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* CURRENT AND FORMER LAW ENFORCEMENT OFFICIALS IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI[1]

The undersigned amici are a group of 22 current and former law enforcement officials who have spent lengthy and distinguished careers protecting communities around the country. Collectively, they have several centuries of law enforcement experience. They have served as officers, sheriffs, chiefs, and police commissioners. Their extensive field work and department leadership give the amici an authoritative perspective on widely adopted best practices used by law enforcement around the country.

Informed by their professional experience, amici write to encourage this Court to reject the Fifth Circuit's myopic "moment of the threat" doctrine. Our nation's police departments expect officers to make tactical decisions that protect public safety and reduce the need for lethal force. And well-trained police officers account for myriad factors that emerge well before they make the grave choice to use lethal force. The Fifth Circuit's analysis is too restrictive to accurately gauge whether an officer used reasonable judgment in making that choice. An approach that accounts for the totality of the circumstances preserves police discretion, promotes public safety, and encourages sound policing consistent with professional standards.

Amici include the following current and former law enforcement officials:

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to this brief's preparation or submission.

- **Art Acevedo** served as Chief of Police in Austin, Houston, Miami, and Aurora. He is also a former president of the Major Cities Chiefs Association and the National Latino Peace Officers Association.
- **Carmen Best** served as the Chief of Police of the Seattle Police Department. In 28 years with the department, she oversaw its Patrol Operations, Investigations, and Special Operations Bureaus, as well as the Community Outreach section.
- **Jerry Clayton** is serving his fourth term as the Sheriff of Washtenaw County, Michigan. He previously served as a front-line officer, Deputy Sheriff, and command officer.
- **Stephen Downing** is a former Deputy Chief of Police with the Los Angeles Police Department. He began his career as a patrol officer, and eventually commanded the Bureau of Special Investigations.
- **Chris Fisher** served as Senior Advisor to the Assistant Attorney General at the Office of Justice Programs in the Department of Justice, where he provided guidance to the federal government on issues involving policing, violent crime, and police reform.
- **Neill Franklin** spent 34 years in the Maryland State Police and the Baltimore Police Department, including leading the Baltimore Police Department's Bureau of Drug and Criminal Enforcement and the Education and Training Division.
- **Renee Hall** served as Chief of the Dallas Police Department. She began her career with the Detroit Police Department and has spent more than 20 years in public service.

- **Michael Harvey** served as Captain in the Spotsylvania County Sheriff's Office and was responsible for training, professional standards, and criminal investigations.
- **Wayne P. Harris** served in law enforcement for 30 years. He became Deputy Chief of the Rochester Police Department following a lengthy career as an officer, lieutenant, captain, and commander.
- **Tracie Keesee** served 25 years with the Denver Police Department, served as Deputy Commissioner of the New York Police Department, and led the Department of Justice's National Initiative for Building Community Trust and Justice.
- **Chris Magnus** served as Commissioner of U.S. Customs and Border Protection and led the police departments in Fargo, North Dakota; Richmond, California; and Tucson, Arizona.
- **Sylvia Moir** served as Chief of Police in Tempe, Arizona and El Cerrito, California. She is currently the Undersheriff of Marin County, California.
- **Dr. Brandon del Pozo** served as Chief of Police of Burlington, Vermont, following a 19-year career with the New York Police Department. He is now an Assistant Professor at Brown University studying public health, safety, and justice.
- **Sonia Pruitt** is a former Chairperson of the National Black Police Association. She is a Professor of Criminal Justice at Howard University and Montgomery College in Maryland, and previously served as a captain with the Montgomery County, Maryland, Police Department.

- **Sue Rahr** is the current Interim Chief of the Seattle Police Department. She has spent more than 40 years in law enforcement, including as Sheriff of King County, Washington.
- **Howard Rahtz** retired as Captain of the Cincinnati Police Department after a career in community policing, training, and drug enforcement. He is the author of four books on police and use-of-force issues.
- **Dr. Ronal Serpas** is the Chairman of the National Policing Institute's Board of Directors and a Professor of Practice in Criminology and Justice at Loyola University New Orleans. His law enforcement record spans 34 years and includes time as Police Superintendent in New Orleans; Police Chief in Nashville; and Chief of the Washington State Police.
- **Dr. Norm Stamper** served as Seattle's Chief of Police. He was a police officer for 34 years, including 28 years with the San Diego Police Department. Dr. Stamper is the author of four books on American policing issues.
- **Darrel Stephens** served as Chief of Police in Largo, Florida; Newport News, Virginia; St. Petersburg, Florida; and Charlotte-Mecklenburg, North Carolina. He has also served as Executive Director of the Police Executive Research Forum and the Major Cities Chiefs Association.
- **Carl S. Tennenbaum** served 32 years in the San Francisco Police Department, including as sergeant of the San Francisco Housing Authority Community Policing Team.

- **Kathleen O'Toole** served as the Commissioner of the Boston and Seattle Police Departments. She began her lengthy career as a patrol officer, and spent six years leading a police reform oversight body in Seattle.
- **Charles P. Wilson** served 23 years with the Rhode Island College Campus Police Department as a patrol shift supervisor. He was also Chief of the Woodmere Village, Ohio Police Department and has served a historic nine terms as National Chairman of the National Association of Black Law Enforcement Officers.

SUMMARY OF ARGUMENT

For more than 35 years, police departments have operationalized *Graham v. Connor*'s mandate that force must be objectively reasonable in the totality of the circumstances. Law enforcement agencies train their officers to make critical decisions based on a wide range of factors—including circumstances that arise before force becomes necessary. And generations of police officers serving their communities have now been trained to employ tactics that minimize the need for force. Police departments and cities across the country have policies requiring police to use these tactics, which yield smart, safer policing and improve community trust in law enforcement.

Some might assume that considering a narrower set of circumstances, occurring at the precise moment an officer used force, would be fairer to officers or more aligned with contemporary police practices. In the experience of amici, the opposite is true.

Graham v. Connor and its kin recognize that officers in the field make judgment calls based on all available facts. The "totality of the circumstances" rule properly accounts for "policies adopted by the police departments" and "the prevailing rules in individual jurisdictions" to evaluate whether the use of force was reasonable in a given case. *Tennessee v. Garner*, 471 U.S. 1, 15–16, 18 (1985). This approach preserves police discretion, encourages good policing, and makes encounters safer for all parties. But the Fifth Circuit improperly restricts the constitutional analysis to the moment the officer deploys lethal force. Its artificially constrained "moment of the threat" rule excludes critical considerations of officer performance and tactical decisionmaking that occur before the use of force.

ARGUMENT

Police have a crucial job. Their work is frequently unpredictable and sometimes dangerous. At times, in tense situations, officers must decide whether to use lethal force to protect themselves, their fellow officers, and the public. But police officers do not make this decision in a vacuum, and should not be encouraged to do so. Officers are expected to make tactical decisions based on all available facts—such as their knowledge of the suspect, the danger of the perceived offense, and the immediacy of the threat. Different situations merit different responses, and police training cultivates critical thinking skills that account for all facets of a given encounter. Department policies require officers to apply that training in the field.

This Court's precedent reflects those basic realities of modern policing. Under *Graham v. Connor*, courts consider "the totality of the circumstances" to evaluate whether an officer's use of force was reasonable. 490 U.S. 386, 396 (1989) (quoting *Garner*, 471 U.S. at 9). This "'objective' inquiry 'pays careful attention to the facts and circumstances of each particular case,'" considering "'the information the officers had when the conduct occurred.'" *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017) (first quoting *Graham*, 490 U.S. at 396; then quoting *Saucier v. Katz*, 533 U.S. 194, 207 (2001)). It also accounts for "the prevailing rules in individual jurisdictions," and "the policies adopted by the police departments themselves." *Garner*, 471 U.S. at 15–16, 18. This framework mirrors the pragmatic analysis police officers apply when making decisions in the field—reflecting their training, the rules and standards governing their conduct, and all facts on the ground.

Instead of following this Court's established doctrine, the Fifth Circuit has openly "narrowed that test, holding that the excessive force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer's shooting." *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (cleaned up). In the extensive experience of the amici, this "moment of the threat" rule takes an artificially myopic view of real-world police decisionmaking. It disregards important factors that shape real encounters. It blinds our Constitution to the training and department rules that govern an officer's conduct. And it is dangerous to police officers, the citizens they encounter, and the communities they serve.

The better approach is to account for "not only the officers' actions at the moment that the threat was presented," but their tactical choices "in the moments leading up to the suspect's threat of force." *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1215 (10th Cir. 2019) (cleaned up); *Estate of Beigert v. Molitor*, 968 F.3d 693, 698 (7th Cir. 2020); *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999). That approach aligns with the basic structure of the Fourth Amendment. After all, the objective reasonableness of any seizure turns on "the totality of the circumstances," *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), accounts for an officer's training and experience, *United States v. Arvizu*, 534 U.S. 266, 273 (2002), and considers police conduct that shapes the encounter, *Kentucky v. King*, 563 U.S. 452, 462 (2011). Consideration of all factors that shape an encounter preserves police discretion, promotes public and officer safety, and encourages sound policing.

Amici offer this brief to illustrate best practices in law enforcement concerning the use of lethal force. Officers are expected to make sound strategic choices that account for all circumstances surrounding an encounter. For example, police departments nationwide train officers to deescalate encounters; to warn suspects before using lethal force; and to stay out of the path of moving vehicles. Many adopt policies requiring officers to use these tactics when it is safe and feasible to do so. These rules, and others like them, act as guardrails around the use of lethal force, mitigating unnecessary risks to police officers and the people they serve. Those best practices—adopted by police departments all across the country—are highly relevant to any assessment of whether a well-trained police officer exercised reasonable judgment in the field.

I. A "totality of the circumstances" rule that accounts for an officer's training, department policies, and tactical decisions is the proper way to evaluate officers' conduct in the field.

In the extensive law enforcement experience of the undersigned amici, the Fifth Circuit's approach to excessive force does not match the realities of policing. Officers are trained and required to approach tense situations with poise, professionalism, and sound tactics—evaluating all aspects of an encounter and taking actions that account for the safety of all parties. It is impossible to meaningfully evaluate whether officers acted reasonably without considering the tactical and strategic decisions they made that shaped the encounter. Courts should evaluate their actions consistent with the standards of this profession—and

with policies adopted by law enforcement agencies nationwide to govern officer conduct.

Today, the "totality of the circumstances" framework outlined in *Graham v. Connor* is a "fundamental principle in police practices."[2] Police departments around the country have operationalized *Graham* through thoughtful policies and training exercises. Some explicitly outline the *Graham* factors, and expect officers to pursue any feasible alternatives before resorting to lethal force.[3] Others adopt a force "spectrum" that determines the reasonableness of force on a continuum based on all known circumstances.[4] And many departments train officers to apply the *Graham* factors through sophisticated programs—such as digital simulations and role-playing exercises. *See, e.g.*, *Graham v. Connor's Implication on Law Enforcement Practices,* Performance Protocol,

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[2] *Today in History: Graham v. Connor (1989)*, South Carolina Fraternal Order of Police (May 15, 2024), https://tinyurl.com/mtwhsh8c.

[3] *E.g.*, Memphis Police Dep't, *Policy and Procedures*, Ch. I, at 15 (Jan. 13, 2023), https://tinyurl.com/4fmxh9aw (applying *Graham* factors, and further prohibiting use of force "unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances"); Baltimore Police Dep't, *Use of Force*, Policy 1115, at 3–4 (Mar. 11, 2024), https://tinyurl.com/29y386jj (expanding upon *Graham* factors, and stating "[f]orce is necessary only when no reasonably effective alternative exists"); Dennis R. Sutton, *Audit of TPD General Order 60: Response to Resistance*, Report AR-2402, Exhibit A at 5–6 (Nov. 27, 2023), https://tinyurl.com/467ejr7c (detailing the factors to be considered in expanded *Graham* analysis).

[4] *See, e.g.*, Emilee Green & Orleana Peneff, *An Overview of Police Use of Force Policies and Research*, Ill. Crim. Just. Info. Auth. (Aug. 15, 2022), https://tinyurl.com/2y79fr5r.

https://tinyurl.com/3cvwmf99 (last visited Nov. 13, 2024). "These programs emphasize critical thinking and the ability to adapt quickly, ensuring that officers understand how to balance assertiveness with the imperative to minimize harm." *Id.*

Those policies and trainings have become the accepted standards of this profession. A National Consensus Policy and Discussion Paper on Use of Force published by eleven of the most prominent police leadership organizations in the United States implements and endorses *Graham*'s "totality of the circumstances" approach, stating that:

> [Law enforcement agencies] value and preserve human life. Officers shall use only the force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others. Officers shall use force only when no reasonably effective alternative appears to exist and shall use only the level of force which a reasonably prudent officer would use under the same or similar circumstances. Introduced in *Graham*, the 'objectively reasonable' standard establishes the necessity for the use and level of force . . . based on the individual officer's evaluation . . . considering the totality of the circumstances.

Fraternal Ord. of Police et al., *National Consensus Policy and Discussion Paper on Use of Force* 8 (Oct. 2017), https://tinyurl.com/55madebe. And while individual policies vary, the "totality of the circumstances" standard remains the critical foundation for police department policies regarding the use of force. *See, e.g.*, Police Exec. Rsch. F., *Guiding*

Principles on Use of Force 16 (Mar. 2016), https://tinyurl.com/5bs3ykej.

The nation's most influential police leadership groups agree with this approach. At least one state chapter of the Fraternal Order of Police describes *Graham* as "a clear and practical standard for evaluating police use of force, ensuring that officers' actions are assessed based on the context and circumstances they faced." *Today in History: Graham v. Connor (1989)*, South Carolina Fraternal Order of Police (May 15, 2024), https://tinyurl.com/mtwhsh8c. And the International Association of Chiefs of Police has opposed efforts to alter the *Graham* standard. *See* Int'l Ass'n Chiefs of Police, *Use of Force Position Paper: Legislative Considerations and Recommendations* 5 (May 2019), https://tinyurl.com/3vbrdhuc. That is because a standard contemplating the full context of an encounter produces fair outcomes for all parties, "fostering a balance between officer safety and the rights of the individuals involved." *Graham v. Connor's Implication on Law Enforcement Practices*, Performance Protocol, https://tinyurl.com/3cvwmf99 (last visited Nov. 19, 2024).

The "moment of the threat" rule will severely disrupt that balance—barring courts from considering factors that are highly relevant to the use of force. For example, in *Cole v. Carson*, the Fifth Circuit affirmed the denial of qualified immunity to officers who shot an armed man who backed out of a treeline and turned toward them. 935 F.3d 444, 449 (5th Cir. 2019) (en banc). But as the dissent noted, the district court failed to consider relevant facts that emerged before the moment of the threat, including:

> (1) the officers were searching for an irate, distraught suspect; (2) who was wandering through the woods armed with a loaded semi-automatic handgun; (3) who had refused police demands to turn over his weapon; (4) who had just that morning deposited a cache of weapons and ammunition at his friend's house; and (5) who had threatened to 'shoot anyone who came near him.'

935 F.3d at 484 (Duncan, J., dissenting). In cases like *Cole*, application of the "moment of the threat" rule threatens to expose police officers to liability for taking action based on critical facts available to them.

II. The "moment of the threat" rule ignores that police trainings and policies require officers to attempt to resolve encounters without using force.

A police officer's use of force is constitutional if it aligns with "objective standards of reasonableness." *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This Court's authority holds that law, policy, and professional standards may inform whether an officer's conduct was reasonable. *See, e.g.*, *Garner*, 471 U.S. at 15–16, 18. And for good reason. Those rules, policies, and standards reflect best practices used by law enforcement agencies around the country, and should guide every officer's tactical decisions. Today, many states and departments require officers to apply tactics—such as verbal warnings and de-escalation techniques—to resolve tense encounters whenever it is safe and feasible to do so. A police officer's use of these

tactics should factor into any analysis of whether the officer acted reasonably.

A. Many department policies require officers to issue warnings before using lethal force, reducing the risk of miscommunication and harm.

Warnings and commands are among the most common steps officers must take before resorting to lethal force.[5] In *Garner*, this Court rightly held that officers should attempt to warn suspects before using lethal force. 471 U.S. at 12. Many states have enacted statutes requiring exactly that—directing officers to issue verbal warnings or attempt to secure compliance whenever doing so is safe and feasible. *E.g.*, Colo. Rev. Stat. § 18-1-707(4); 720 Ill. Comp. Stat. § 5/7-5(a-5); Md. Code Ann., Pub. Safety § 3-524(e)(1); Nev. Rev. Stat. § 171.1455(1)(a); Or. Rev. Stat. § 161.242(2)(b); Utah Code Ann. § 76-2-404. Local, state, and federal law enforcement agencies have adopted policies requiring the same, including police departments within the Fifth Circuit. *E.g.*, Houston Police Dep't, *Use of Force*, General Order 600-17, at 3 (Mar. 4, 2022), https://tinyurl.com/yuapvnn3; Dallas Police Dep't, *Use of Deadly Force*, General Order 906.00 (Sept. 9, 2020), https://tinyurl.com/mupnktym; New Orleans Police Dep't, *Use of Force*, Operations Manual Ch. 1.3, at 6 (Dec. 6, 2015), https://tinyurl.com/yra9623n; *see also* U.S. Customs & Border Protection, *Use of Force*

[5] Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 282 (Apr. 2017) ("Most of the largest departments . . . require or encourage verbal warnings before using lethal force.").

Policy, Guidelines and Procedures Handbook 1–2 (May 2014), https://tinyurl.com/2u9r3k7d.

For example, the Cleveland Division of Police instructs its officers to "issue a verbal warning to submit to their authority prior to the use of force" provided it is safe to do so. Cleveland Div. of Police, *Use of Force: General*, Ord. 2.01.03, at 4 (Mar. 20, 2023), https://tinyurl.com/49zxsaep. The Memphis Police Department requires officers to attempt to gain control "through advice, warnings, and persuasion" before using force, unless doing so is unsafe or impractical. Memphis Police Dep't, *Policies and Procedures*, Ch. I, at 15 (Jan. 13, 2023), https://tinyurl.com/4fmxh9aw. And the Northampton Police Department directs officers to "identify themselves . . . and issue verbal commands and warnings prior to the use of force." Northampton Police Dep't, *Policy: Police Use of Force*, AOM O-101, at 3–4 (last updated Apr. 2024), https://tinyurl.com/bdffrvyp.

These warnings and commands are a prudent tool for trained officers to reduce the volatility of a dangerous encounter. They "reduce the need for use of force by preventing miscommunication that can lead to escalation." ALI, *Principles of the Law, Policing* § 7.06 (2023), https://tinyurl.com/4y5yh7bh. And studies have validated the effectiveness of these policies in jurisdictions that require them, finding a 5% reduction in police killings *per capita*. *See, e.g.*, Campaign Zero, *Police Use of Force Policy Analysis* (Sept. 20, 2016), https://tinyurl.com/249su6e5.

None of this is to suggest that the Constitution requires officers to offer verbal warnings or preliminary commands in every case. As this Court observed in *Graham*, "the test of reasonableness under the Fourth

Amendment is not capable of precise definition or mechanical application." 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)); *accord Garner*, 471 U.S. at 8–9; *Robinette*, 519 U.S. at 39 ("In applying this test we have consistently eschewed bright-line rules."). Sometimes, in volatile encounters that demand split-second decisions, it may be impossible to issue a warning or command before deploying lethal force. But the Fifth Circuit rule precludes courts from examining whether an officer had such an opportunity and unreasonably declined to take it.

And crucially, a rule that considers whether officers attempted to secure compliance before using lethal force protects officers who properly follow department policy. An officer's use of force is more likely to be reasonable if the officer warned the suspect, and the suspect refused to comply. *E.g.*, *Palacious v. Fortuna*, 61 F.4th 1248, 1257–58 (10th Cir. 2023) (holding use of lethal force on fleeing suspect reasonable where officer repeatedly told suspect to show his hands and to "drop it"); *Ford v. Childers*, 855 F. 2d 1271, 1275–76 (7th Cir. 1988) (holding use of lethal force reasonable where officer twice warned the suspect before shooting). But the officer's preceding actions could not be considered under the Fifth Circuit's "moment of the threat" doctrine. As a result, officers who use force in full compliance with department rules and professional standards may find themselves vulnerable to suit.

B. Many department policies require officers to use de-escalation tactics, and have yielded dramatic downturns in violent encounters.

The Fourth Amendment's reasonableness standard accounts for an officer's special training and experience. *E.g.*, *Lombardo v. City of St. Louis*, 594 U.S. 464, 467–68 (2021); *Kansas v. Glover*, 589 U.S. 376, 384 (2020); *Arvizu*, 534 U.S. at 273; *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Officers rely on their training to make life-or-death decisions in volatile encounters. And police departments around the country train their officers to use de-escalation tactics to defuse dangerous situations while minimizing risks to the officer, the suspect, and the public. They expect officers to apply these techniques before resorting to lethal force whenever it is safe to do so.

Today, 77 of our nation's 100 largest police departments train and expect their officers to use de-escalation tactics. Campaign Zero, *8 Can't Wait*, https://8cantwait.org (last visited Nov. 10, 2024). These techniques frequently include persuasion, slowdowns, and careful positioning. For example, the Louisville Police Department instructs its officers to consider the following:

> When reasonable, under the totality of circumstances, officers should gather information about the incident, assess the risks, assemble resources, attempt to slow the momentum, and communicate and coordinate a response. In their interaction with subjects, officers should use advisement, warnings, verbal persuasion, and other de-escalation tactics as alternatives

> to force. Officers should recognize that they may withdraw to a position that is more tactically secure, or allows them greater distance in order to consider, or deploy, a greater variety of force options.

Louisville Metro. Police Dep't, *Standard Operating Procedures* 9.1 (Apr. 8, 2023), https://tinyurl.com/3n4d69v5. Police departments nationwide require officers to use similar de-escalation tactics, such as "verbal persuasion, warnings, slowing down the pace of an incident, and tactical repositioning." *See* Washington D.C. Metro. Police Dep't, *5.3 Four Pillars of Communication*, Metropolitan Police Academy, https://tinyurl.com/22rvwc8b (last visited Nov. 20, 2024); *see, e.g.*, Albuquerque Police Dep't, *Use of Force: De-escalation*, SOP 2-55-4 (Jan. 26, 2024), https://tinyurl.com/vyeu53u3; Columbus Police Dep't, *Use of Force*, Division Directive 2.01, at 2 (June 30, 2023), https://tinyurl.com/yewwuhxt.

De-escalation techniques make police encounters safer for everyone involved. Incidents involving lethal force are dangerous to officers and the public—with officers injured at a rate of 10 to 20%, and members of the public at a rate of 17 to 64%, depending on the jurisdiction. *See, e.g.*, Michael R. Smith et al., *A Multi-Method Evaluation of Police Use of Force Outcomes: Final Report to the National Institute of Justice*, Nat'l Inst. Just. 1-1 (Jul. 2010). Conversely, jurisdictions that have implemented de-escalation training have since seen a 28% decline in use-of-force incidents; a 36% decline in injuries to officers; and a 26% decline in injuries to the public. *See* Robin S. Engel et al., *Assessing the Impact of De-Escalation Training on Police Behavior: Reducing Police Use of Force in the*

Louisville, KY Metro Police Department, 21 Criminology & Pub. Pol'y 199, 201 (2022). They have also exhibited sharp declines in excessive force complaints. *See* Rachel Abanonu, *De-Escalating Police-Citizen Encounters*, 27 Rev. L. & Soc. Just. 240, 249–50 (2018) (noting 64% reduction in Dallas).

Additionally, police departments nationwide prohibit officers from using "tactics that unnecessarily escalate an encounter or create the need for force." *See, e.g.*, Phoenix Police Dep't, *Use of Force*, Order 1.5(5)(B)(3) (Jan. 2023), https://tinyurl.com/3xy236r2; Louisville Metro. Police Dep't, *Standard Operating Procedures* 9.1 (Apr. 8, 2023), https://tinyurl.com/3n4d69v5 ("Officers will take reasonable care that their actions do not precipitate an unreasonable use of force that places themselves, or others, in jeopardy."); Minneapolis Police Dep't, *Policy and Procedure Manual*, Volume 5, at 283 (Sept. 6, 2024), https://tinyurl.com/3378xnt7 ("Officers shall not purposefully use words or actions that a reasonable officer would conclude are intended to incite or escalate reactive behavior."). These rules recognize that an officer's duty is to protect public safety, and that escalatory conduct does not advance that imperative.

And many agencies dictate that officers "shall not intentionally position themselves in the path of a moving vehicle where they have no option but to use Deadly Force." *See, e.g.*, Baltimore Police Dep't, *Use of Force*, Policy 1115 at 9 (Mar. 11, 2024), https://tinyurl.com/29y386jj. Among them, the Memphis Police Department instructs its officers not to engage in the type of conduct at issue here:

> If the officer is in the path of the vehicle, the officer's first responsibility, if possible, is to move from the path of the oncoming vehicle, as shooting the driver of a moving vehicle raises the danger from an uncontrolled vehicle. Officers should not intentionally place themselves in the path of a moving vehicle or reach inside of a moving vehicle.

Memphis Police Dep't, *Policies and Procedures*, Ch. II, at 7 (Jan. 13, 2023), https://tinyurl.com/4fmxh9aw; *see also* L.A. Police Dep't, *Use of Force Policy*, Directive No. 1.3, at 4 (Aug. 2022), https://tinyurl.com/369wzzr6; Washington D.C. Metro. Police Dep't, *Use of Force*, Gen. Ord. 901.07, at 6 (Mar. 28, 2024), https://tinyurl.com/5e3f3y3d; U.S. Dep't of Homeland Sec., Policy Statement 044-05, at 3 (Feb. 6, 2023), https://tinyurl.com/yedb3hkr.

These policies are the product of a decades-long effort by police professionals and legislators to promote safety in tense situations. They are also supported and informed by Fourth Amendment jurisprudence holding that a search or seizure may be unreasonable if the officer manufactured—or disregarded a reasonable opportunity to avoid—the exigent circumstances that made it necessary. *See King*, 563 U.S. at 462 (holding that officers may not create exigent circumstances in order to execute a warrantless search). The "moment of the threat" doctrine demonstrably frustrates these efforts to implement procedures that protect officers and the public.

Amici do not argue that police officers can be expected to de-escalate every situation. Such a rule would be neither safe nor realistic. As this Court has

long recognized, police officers are sometimes "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397; *see also Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Courts should continue to account for the quick, high-stakes decisions police officers may need to make in evolving tactical situations. Sometimes those situations may leave no time for de-escalation or peaceful resolution.

But not every situation requires split-second decisions that leave no opportunity to pursue alternatives to force. Not every encounter is so volatile that officers may resort to lethal force without first attempting to secure a peaceful resolution. Officers are trained, expected, and required by policy to make tactical choices that shape each encounter. Those choices are relevant to the reasonableness of their conduct in the field.

The Fifth Circuit's approach artificially narrows the aperture through which we view police conduct. A broader view is necessary to preserve public safety and account for officer performance. As John F. Timoney, the former Miami Chief of Police and Philadelphia Police Commissioner, has observed:

> Too often, we only look at the exact moment when an officer uses deadly force. We also need to 'go upstream' and see whether officers are missing opportunities to de-escalate incidents, in order to prevent them from ever reaching the point where a use of force is required or justified.

Police Exec. Rsch. F., *Guiding Principles on Use of Force* 47 (Mar. 2016), https://tinyurl.com/5bs3ykej. Force may be necessary at the very moment an officer

pulls the trigger. But it is not "reasonable" for an officer to violate training, policy, and accepted professional standards by disregarding a clear opportunity to end the encounter peacefully. Departments and jurisdictions across the country expect officers to adhere to the policies and standards governing their conduct in the field.

III. The "moment of the threat" doctrine erodes public trust in law enforcement.

By shielding officers from liability for incautious and dangerous conduct, the "moment of the threat" doctrine undermines efforts to promote safe, effective policing, and impairs public trust in law enforcement. Circuits that apply it have failed to hold police accountable when they engage in dangerous or incautious conduct that violates department policy and broadly accepted professional standards. *See, e.g.*, *Kong v. City of Burnsville*, 960 F.3d 985, 993–94 (8th Cir. 2020); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996). When the legal system fails to hold such officers to account, it erodes public trust in law enforcement, making police work more difficult and communities less safe.

For example, in *Cass v. City of Abilene*, officers raided a business that bought jewelry and precious metals for cash. 814 F.3d 721, 731 (5th Cir. 2016). They entered with guns drawn and began shouting at people to put their hands up. *Id.* at 725. Four of the five raiding officers were dressed in street clothes and lacked any clear police identification. *Id.* When one plainclothes officer approached the manager's office, the manager drew a gun, and the officer shot him. *Id.*

at 726. The Fifth Circuit agreed that the officer had created a deadly situation by conducting the raid in this manner—but held that the moment of threat doctrine precluded any consideration of these facts. *Id.* at 731.

In *Harmon v. City of Arlington*, officers pulled over two suspects in a vehicle with an expired registration tag, and smelled marijuana. 16 F.4th 1159, 1162 (5th Cir. 2021). The officers decided to search the vehicle, but the suspects turned the engine on and attempted to flee. *Id.* All in the span of ten seconds, one officer "clambered onto the running board of the SUV, and grabbed the passenger window with his left hand"—before drawing his firearm, sticking it inside, and firing five shots, killing the passenger within. *Id.* When the estate filed an excessive force claim, the Fifth Circuit exclusively analyzed the "brief interval" where the officer was "clinging to the accelerating SUV." *Id.* at 1164. It paid no heed to the nonviolent nature of the perceived offense, or to the officer's dangerous decision to leap onto a vehicle in motion.

And in *Rockwell v. Brown*, officers arrived at the home of Scott Rockwell—a young man with bipolar disorder and schizophrenia who had locked himself in his bedroom and begun behaving erratically. 664 F.3d 985, 988 (5th Cir. 2011). The officers attempted to communicate with Scott, but could not convince him to leave his bedroom. *Id.* at 989. Scott's parents asked the officers to wait until morning to give him a chance to calm down. *Id.* Instead, the officers drew their firearms and breached the bedroom door. *Id.* Scott charged the officers with two eight-inch knives, and the officers opened fire. *Id.* at 990. As one judge noted, the officers had been called to prevent a suicide, but

"provoked a man they knew to be mentally ill into a violent reaction." *Id.* at 996–97 (DeMoss, J., specially concurring). Nonetheless, the Fifth Circuit, bound by its "moment of the threat" rule, could not consider any of the officers' prior conduct in its analysis. *Id.* at 992 (majority opinion).

These cases, and others like them, highlight the anomalies produced by the "moment of the threat" doctrine. The unnecessary use of force—the use of force where it could have been safely avoided—damages community faith and trust in the police. *See, e.g.*, U.S. Comm'n on Civ. Rts., *Police Use of Force: An Examination of Modern Policing Practices* 137 (Nov. 2018), https://tinyurl.com/23exjc5z. That, in turn, reduces the public's willingness to cooperate with law enforcement. Indeed, several studies have shown that incidents involving the unnecessary use of force have led to a substantial decrease in 911 calls and civilian reporting rates.[6] And a recent survey found that 75% of voters view excessive force as a pressing concern. Eli Yokley, *Most Voters See Police Violence as a Problem—and Common Against Black Americans*, Morning Consult (Feb. 1, 2023), https://tinyurl.com/5ft2sck8.

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[6] *See* Kevin J. Strom & Sean Wire, *The Impact of Police Violence on Communities: Unpacking How Fatal Use of Force Influences Resident Calls to 911 and Police Activity*, RTI International 7 (Jan. 2024), https://tinyurl.com/466xra58; Desmond Ang et al., *Police Violence Reduces Civilian Cooperation and Engagement with Law Enforcement*, Harvard Scholar 3 (Sept. 20, 2021), https://tinyurl.com/bdf92dh8; Matthew Desmond et al., *Police Violence and Citizen Reporting in the Black Community*, 81 Am. Soc. Rev. 857, 870 (Sept. 29, 2016), https://tinyurl.com/427kd6d3.

"No single factor has been more crucial to reducing crime levels than the partnership between law enforcement agencies and the communities they serve." *Community-Police Engagement*, Int'l Ass'n Chiefs of Police, https://tinyurl.com/2s33z5b4 (last visited Nov. 14, 2024). For this reason, nationally recognized leaders in law enforcement have increasingly trained officers to use tactics and techniques to promote safety and avoid unnecessary risks. The Fourth Amendment, animated by reasonableness and considering all material facts, should account for whether officers chose to apply them.

CONCLUSION

For the foregoing reasons, the undersigned amici urge this Court to reverse the decision below.

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