of a moving car and shoots the driver. The "car poses an immediate danger," but Respondents acknowledge the officer caused the "aggression" and cannot claim self-defense. *Id.*

The same should hold true when an officer jumps onto a car: The car poses a threat, but the officer is the aggressor. The Fifth Circuit, however, did not ask whether Officer Felix acted in a manner (*i.e.*, jumping onto a car) that Respondents now say is aggression. Instead, the Fifth Circuit excluded "[a]ny of the officer['s] actions" from consideration—an approach that Respondents now appear to agree was wrong. Pet. App. 8a (quotation marks omitted).

Indeed, *Graham*'s totality of the circumstances test is far more consistent with the law of self-defense than the moment of the threat doctrine. *Graham* allows courts to consider whether *either* the officer *or* the plaintiff acted in self-defense. Thus, where an officer fails to identify himself and a civilian draws her firearm in response to a threat, the totality of the circumstances test recognizes the civilian lawfully exercises her "basic right" to "[s]elf-defense." *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010); *see Doornbos* v. *City of Chicago*, 868 F.3d 572, 585 (7th Cir. 2017). But because the moment of the threat doctrine ignores "the officer['s] actions leading up to the shooting," the Fifth Circuit always places the blame on the civilian

and robs her of the right to self-defense. Pet. App. 8a (quotation marks omitted); *see* Giffords Br. 23-24.

III. RULING FOR PETITIONER WILL PROTECT THE FOURTH AMENDMENT AND PROMOTE EFFECTIVE LAW ENFORCEMENT.

1. The moment of the threat doctrine "lessens the Fourth Amendment's" protections and "devalues human life." Pet. App. 10a (Higginbotham, J., concurring). It permits an officer to jump onto (or in front of) a moving vehicle over a minor traffic violation and shoot the driver. It would be deeply damaging for this Court to endorse that unjust rule.

Contrary to Respondents' suggestion (at 33), this kind of disturbing behavior is not "non-existent." The decision below is by no means the first time an officer in the Fifth Circuit has jumped onto a car and shot the driver. *See Harmon* v. *City of Arlington*, 16 F.4th 1159, 1164-65 (5th Cir. 2021). Nor is this conduct limited to officers in the Fifth Circuit. A recent study of 400 car stops found that officers frequently "put themselves at risk by jumping in front of moving cars, then aiming their guns at the drivers as if in a Hollywood movie."[7]

There is a similar problem of officers failing to identify themselves at the outset of an encounter, which the moment of the threat doctrine likewise improperly excludes from the Fourth Amendment analysis. In 2017, the Department of Justice criticized Chicago police officers for engaging in a strategy known as "jump

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[7] Kim Barker et al., *How Police Justify Killing Drivers: The Vehicle Was A Weapon*, N.Y. Times (Nov. 6, 2021), https://tinyurl.com/y8df9ja2.

out." Groups "of officers, frequently in plain clothes" and "unmarked vehicles driv[e] rapidly toward a street corner or group of individuals and then jump[] out and rapidly advanc[e], often with guns drawn," simply to see who might flee.[8] The moment of the threat doctrine penalizes citizens who lawfully defend themselves in that scenario.

In response, Respondents point (at 28 n.6) to a handful of cases in which a court that applies the moment of the threat doctrine found an officer violated the Fourth Amendment. But citing a small number of cases coming out the right way does not justify the application of a doctrine that leads to deeply unjust results, including in this case.

2. As our Opening Brief explained (at 37-38), the moment of the threat doctrine creates severe line drawing problems. Respondents have no convincing answer. Indeed, Respondents claim that the decision below was correct, while also asserting (at 8, 35) that Felix was in danger *before* he jumped onto the car, *i.e.*, the moment of the threat identified by the Fifth Circuit. That is wrong. Felix was standing back from the passenger cabin and was in no danger until he lunged and jumped onto the door sill. *See* App. 4a-7a. But regardless, the crucial point is that Respondents' argument itself underscores there is no clear "moment of the threat"—further illustrating why the Court should remand and direct the lower courts to apply a totality of the circumstances inquiry.

3. Under the moment of the threat doctrine, victims cannot make out a Fourth Amendment violation if an

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[8] U.S. Dep't of Justice, Investigation of the Chicago Police Department 31 (Jan. 13, 2017), https://tinyurl.com/42dhuexh.

officer's life was in danger, no matter the surrounding circumstances. Respondents claim that is not a problem, because a plaintiff may nevertheless recover for an unreasonable use of force if they can identify "*a separate Fourth Amendment violation*" that proximately caused the use of force. Response Br. 29 (emphasis added). But finding no Fourth Amendment violation where a plaintiff was unreasonably *killed*—and then allowing the plaintiff to recover as long as she can identify *some antecedent* Fourth Amendment violation—makes no sense.

Respondents argue (at 29) that Petitioner could have pursued a Fourth Amendment claim for Officer Felix jumping onto Barnes's car. But had Officer Felix jumped in front of the car before shooting Barnes, there would have been no antecedent Fourth Amendment violation—and thus no possible recovery under Respondents' theory. Similarly, under Respondents' reasoning, a plaintiff shot in her home might be able to assert a Fourth Amendment claim based on an unlawful entry, but she would be out of luck if the incident occurs on the street. Such minor factual differences should not lead to radically different outcomes.

Respondents (at 29) shrug and assert this "is how the Fourth Amendment works." Not so. The Framers enshrined a standard of reasonableness in the Fourth Amendment, not the arbitrary "on/off switch" Respondents propose, which depends on whether an officer violated a plaintiff's rights *twice*. *Scott*, 550 U.S. at 382. Shooting a motorist over a minor toll violation is not reasonable. Petitioner should be entitled to bring a Fourth Amendment claim.

4. Finally, as leading law enforcement figures explain, evaluating the totality of the circumstances will

save officer and civilian lives. Law Enforcement Officials Br. 13-22; *see* Inst. for American Policing Reform Br. 11-12. In contrast, the moment of the threat doctrine encourages unreasonable conduct that places everyone at risk, eroding "public trust in law enforcement." Law Enforcement Officials Br. 22-25; *see* Cato Br. 15-18.

Consider this case. Respondents argue (at 35) that Officer Felix safeguarded the public by jumping onto the car and shooting Barnes. The opposite is true. Felix greatly endangered innocent drivers on the highway. Police avoid shooting at cars because "a collision is often the only way the vehicle will stop." Inst. for American Policing Reform Br. 13. In the worst scenario, Barnes could have lost control and careened into speeding traffic. *See* JA 115; *Harmon*, 16 F.4th at 1162 (car crashed after driver shot). The decision below is so dangerous because it encourages others to emulate Felix's concerning behavior.

The empirical evidence, moreover, disproves Respondents' fearmongering. "Actual departmental policies"—including the Department of Homeland Security, which employs 80,000 officers—prohibit unreasonable actions that necessitate using deadly force. *Garner*, 471 U.S. at 19; *see* Opening Br. 41; Response Br. 31 (acknowledging "many states" limit officers' use of force). In those jurisdictions, officers do not "cower in the face of threats," and they can and do use force against suspects who "level[] a "gun" in their face. Response Br. 47, 49.

Nor will officers face crippling liability for making a mistake. *Graham* does not impose liability for mistakes, officers enjoy the strong protection of qualified immunity—a point Respondents essentially ignore—

and governments nearly always indemnify officers. Cato Br. 22.

In the end, Respondents (at 46) bemoan that there cannot have been a Fourth Amendment violation because of "Barnes's decision to flee." *See* Response Br. 4, 21, 25, 45. That says the quiet part aloud. The Fourth Amendment has long prohibited killing a fleeing non-dangerous suspect. *Garner*, 471 U.S. at 11. Respondents would have this Court overturn *Garner* and enact an unprecedented rule authorizing deadly force against fleeing misdemeanants. This Court should reject that extraordinary suggestion.

CONCLUSION

The Court should vacate the judgment and remand.

Respectfully submitted,

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