

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JANICE HUGHES BARNES, INDIVIDUALLY)

AND AS REPRESENTATIVE OF THE)

ESTATE OF ASHTIAN BARNES, DECEASED,))

Petitioner,)

v.) No. 23-1239

ROBERTO FELIX, JR., ET AL.,)

Respondents.)
- - - - -

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4 AND AS REPRESENTATIVE OF THE)
5 ESTATE OF ASHTIAN BARNES, DECEASED,)
6 Petitioner,)
7 v.) No. 23-1239
8 ROBERTO FELIX, JR., ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Wednesday, January 22, 2025
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:04 a.m.
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-1239, Barnes versus Felix.

Mr. Zelinsky.

ORAL ARGUMENT OF NATHANIEL A.G. ZELINSKY
ON BEHALF OF THE PETITIONER

MR. ZELINSKY: Mr. Chief Justice, and may it please the Court:

We are here today because Ashtian Barnes was shot and killed on the side of a Texas highway after being pulled over for unpaid tolls. The question before this Court is how to determine whether Ashtian's Fourth Amendment rights were violated.

The Fourth Amendment prohibits unreasonable seizures. Justice Scalia was no fan of a totality-of-the-circumstances test, but, in Scott, Justice Scalia made clear that courts must "slosh through the fact-bound morass of reasonableness."

In this case, the district court and the Fifth Circuit didn't do that. Instead, they applied the "moment of the threat" doctrine.

1 According to the Fifth Circuit decision below,
2 "we may only ask whether Officer Felix was in
3 danger at the moment of the threat," and "any of
4 the officer's actions leading up to the shooting
5 are not relevant."

6 This kind of legal amnesia is
7 incompatible with precedent, conflicts with
8 common law, and defies common sense. Until now,
9 Respondents had embraced the "moment of the
10 threat" doctrine, but, before this Court,
11 Respondents have abruptly shifted position.
12 They now argue that courts should look to what
13 occurs before the moment of the threat and apply
14 the law of self-defense and superseding cause.
15 Absolutely none of this appears in the decision
16 below. All of it confirms why the "moment of
17 the threat" doctrine is so wrong.

18 Finally, as Judge Higginbotham
19 underscored in his concurrence, the facts show
20 that Officer Felix acted unreasonably. But this
21 is a court of review, not of first view. The
22 Court should rule for Petitioner on the sole
23 question presented and remand for the lower
24 courts to apply the correct constitutional
25 standard.

1 I welcome this Court's questions.

2 JUSTICE THOMAS: Under your approach,
3 what would that correct standard look like and
4 how would it be applied here?

5 MR. ZELINSKY: Justice Thomas, we
6 think the standard is the "totality of the
7 circumstances" standard that this Court
8 articulated in Graham and Garner, Scott, and
9 Plumhoff. In this particular case, it would
10 require looking at more than just the two
11 seconds in which Officer Felix was on the moving
12 vehicle. It would require asking was there a
13 reason for Officer Felix --

14 JUSTICE THOMAS: How much more than
15 the -- than the last two seconds?

16 MR. ZELINSKY: Justice Thomas, if you
17 include an extra three seconds, then you would
18 look at the seizure in its totality. I think
19 that this Court shouldn't be drawing bright-line
20 rules on exactly how much of the seizure should
21 or shouldn't come in. That's what Justice
22 Scalia underscored in Scott. There are no rigid
23 rules.

24 And courts can apply ordinary
25 principles of relevancy and proximate cause to

1 determine the -- the reasonableness of a
2 seizure.

3 JUSTICE KAVANAUGH: Was it reasonable
4 to -- for the officer to jump on the side of the
5 car?

6 MR. ZELINSKY: So, Just -- Justice
7 Kavanaugh, we don't think it was in this
8 particular case, but that's precisely the issue
9 that the lower courts couldn't evaluate because
10 they applied this legal amnesia and only look at
11 the fact that the officer was on the moving
12 vehicle. Judge Higginbotham, in his
13 concurrence, looked to the totality of the
14 circumstances and said: I think it was
15 unreasonable in this case.

16 We want the opportunity for a court to
17 be able to look at that and for us to be able to
18 litigate that core claim.

19 JUSTICE KAVANAUGH: What's an officer
20 supposed to do when at a traffic stop and
21 someone pulls away? Just let him go?

22 MR. ZELINSKY: No, Justice Kavanaugh.
23 I think there are a number of other options that
24 were available to Officer Felix that day. Let
25 me give you four.

1 First, the highway was a
2 camera-controlled highway. So you can monitor
3 all the cars by camera. That's, in fact, how
4 Ashtian Barnes was pulled over in the first
5 place. The cameras automatically identified his
6 car as one with unpaid tolls.

7 Second, he could have radioed to
8 somebody else on the road to follow Ashtian
9 Barnes.

10 Third, he could have gotten back into
11 his squad car and followed him.

12 And, fourth, they also had the car's
13 license plate.

14 So we're not suggesting that somebody
15 should just get away scot-free, but it is
16 unreasonable to use deadly force because what
17 happened was Officer Felix put himself in a
18 position where he had no alternative but to
19 shoot the driver. And that's unreasonable, and
20 you have to look at the whole picture, not just
21 the two seconds in which he's on the car.

22 JUSTICE ALITO: Did the officer
23 violate the Fourth Amendment at any point prior
24 to the time when he used deadly force? If he
25 had not -- if he had not used deadly force, but

1 he had jumped on the side of the car and done
2 everything else he did prior to that moment,
3 would there be a violation of the Fourth
4 Amendment?

5 MR. ZELINSKY: So, Justice Alito, we
6 had brought a predicate claim below about the
7 drawing of the firearm. My friends on the other
8 side have suggested we should have brought a
9 predicate claim based on the jumping onto the
10 car. But, at the end of the day, I don't think
11 that it matters whether there is a predicate
12 claim because, in the -- let me give you an
13 analogy. In the search context, you have an
14 obligation to knock before you search. There's
15 no freestanding requirement under the Fourth
16 Amendment if you're an officer standing outside
17 a door to knock. But, if you are going to
18 engage in a search, we evaluate the
19 reasonableness of that search by looking a
20 couple seconds before, did you knock?

21 JUSTICE ALITO: Well, my question --

22 MR. ZELINSKY: It's the same thing
23 here.

24 JUSTICE ALITO: The reason for the
25 question is to probe whether you are using the

1 term "unreasonable" in a sense that's different
2 from the sense in which the Fourth Amendment
3 prohibits unreasonable searches and seizures.
4 So "unreasonable" has a particular meaning when
5 the Court has to decide whether there was a
6 Fourth Amendment violation. But, in lay speech,
7 "unreasonable" could go to whether the action
8 was prudent, whether it was a violation of best
9 police practices or the practices of a
10 particular police department.

11 Those are not necessarily the same
12 thing. In fact, it seems that they're probably
13 different. So you are eliding these two
14 different meanings of "reasonable." Now maybe
15 that's -- maybe that's sound. Maybe that's
16 unsound.

17 MR. ZELINSKY: Justice Alito, what
18 we're asking for is the standard that this Court
19 has applied in Garner, Graham, and Scott and
20 Plumhoff, which is you have to look at the --
21 the balance here. There's, on the one side, the
22 state interest in seizing someone in a
23 particular manner. On the other side, there is
24 the harm to the suspect, here, the ultimate
25 harm, the loss of his life.

1 The problem in this case is that the
2 Fifth Circuit couldn't engage in that core
3 balancing because it couldn't ask was there a
4 really pressing reason for an officer to jump
5 onto a car and give himself no other opportunity
6 but to shoot the driver.

7 JUSTICE ALITO: Well, would you be
8 satisfied with a narrow holding that it is wrong
9 to -- it is wrong for a court to look just at
10 the moment of the threat, that the court has to
11 judge the reasonableness of the alleged
12 unreasonable seizure based on -- taking into
13 account to whatever extent they are relevant the
14 events that occurred before that? Would you be
15 satisfied if we just did that --

16 MR. ZELINSKY: I think we would,
17 Justice --

18 JUSTICE ALITO: -- and not get into
19 these other, more difficult questions?

20 MR. ZELINSKY: One hundred percent. I
21 think it would be helpful if the Court makes
22 clear that that means that you can look at the
23 jump in addition to the shoot, right? That's
24 the core issue that we want to be able to
25 litigate. But, yes, Justice Alito, we'd be

1 happy with a very narrow holding.

2 JUSTICE JACKSON: So, Mr. --

3 JUSTICE SOTOMAYOR: You don't want to
4 limit it just to that, though. I mean, I
5 thought that the totality of the circumstances,
6 as we described it, has at least three factors,
7 the nature of the crime for which the stop
8 occurred, the circumstances, et cetera.

9 The three minutes, are you starting
10 that from the moment that the stop occurred --

11 MR. ZELINSKY: So --

12 JUSTICE SOTOMAYOR: -- and the reason
13 for it, or are you stop -- or you want to do it
14 just from when he jumped on the car?

15 MR. ZELINSKY: So we don't want to
16 look at it just from when he jumps on the car.

17 JUSTICE SOTOMAYOR: Right.

18 MR. ZELINSKY: I do think you have to
19 consider things like what he's stopped for. My
20 friends on the other side, by the way, agree on
21 that, because they say all of that comes in
22 because it's part of the officer's mind.

23 JUSTICE SOTOMAYOR: I -- I know.

24 MR. ZELINSKY: So --

25 JUSTICE SOTOMAYOR: We'll get to that

1 with them, which is --

2 MR. ZELINSKY: Yeah. So --

3 JUSTICE SOTOMAYOR: -- they -- they --
4 they want to make it a totality-of-the-
5 circumstance case, but that's not what the Fifth
6 Circuit said.

7 MR. ZELINSKY: Totally.

8 JUSTICE SOTOMAYOR: But I can ask
9 those -- them that question.

10 Having said that, there is a split of
11 8 to 4 --

12 MR. ZELINSKY: Mm-hmm.

13 JUSTICE SOTOMAYOR: -- on this
14 question: whether the Court needs to look at
15 the totality or just the moment of threat.

16 Correct?

17 MR. ZELINSKY: That's correct, Justice
18 Sotomayor.

19 JUSTICE SOTOMAYOR: So, if we do what
20 Justice Alito has defined as a narrow approach,
21 that's not really narrow. That's deciding a
22 circuit split, correct?

23 MR. ZELINSKY: Yes. Can I add a
24 "but" --

25 JUSTICE SOTOMAYOR: Mm-hmm.

1 MR. ZELINSKY: -- to clarify my answer
2 to Justice Alito?

3 I think you could resolve this case by
4 saying: The moment of the threat doctrine is
5 wrong. It was too narrow. It didn't apply the
6 totality of the circumstances. And we, this
7 Court, are not going to try and delineate every
8 mete and bound in every case.

9 I think --

10 JUSTICE SOTOMAYOR: You've given up in
11 your reply brief, I understood, that you're not
12 asking us to -- the -- the -- to address the
13 question of what an officer-created danger rule
14 is like?

15 MR. ZELINSKY: We're not asking for an
16 officer-created danger test at all.

17 JUSTICE SOTOMAYOR: And -- and that
18 wasn't even addressed below, correct?

19 MR. ZELINSKY: That's correct.

20 JUSTICE SOTOMAYOR: Okay. Thank you.

21 JUSTICE JACKSON: Mr. Zelinsky --

22 JUSTICE KAVANAUGH: You --

23 JUSTICE BARRETT: So you're happy with
24 the -- you're happy with the narrow -- I'm going
25 to call it narrow in the sense that if we said

1 moment of the threat is wrong and we don't
2 articulate a precise standard, other than saying
3 our regular totality-of-the-circumstances test
4 applies, as Justice Sotomayor said, that's
5 really what you're asking for?

6 MR. ZELINSKY: I think, in this case,
7 we're trying to be able to litigate the fact
8 that he jumped onto a car. And we have sharply
9 different views. My friend on the other side
10 and I have sharply different views about whether
11 it was reasonable to jump onto that car. That's
12 the issue we were not able to litigate.

13 I think this Court doesn't need to go
14 and say: In every case, here are the metes and
15 bounds.

16 I do think, Justice Barrett, if you
17 want to put a little bit of flesh on the bones
18 of that test, you could look to your decision in
19 Biegert for the Seventh Circuit, where you said
20 an officer might act unreasonably where they're
21 primarily responsible for the danger.

22 JUSTICE BARRETT: And you would be
23 happy with that language?

24 MR. ZELINSKY: We would be happy with
25 that language.

1 JUSTICE BARRETT: And you don't have a
2 position on whether a prior Fourth -- it kind of
3 goes to Justice Alito's point, whether kind of a
4 predicate Fourth Amendment violation that's
5 unrelated to the excessive force necessarily
6 means that if the -- if the officer violated
7 constitutional rights -- let's imagine it's not
8 a car stop, let's imagine it's a home entry or
9 something like that -- you know, that then it's
10 off the table. After that, even if things
11 devolve --

12 MR. ZELINSKY: No. And --

13 JUSTICE BARRETT: -- the officer put
14 himself in this situation?

15 MR. ZELINSKY: -- in fact -- well, I
16 have two answers to that.

17 The first is, in *Mendez*, this Court
18 already held that where the damages are the
19 foreseeable consequences of that predicate
20 violation --

21 JUSTICE BARRETT: Yeah.

22 MR. ZELINSKY: -- then they are on the
23 table. I think that goes a long way toward
24 disproving the parade of horrors on the other
25 side because you are, in those cases, going to

1 look at preceding conduct.

2 But the second answer to your question
3 is that we, of course, agree, things like
4 superseding cause. Again, your decision in
5 Biegert for the Seventh Circuit is a great
6 example of that. Superseding cause comes into
7 play.

8 The Fifth Circuit couldn't apply those
9 kinds of tests because all it looks at is the
10 fact that Officer Felix is standing on that
11 vehicle. And that's why it's so concerning. It
12 prevents you from engaging in that core Fourth
13 Amendment balancing: What was the nature of the
14 government interest on the one hand? What was
15 the harm to the individual on the other?

16 JUSTICE KAVANAUGH: Do you agree with
17 the language in the Seventh Circuit opinion that
18 said it applies when the officer created a
19 situation where deadly force became essentially
20 inevitable?

21 MR. ZELINSKY: I think that that is
22 our view of this case, Justice Kavanaugh.
23 Once --

24 JUSTICE KAVANAUGH: And are you asking
25 then -- I realize you're going to say this is

1 for the Fifth Circuit on remand, but I'm going
2 to ask it anyway.

3 Are officers always prohibited at
4 traffic stops, when the car pulls away, from
5 jumping on the car?

6 MR. ZELINSKY: Absolutely not.

7 JUSTICE KAVANAUGH: Okay. When can
8 they and when can't they?

9 MR. ZELINSKY: Let me give you an
10 example when they can. Let's say they see an
11 abducted child in the back seat, and they know,
12 if they don't jump onto the car then, something
13 terrible might happen to that abducted child.

14 That's a -- a type of the totality-of-
15 the-circumstances inquiry that looks at: What's
16 the nature of the government interest at play?
17 What's the harm to the individual?

18 In this particular case, we're talking
19 about unpaid tolls. So we want to be able to
20 argue down the Fifth Circuit --

21 JUSTICE KAVANAUGH: Well, true. But,
22 obviously, you know, traffic stops sometimes
23 identify people who are doing things that are
24 much worse. Oftentimes, major criminals are
25 apprehended for things like that, and I can give

1 you some historical examples that are obvious,
2 but -- so I don't know that an officer can
3 assume that's the only thing going on.

4 And if someone's pulling away, they
5 could be a danger to others on the road. Who
6 knows what's going on, right?

7 MR. ZELINSKY: So, Justice Kavanaugh,
8 that's precisely -- and -- and maybe this was
9 prefaced in your opening colloquy, but that's
10 precisely what the Fifth Circuit couldn't engage
11 in in this case. And so -- so I agree that
12 there may be some circumstances --

13 JUSTICE KAVANAUGH: And when an
14 officer jumps on the car, the deadly force can
15 be avoided by -- by the driver too.

16 MR. ZELINSKY: Well, in this
17 particular case, Officer Felix's own expert
18 testifies that Officer Felix shot so quickly,
19 Ashtian Barnes didn't have time to stop.

20 And -- and if I could, let me sketch
21 out, Justice Kavanaugh, why it's so dangerous
22 for you to shoot a driver. In fact, there is --
23 I'm not aware of any police department that
24 recommends that its officers shoot drivers.

25 The high likelihood -- in this

1 particular case, Ashtian Barnes didn't
2 immediately die. He was able to brake the car
3 and put it into park. If he had been
4 immediately killed, that car could have careened
5 and crashed into the highway. Officer Felix put
6 other people on that highway in grave, very
7 serious danger that particular day.

8 So I don't think it's just a he's
9 jumping on to stop Ashtian from getting away.
10 He's also jumping on in a manner that is going
11 to put a lot of other people at risk.

12 JUSTICE JACKSON: Mr. Zelinsky, can I
13 take you back to the question presented, which
14 is whether or not it was correct for the Fifth
15 Circuit to apply the moment of threat doctrine.
16 What is your understanding of that doctrine?

17 I guess I was surprised that
18 Respondent in this case at this time sort of has
19 created now a conception of it that did not seem
20 to align with what the Fifth Circuit said.

21 So what is your view of the moment of
22 the threat doctrine?

23 MR. ZELINSKY: So, Justice Jackson,
24 Judge Higginbotham was very clear in his
25 decision below. You cannot look at any of the

1 officer's actions prior to the moment of the
2 threat. He's joined in that decision by Judge
3 Elrod and Judge Smith. Respondents themselves
4 agreed below that you can't look at anything
5 prior to the moment.

6 JUSTICE JACKSON: And do you perceive
7 them now to be saying that you can look at some
8 things?

9 MR. ZELINSKY: Yes.

10 JUSTICE JACKSON: So that's a
11 different concept?

12 MR. ZELINSKY: A hundred percent.
13 And, Justice Jackson, they've gone so far as to
14 say, if an officer jumps in front of a moving
15 car and shoots the driver, that's unreasonable.
16 Well, that's our view of this case.

17 And part of the problem is we weren't
18 able to have a lower court look at the totality
19 of the circumstances and decide was this like a
20 case in which you jump in front of a car and
21 immediately shoot the driver.

22 JUSTICE KAVANAUGH: Do you agree with
23 the language in the Solicitor General's brief
24 that says the circumstances at the moment that
25 force is used will generally have primary

1 significance in the analysis?

2 MR. ZELINSKY: So I think that there's
3 very little daylight between us and the
4 Solicitor General. I think that language,
5 Justice Kavanaugh, is descriptive. So it's
6 describing that in the vast majority of these
7 cases --

8 JUSTICE KAVANAUGH: Do you agree with
9 it?

10 MR. ZELINSKY: I do --

11 JUSTICE KAVANAUGH: Okay.

12 MR. ZELINSKY: -- in its descriptive
13 aspect.

14 JUSTICE KAVANAUGH: And do you agree
15 with when the Solicitor General says the type of
16 situation that was described in Biegert will be
17 rare?

18 MR. ZELINSKY: I think that the --
19 there are a series of reoccurring fact patterns.
20 I think there are two of them. I think that the
21 jumping in front of or onto car does occur with
22 some frequency. So we cited in our reply brief
23 a study of 400 stops that found that there is a
24 routine problem of officers jumping in front of
25 cars -- in the article, it's described "in a

1 Hollywood style" -- and then shooting the
2 driver.

3 The other reoccurring fact pattern is
4 a pattern where officers fail to identify
5 themselves, and the suspect, exercising his or
6 her own Second Amendment rights to self-defense,
7 pulls out a firearm.

8 The Fifth Circuit alone has two cases
9 in which they apply the moment of the threat
10 doctrine. The cases are Cass and Royal. And
11 they say: We can't look at the fact that the
12 officer failed to identify himself. We can only
13 look at the fact that the officer faced a loaded
14 gun.

15 And that, by the way, is just sharply
16 inconsistent with how the common law approached
17 the exact same circumstance. And that's a very
18 strong indication --

19 JUSTICE KAVANAUGH: On the jumping in
20 front of the car, I think you said this earlier,
21 but sometimes it'll be reasonable and sometimes
22 not?

23 MR. ZELINSKY: So, yeah, let me give
24 you an example maybe where it might be
25 reasonable just to help flesh it out.

1 Take the tragic terrorist attack in
2 New Orleans. In that particular case, someone
3 used a car as a weapon of terror. If an officer
4 had jumped in front of the car and shot the
5 driver, that officer would be a hero, and it's
6 because the state interest in that case in
7 seizing that terrorist is incredibly high.

8 Again, that's the type of balancing
9 that the Fifth Circuit just couldn't engage in
10 in this case.

11 JUSTICE ALITO: Well, here, the stop
12 is for a failure to pay tolls. But we could
13 ratchet up very gradually the severity of the
14 reason for the stop, and at what point would
15 the -- would the offense become sufficiently
16 serious, if -- at what point, if any, would the
17 offense become sufficiently serious in your
18 judgment to make it reasonable for the officer
19 to get on the sill of the car?

20 MR. ZELINSKY: So, Justice Alito, it's
21 a very difficult question to answer because, as
22 this Court has said, that it is a fact-specific
23 question that's going to depend in each given
24 case. And there are no magic rules. There's no
25 on/off switch. And that's Justice Scalia and

1 Scott. You can't just start drawing the lines
2 precisely because these cases are so numerous
3 and there are so many different permutations.

4 And so I think it would be very
5 dangerous to start drawing those lines.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 Justice --

10 JUSTICE SOTOMAYOR: What do you do
11 with the cases cited by the other side where the
12 Fifth Circuit does appear not to apply the
13 moment of threat docket -- doctrine and does
14 take into account more of the totality of
15 circumstances?

16 MR. ZELINSKY: So, Justice Sotomayor,
17 let me give you three responses.

18 First, there's never a Fifth Circuit
19 case where they actually look at the officer's
20 prior conduct and say that's part of the
21 calculus and it goes against the officer. So
22 it's always -- whenever they might do it, it's
23 only in the officer's benefit.

24 The second, the best case --

25 JUSTICE SOTOMAYOR: Some of my

1 colleagues might agree with that. Why should we
2 not?

3 MR. ZELINSKY: Because you have to
4 look -- reasonableness. The framers gave us a
5 test of reasonableness, and that is a -- it's a
6 two-way street, not a one-way ratchet. And it
7 requires --

8 JUSTICE SOTOMAYOR: The common law --
9 you gave the prime example in the common law,
10 which is, if an officer -- a plain clothes
11 officer doesn't announce he's an officer and
12 pulls out a gun --

13 MR. ZELINSKY: Yes.

14 JUSTICE SOTOMAYOR: -- under that
15 circumstance, the common law would say someone
16 can defend themselves and pull out a gun?

17 MR. ZELINSKY: Yes.

18 JUSTICE SOTOMAYOR: All right.

19 MR. ZELINSKY: Yes.

20 JUSTICE SOTOMAYOR: So -- okay. Go
21 ahead with your --

22 MR. ZELINSKY: And then the other
23 response to your question -- and I -- and I have
24 two more answers. The first is that there's
25 just a wealth of Fifth Circuit cases that come

1 out in the other direction and are just
2 crystal-clear.

3 So I would just direct the Court to
4 the Harris v. Serpas case, and that's quoted by
5 Judge Higginbotham in his decision below. In
6 Harris, the Fifth Circuit goes out of its way to
7 say this Court has narrowed that test, and "that
8 test" is referring to the Graham test. They are
9 self-consciously clear that they are narrowing
10 this Court's precedent.

11 And the court then goes on to say any
12 of the officer's actions leading up to the
13 shooting are not relevant for the purposes of an
14 excessive force inquiry in this circuit. So
15 that's a categorical bar.

16 And then the third point is that in
17 this case, you don't just have Judge
18 Higginbotham who's describing the split or
19 the -- the moment of the threat doctrine; you
20 also have Judge Elrod and Judge Smith who sign
21 on to that panel decision, and all of them agree
22 this is how the doctrine operates in the Fifth
23 Circuit.

24 JUSTICE SOTOMAYOR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Kavanaugh?

2 Justice Barrett?

3 Justice Jackson?

4 Thank you, counsel.

5 Ms. Jacoby.

6 ORAL ARGUMENT OF ZOE A. JACOBY

7 FOR THE UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING VACATUR AND REMAND

9 MS. JACOBY: Mr. Chief Justice, and
10 may it please the Court:

11 The Fifth Circuit analyzed this case
12 by examining only the so-called moment of the
13 threat and categorically ignoring all prior
14 events. None of the parties defends that
15 approach. That is because reasonableness is
16 assessed under the totality of the circumstances
17 and pre-force events can be critical to that
18 assessment.

19 Prior events often show that the force
20 was reasonable. For example, police may have
21 issued warnings or attempted deescalation, all
22 of which a split-second moment-of-the-threat
23 doctrine misses. Of course, when officers face
24 a moment of danger, that is by far the most
25 important factor under Graham. But, in rare

1 cases, a moment of danger doesn't tell the whole
2 story. If the danger was manufactured entirely
3 by police conduct outside the bounds of
4 reasonable behavior and not by the suspect's
5 intervening apparent misconduct, it is
6 unreasonable to use force in the moment.

7 The panel's approach fails to provide
8 a constitutional backstop in those cases, and it
9 disregards context that may show that force was
10 reasonable in others.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Would that also
13 include -- those circumstances also include the
14 conduct of the victim that preceded the
15 shooting?

16 MS. JACOBY: Absolutely. And, as we
17 explained in our brief, the officer's conduct
18 and the suspect's conduct are often intertwined.
19 It's how the suspect reacted to what the officer
20 did. And that can be very important in the
21 reasonableness assessment.

22 JUSTICE THOMAS: And the other way,
23 how the officer reacted to the victim?

24 MS. JACOBY: Exactly. It's truly a
25 totality-of-the-circumstances approach, and the

1 Fifth Circuit's narrow, cramped reasoning didn't
2 allow for any of that to be considered.

3 CHIEF JUSTICE ROBERTS: Is there --

4 JUSTICE BARRETT: Ms. Jacoby, what do
5 you -- oh, sorry, Chief.

6 CHIEF JUSTICE ROBERTS: I just
7 wondered, is there any area where you disagree
8 with the Petitioner?

9 MS. JACOBY: No. I think that what
10 Petitioner's just articulated aligns well
11 with -- with our view, and I'm glad to hear that
12 he endorses some of the statements in our -- in
13 our brief. We agree this Court doesn't need to
14 go further than just saying that the Fifth
15 Circuit's approach here was wrong because it
16 focused only on a narrow two-second snippet of
17 the encounter rather than looking at the
18 entirety, and the Court probably doesn't need to
19 go further and delineate the precise bounds of
20 when force will be sort of reasonable or not.

21 And -- and so I think we don't have a
22 lot of daylight. To be honest, I don't think we
23 have a lot of daylight between us and
24 Respondents either because Respondent also seems
25 to agree now that pre-force circumstances

1 matter. And I think Respondent also agrees that
2 a moment of danger doesn't tell the whole story
3 because, at page 33 and 34 of his brief, he
4 agrees there are circumstances where there can
5 be an imminent danger to the officer and the use
6 of force can still be reasonable.

7 JUSTICE KAVANAUGH: What do you tell
8 an officer who pulls someone over for a traffic
9 violation, but, as often, or not often, but
10 sometimes happens, that person has done or is
11 planning to do something more serious and, you
12 know, driving away is one potential indicator of
13 that? An officer does not get the time we've
14 spent here today to make the decision, do I let
15 it go knowing that this person could do serious
16 harm or has done and we'll never catch the
17 person, or do I jump on the car? And they have
18 to make that decision in about -- what do you
19 tell them?

20 MS. JACOBY: So, Justice Kavanaugh, we
21 completely agree that the -- the Graham inquiry
22 has to be very sensitive and deferential to the
23 officer's need for -- for split-second
24 decision-making. I think the training, the
25 guidance we would have officers be given is one

1 that officers are already trained under, as
2 Petitioner points out at page 41 of -- of her
3 brief. Basically, you may use force to respond
4 to a danger to yourself or the public, but don't
5 manufacture a situation where the use of force
6 becomes essentially inevitable. And I think
7 that kind of guidance would be helpful to
8 officers.

9 When they are in a split-second moment
10 in a traffic stop, as you're discussing, it may
11 often be reasonable to use force to stop the --
12 the vehicle. A vehicle can be a dangerous
13 weapon, as this Court has recognized. But
14 that's not true in every single case, and the
15 Graham inquiry has to be case-sensitive to that
16 also.

17 JUSTICE KAVANAUGH: Well, I think the
18 officers are going to want to know do I let him
19 go or do I not let him go as a general
20 proposition when someone pulls away from a
21 traffic stop, or do I try to jump on the car,
22 jump in front of the car. And I don't know that
23 your -- and I realize we're not going to flesh
24 all this out in this case, but officers are
25 presumably paying attention to this, and they

1 have to make those decisions all the time. I'm
2 curious, let him go or not?

3 MS. JACOBY: Of course. I think it's
4 going to depend on what you've pulled them over
5 for: if you know or suspect them to be armed;
6 how they are behaving in your interaction with
7 them; if you're getting the sense that, as they
8 pull away, they're going to pose right away a
9 big danger to people on the road.

10 And Respondent says that that was the
11 case here, and it may well have been, and it may
12 well have been reasonable to -- to use force to
13 stop the officer or to jump on the car to -- to
14 stop Barnes from getting away. But the Fifth
15 Circuit just didn't consider any of that, and
16 that's what we think is wrong.

17 JUSTICE KAGAN: I assume --

18 CHIEF JUSTICE ROBERTS: Is this an
19 objective or subjective inquiry in terms of what
20 type of conduct is going to create the danger?
21 I mean, it's like -- what about in sort of the
22 equivalent of an eggshell plaintiff? I mean, is
23 the officer subject to varieties in terms of
24 reaction from people that he pulls over?

25 MS. JACOBY: Mr. Chief Justice,

1 it's -- the Fourth Amendment test is always an
2 objective reasonableness test. We're not
3 looking into the subjective state of mind of the
4 officer to see if he was acting in good faith or
5 being particularly sensitive or something like
6 that. It's whether he acted objectively
7 reasonably. I do want to briefly --

8 CHIEF JUSTICE ROBERTS: I'm thinking
9 more of the -- of the perpetrator in the
10 officer's mind. I mean, maybe somebody is --
11 really -- really views something as -- as a
12 serious danger, and the officer doesn't know
13 that. Is that at all pertinent?

14 MS. JACOBY: I think the officer
15 should take into account sort of the imminence
16 of the threat he perceives. And he may perceive
17 that the suspect is about to -- you know, has a
18 bad motivation, is about to do something
19 dangerous, and -- and that does matter, but the
20 ultimate inquiry is the reasonableness of the
21 officer's perception that there was an imminent
22 threat and it was reasonable to use force.

23 I do want to just briefly address --
24 on the subject of objective versus subjective
25 standards. I think Texas argues in its amicus

1 brief, and we haven't had a chance to respond,
2 that we are sort of improperly inserting a
3 subjective element into the qualified immunity
4 inquiry because we say that reasonableness is
5 assessed based on the actual facts that the
6 officer knew.

7 That's not correct. Our test is an
8 objective reasonableness one. And this Court
9 has actually rejected that precise argument that
10 Texas makes in Anderson versus Creighton, which
11 is a case that Texas cites in its brief. If I
12 could quote from page 641 of the U.S. Reports
13 there, the Court says that the qualified
14 immunity inquiry "will often require examination
15 of the information possessed by the searching
16 officials. But, contrary to the Creightons'
17 assertion, this does not reintroduce into
18 qualified immunity analysis the inquiry into
19 official subjective intent that Harlow sought to
20 minimize." So this really is an objective test.

21 Of course, the -- the officer will be
22 making perceptions about whether the subject
23 that he's engaging with is acting in bad faith
24 or about to do something dangerous. But -- but
25 the ultimate inquiry is objective.

1 JUSTICE KAGAN: I assume -- tell me if
2 I'm wrong, but I assume that you would want us
3 to write an opinion that doesn't say anything
4 about the weight to be given to the officer
5 himself creating the danger.

6 But I'm -- I'm trying to think of --
7 of -- given the facts of this case, how an
8 opinion that you would want us to write avoids
9 that question entirely.

10 MS. JACOBY: I think the narrowest
11 opinion this Court could write would just be to
12 say: Prior circums matter -- circumstances
13 matter. They're part of the totality of the
14 circumstances. The Fifth Circuit didn't
15 recognize that.

16 If the Court wants to put more meat on
17 the bones, I think it could say, as we've said
18 in our brief: The circumstances at the moment
19 of the threat are going to have prime
20 importance, and it's going to be a rare case in
21 which an officer is experiencing a moment of
22 danger and it's nevertheless unreasonable to use
23 force.

24 And it's going to be the types of
25 cases where we're talking about and -- of the

1 sort that Justice Barrett recognized in her
2 Biegert opinion, where the officer has done
3 something outside the bounds of reasonable
4 behavior that essentially makes the use of force
5 almost inevitable. There's really no
6 intervening misconduct by the suspect.

7 JUSTICE GORSUCH: Why would we do
8 that? Why would we put a thumb on the scale
9 that way and -- and say that it's almost
10 impossible to make out a Fourth Amendment claim
11 in those circumstances given the varied nature
12 of encounters between police officers and
13 citizens across the country, the standard --
14 we've always said reasonableness is the totality
15 of the circumstances.

16 And, at common law, these are all
17 questions for the jury. And you also have
18 layered on top of the Fourth Amendment qualified
19 immunity to protect the officers in these cases.
20 Why would we -- why would we start creating a
21 new jurisprudence of exceptional circumstances?

22 MS. JACOBY: I don't think it would be
23 a -- a new jurisprudence or a thumb on the scale
24 so much as a reflection that when balancing the
25 Fourth Amendment interests of the individual and

1 the government, the government has a very strong
2 interest when there is an imminent danger to
3 himself or to the public.

4 But you're right, of course, it is a
5 totality-of-the-circumstances inquiry. And we
6 wouldn't be asking for a departure of that.

7 I think the reason the Court might
8 want to go further and -- and say it's going to
9 be rare when there truly is a moment of danger
10 is because you want to avoid a situation where
11 courts are taking this as license to do some
12 kind of officer-created danger rule, where
13 merely getting into a bad circumstance, making a
14 bad stop, means that the later use of force is
15 automatically unreasonable.

16 I think that would be what we're
17 trying to guard against, Justice Gorsuch.

18 JUSTICE JACKSON: But wouldn't we --

19 JUSTICE SOTOMAYOR: That's nice, but
20 this is not the issue before this Court,
21 correct?

22 MS. JACOBY: Correct. This Court does
23 not need to go -- to go any further than to say
24 that in this case --

25 JUSTICE SOTOMAYOR: And Justice Scalia

1 was very clear in his Scott writings that we
2 shouldn't be trying to do black-line rules here.

3 MS. JACOBY: Certainly. We're --
4 we're not asking for -- for black-line rules. I
5 think just, if the Court wanted to give more --
6 more color, it could say, as Justice Barrett
7 said in the Biegert opinion: We think, you
8 know, when there's a moment of danger, that's --
9 that's very often going to be dispositive but
10 not -- but not always --

11 JUSTICE SOTOMAYOR: Well, why don't we
12 just say it's important, just as everything is
13 important, but it's important? You're putting a
14 scale on it. By the words you use, you're
15 putting a thumb on it.

16 MS. JACOBY: This Court certainly
17 doesn't need to -- to say anything further
18 than -- than the narrow opinion that -- that
19 Justice Alito sketched out with my friend.

20 But I do think, given that the
21 question is the reasonableness of the use of
22 force in the moment, the circumstances in the
23 moment and the presence of a danger in the
24 moment will have to be quite important.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: Well, it's fine to
5 tell someone, a court or anybody else: Take
6 into account the totality of the circumstances.
7 But that's fairly meaningless unless you also
8 tell that person what -- what you are examining
9 the totality of the circumstances to determine.

10 And that's really the -- the difficult
11 question here. Are you examining the totality
12 of the circumstances to determine whether the
13 act that forms the gravamen of the Fourth
14 Amendment claim -- let's say it is the -- the
15 use -- the allegedly unreasonable use of deadly
16 force -- is unreasonable?

17 Or are you asking the court or the
18 jury to determine whether the whole course of
19 conduct in which the officer is engaged was
20 unreasonable, in part in the sense that it
21 wasn't prudent, it was in violation of perhaps
22 departmental policies or the best practices that
23 had been established for police department --
24 that -- that some people think should be
25 followed by police departments around the

1 country?

2 That -- that's really the difficult
3 question, and what -- what would you say to
4 that?

5 MS. JACOBY: I would say, Justice
6 Alito, the former. The question is: Was the
7 use of force, the seizure, reasonable in the
8 moment? That's what we're trying to get at when
9 we look at the totality of circumstances.

10 We're not doing some sort of
11 freewheeling inquiry into whether the officer
12 overall, over the course of five minutes, acted
13 reasonably.

14 So -- so that is why we think the
15 circumstances in the moment do have prime
16 importance. But that does not mean that courts
17 have a license to ignore everything before that
18 moment, as the Fifth Circuit did here.

19 JUSTICE ALITO: Well, would it be --
20 would a court hearing this case be obligated to
21 admit expert testimony by various individuals
22 who have a view about what are good police
23 practices and what are not good police
24 practices? Would the -- would that be what the
25 jury's determination would boil down to?

1 MS. JACOBY: So the ultimate
2 determination here about whether the officer
3 acted reasonably is, according to Scott, a pure
4 question of law. The jury's not deciding that.

5 The jury could be making factual
6 determinations about what actually happened, you
7 know, when the officer jumped and -- and all the
8 rest.

9 As the Court is examining whether that
10 initial thing that the officer did here, jumping
11 on the car, was outside the bounds of reasonable
12 behavior, I do think it's appropriate to look at
13 training manuals and the like. That can't
14 resolve the question, but that could provide
15 helpful guidance.

16 JUSTICE ALITO: Well, there are
17 federal -- there are some federal law
18 enforcement officers who make vehicle stops. So
19 what is the -- the teaching? Do you know?
20 What -- what are they taught about placing
21 themselves in front of the car or in a position
22 where they could be killed or injured if the
23 driver decides to try to drive away?

24 MS. JACOBY: I don't know across the
25 board a rule for stepping in front of cars. I

1 know that federal officers are trained to use
2 force to respond to danger but not to enter into
3 situations where the use of force becomes sort
4 of inevitable. That's like the DHS manual that
5 my friend points to at page 41 of her brief.

6 I think, again, we don't really train
7 officers to go right up to the constitutional
8 line. We often will train officers to not enter
9 in these situations to begin with even if -- if
10 they ultimately do so, it could end up being not
11 a Fourth Amendment violation. So I suspect we
12 would train officers not to -- you know, to
13 frequently avoid using force on roads and
14 whatnot, even if it would be permissible under
15 the circumstances to do so, because we just want
16 to -- to train them more cautiously, I suspect.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: No. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: I just am curious,
25 after this case gets resolved on remand, if it

1 goes back on remand, what the rule will be for
2 officers and what those training manuals will
3 say. You know, put aside the abducted child
4 example.

5 Someone's pulling away, it might be
6 they just don't feel like they want to be
7 hassled for a traffic violation, but they could
8 be, you know, about to drive down the street in
9 New Orleans. You don't know. Or they might be
10 on drugs and about to kill someone else who's,
11 you know, on a bike on the side of the road.

12 And I don't know what we want officers
13 to do, and I don't know how that's going to get
14 fleshed out. But I'm not -- you know, officers,
15 if they're held liable for jumping on cars, for
16 anything that happens thereafter, are just going
17 to let cars go. And maybe that's the rule that
18 the United States thinks is appropriate. I
19 don't know.

20 MS. JACOBY: That's not the rule the
21 United States thinks is appropriate. I do think
22 that it is sometimes appropriate to use force to
23 stop a car from -- from pulling away from a
24 stop. I think Brosseau is good guidance on
25 that.

1 But Brosseau also says that the use of
2 force to stop a vehicular flight is necessarily
3 a context-specific thing. I think it says in
4 Brosseau that that is an area that depends very
5 much on the facts of each case.

6 So I recognize that can be
7 unsatisfying. In giving guidance to officers,
8 police departments may well say: You know,
9 don't jump on the car no matter what, unless you
10 see a weapon or something like that.

11 Again, they may train them not to go
12 all the way up to the Fourth Amendment line, but
13 we don't think that --

14 JUSTICE KAVANAUGH: Well, an
15 individual officer too would be --

16 MS. JACOBY: -- there is at a point
17 until they can't --

18 JUSTICE KAVANAUGH: -- an individual
19 officer would be -- who would -- would be --
20 who's risk-averse on being held liable for
21 something like this is just not going to do it.

22 But anyway, I'll -- I'll stop there.
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Ms. Jacoby, to -- to
2 this point, there is a split on this. So what
3 about in the circuits that don't take the
4 moment-of-threat approach, these questions that
5 Justice Kavanaugh is asking about guidance for
6 police officers?

7 I'm just wondering what your view is
8 of how courts are handling these kinds of cases
9 in that circuit in ways that might affect police
10 behavior.

11 MS. JACOBY: So I do think, actually,
12 the split is maybe not so much a two-sided split
13 as a three-sided. I do think there have been
14 some courts that veer a little bit towards an
15 officer-created danger rule, where they seem to
16 say that -- almost suggest that the use of force
17 is automatically unreasonable if earlier in the
18 sequence the officer did anything unreasonable.

19 And we don't think that's correct, and
20 we do think that would be bad guidance for
21 officers and would lead them to police less
22 aggressively than they need to be able to.

23 But I think, in a -- in a court that
24 appropriately takes into account the totality of
25 the circumstances, officers will have good

1 guidance to use force when necessary, when --
2 when there's a danger and they need to protect
3 themselves or the public.

4 But, to avoid situations, as I said,
5 where, you know -- to avoid manufacturing a
6 situation where the use of force effectively
7 becomes inevitable. That's, you know, jumping
8 in front of the car, that type of thing. Again,
9 obviously, Respondent disputes that's what he's
10 done here. Petitioner thinks it is. That's
11 what they'll sort of hash out below. But I
12 think guidance that says you can use force to
13 respond to danger, don't manufacture a dangerous
14 situation, would -- would go a long way.

15 JUSTICE BARRETT: So you say -- you
16 said it's a three-sided split and you're kind of
17 saying Fifth Circuit on one side and then these,
18 you know, officer-fabricated or officer-caused
19 dangers on the other side. What about those
20 circuits in the middle and this concern that,
21 you know, Justice Kavanaugh is correctly
22 expressing about what cops do in the moment?
23 And in that -- in those circuits that take the
24 more middle approach, I take it that's what the
25 United States is supporting?

1 MS. JACOBY: Correct. Correct.

2 JUSTICE BARRETT: And this isn't a
3 problem in those circuits or -- or it is?

4 MS. JACOBY: I don't think so. I
5 mean, we have amicus briefs on the other side
6 from, for example, the law enforcement officers
7 from Wisconsin, which is in the Seventh Circuit,
8 which does take this kind of more
9 middle-of-the-road approach, and I don't see in
10 their brief something saying that they have a
11 uniquely difficult time policing. I think they
12 are, of course, going to have to make
13 split-second decisions, and very often in the
14 cases where a court sort of ultimately decides
15 that the decision they made was on the wrong
16 side of the line, they'll still be protected by
17 qualified immunity.

18 So, of course, we are definitely very
19 concerned as the United States about officers
20 not being able to engage in aggressive-enough
21 policing. They need to be able to. But -- but
22 we don't think that a totality-of-the-
23 circumstances approach, which is what Graham
24 cautions, what Scott cautions, what this Court
25 has endorsed over and over again, would lead

1 down that path.

2 JUSTICE BARRETT: And last question,
3 what's the deal -- you know, in Respondent's
4 brief at Footnote 3, it says "United States
5 questions whether Sergeant Felix jumped onto the
6 door sill shortly before or shortly after. But
7 the parties agree it was after." What's the
8 deal with that factual dispute?

9 MS. JACOBY: I think it's a dispute
10 about where -- the way the district court
11 phrased its opinion. It seems to have suggested
12 a distinction between the moment that the car
13 started moving forward and a moment of
14 acceleration. So it seems now everyone agrees
15 that the officer stepped on the car after it
16 started moving forward.

17 There is that passage that we quoted
18 from the district court opinion that says it's
19 not clear if it's before or after the
20 acceleration. I think that may be where the
21 confusion comes from. The fact that there is
22 some confusion about this matter of timing,
23 which could go to the -- to the question whether
24 the decision to jump on the sill was -- was
25 reasonable or not, to me seems like further

1 reason to -- to vacate and remand and send it
2 back to the Fifth Circuit.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: Yeah. Just to
6 follow up on Justice Barrett's questions, it's
7 the majority of circuits that use a totality
8 test, is that correct?

9 MS. JACOBY: Yes, I think that's
10 correct.

11 JUSTICE JACKSON: And is there any
12 indication in those circuits that there is
13 confusion or concern about the application of
14 that test either on the part of the courts or on
15 the part of the officers who do their jobs in
16 that context?

17 MS. JACOBY: Not to my knowledge. I
18 do think that, again, a feature of the sort of
19 totality-of-the-circumstances approach that
20 applies to the Fourth Amendment across the board
21 is that it doesn't always provide perfect
22 guidance to officers. That's why we do have the
23 backstop of the "clearly established" prong of
24 the qualified immunity analysis, to make sure
25 that officers are not held liable for things

1 that they sort of weren't on notice were on the
2 wrong side of the line.

3 But I'm not aware of a problem in the
4 circuits that are correctly applying a
5 totality-of-the-circumstances approach.

6 JUSTICE JACKSON: And is it the case
7 that in those circuits that are correctly
8 applying the test, officers are regularly found
9 to have engaged in using reasonable force?
10 We're not talking about the application of a
11 test that necessarily results in officer
12 liability, right?

13 MS. JACOBY: Absolutely. Obviously,
14 the United States would not endorse such a test.
15 Of course.

16 JUSTICE JACKSON: And can I just
17 clarify that the United States is not taking a
18 position on the facts of this case and whether
19 or not Officer Felix used reasonable force, and,
20 in fact, you would be satisfied with just a
21 clarification that "moment of the threat"
22 doctrine is not what courts should be using, and
23 then sending it back to the Fifth Circuit for
24 the Fourth Amendment analysis in this situation?

25 MS. JACOBY: That's absolutely

1 correct. Our interest in this dispute is a
2 narrow one. We're really just interested in
3 correcting the Fifth Circuit's legal error.
4 And -- and we have no position on the facts of
5 this case.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. McCloud.

10 ORAL ARGUMENT OF CHARLES L. McCLOUD

11 ON BEHALF OF THE RESPONDENTS

12 MR. McCLOUD: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 When an officer doing his duty
15 confronts a threat to his safety or the safety
16 of others, it is reasonable for that officer to
17 use force to end that threat. That's the
18 conclusion this Court has consistently reached,
19 and that's what the Fifth Circuit correctly held
20 below.

21 At the moment Sergeant Felix used
22 force, he was clinging to the side of a fleeing
23 suspect's car, and Felix reasonably believed
24 that his life was in imminent danger. That
25 conclusion should end this case.

1 Petitioner's contrary argument attacks
2 a strawman. Let me be very clear. We are
3 defending the decision below and the moment of
4 threat doctrine as it actually exists. The core
5 premise of that doctrine is that an officer
6 doesn't lose his right to defend himself just
7 because he made a mistake at an earlier point in
8 time.

9 But applying that rule does not
10 require courts to ignore everything that
11 occurred prior to the use of force. Like other
12 circuits, the Fifth Circuit has repeatedly held
13 that preceding events are relevant to the extent
14 they inform the officer's perception of the
15 danger that he faced. The panel decision below
16 repeatedly cited to and quoted from those very
17 precedents. The panel did not and could not
18 overrule them sub silentio.

19 Petitioner asked the Court to create a
20 new breed of constitutional tort under which an
21 officer facing the barrel of a gun loses his
22 right to defend himself if he previously used
23 bad tactics or poor planning.

24 That's contrary to precedent and
25 common sense. Graham asks only whether an

1 officer's use of force was reasonable in the
2 particular circumstances he faced. It requires
3 courts to put themselves in the shoes of the
4 officer who used force, not to second-guess
5 every decision the officer made in some of the
6 most stressful circumstances imaginable.

7 And Plumhoff and Mendez rejected
8 similar officer-created danger theories as
9 illogical, unwarranted, and inconsistent with
10 precedent. The Court should reject the theory
11 again in this case and affirm the judgment of
12 the court of appeals.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: How would you assess
15 the difference between the Fifth Circuit's
16 approach, what you -- as you see it, and the
17 totality-of-the-circumstances approach, as we
18 heard it this morning?

19 MR. McCLOUD: So I don't think that
20 there is any difference between what the Fifth
21 Circuit does and what Graham directs. Both --

22 JUSTICE THOMAS: No, I mean, as --
23 what the Solicitor General and Petitioner, as
24 they see the totality of the circumstances, not
25 so much Graham.

1 MR. McCLOUD: So the difference, I
2 think, between our position and -- and somewhat
3 the government's position is they want to
4 include within the totality of the circumstances
5 arguments that the officer escalated the danger
6 or created the danger.

7 And we think that that is not a
8 relevant consideration under Graham and under
9 the Fourth Amendment. In those cases, the
10 question is, was there a legitimate threat that
11 the officer is responding to?

12 JUSTICE THOMAS: Were they arguing
13 that this morning?

14 MR. McCLOUD: That was exactly their
15 argument that I heard this morning. He said
16 that -- Mr. Zelinsky said that Sergeant Felix
17 created a dangerous situation by jumping onto
18 the car.

19 JUSTICE THOMAS: But I thought he said
20 he wants to argue that later, when he -- when it
21 goes back.

22 MR. McCLOUD: Well, that was the
23 argument that they tried to advance in the Fifth
24 Circuit. And this is, I think, the one thing I
25 agree with in Judge Higginbotham's solo

1 concurrence. At 15a of the Petition Appendix,
2 he says that argument is foreclosed under Fifth
3 Circuit law.

4 And that is the actual issue that
5 divides the circuits. There is no split on the
6 question of whether you can consider preceding
7 events. Every court in the country considers
8 preceding events. The question is whether you
9 can use those preceding events as a basis for
10 making an argument that the officer made a
11 mistake or used poor planning --

12 JUSTICE JACKSON: But, Mr. McCloud,
13 that's not what you argued before, and I'm very,
14 very confused now. I mean, it -- it seems as
15 though the moment of the threat doctrine, as it
16 exists and as everybody has understood it, is
17 about evidence essentially. It's what can you
18 look at to prove the alleged Fourth Amendment
19 excessive force claim. Can you look at anything
20 that occurred outside of the moment of the
21 threat, anything that occurred previously?

22 You seem to be now suggesting that it
23 is about liability. You said that they are
24 creating a new breed of constitutional tort and
25 this is about, you know, whether or not the

1 police officer can be held liable for his own
2 negligence in the time preceding.

3 I haven't seen that concept anywhere.

4 MR. McCLOUD: That -- that was the
5 argument that was made below. Issue Number 1 in
6 Petitioner's Fifth Circuit brief was that
7 Sergeant Felix escalated the danger and was
8 negligent in jumping onto the car, and that is
9 the issue that actually divides the circuits.

10 The Fifth Circuit has never adopted a
11 rule that you can't ever look to anything that
12 happened prior to the use of the force --

13 JUSTICE JACKSON: Did -- is it true
14 that --

15 MR. McCLOUD: -- and the best example
16 I can give --

17 JUSTICE JACKSON: -- isn't it true
18 that in your bio, you stated the Fifth Circuit's
19 approach involves reviewing only the events
20 immediately prior to the use of deadly force as
21 opposed to other prior conduct?

22 MR. McCLOUD: The other prior conduct
23 that was being referred to there is conduct that
24 is alleged to have created the danger.

25 JUSTICE JACKSON: That might be what

1 you're saying is referred to now. I -- the
2 sentence suggests that the dividing line is
3 between looking only at the events immediately
4 prior to the use of deadly force as opposed to
5 other prior conduct.

6 MR. McCLOUD: No, Your Honor, and on
7 page 33 of the bio, we said there was no circuit
8 split on that issue. We said that every court
9 considers prior events. So --

10 JUSTICE KAGAN: Whatever you said or
11 you didn't say, Mr. McCloud, I think it's pretty
12 clear that if you look at the court below, the
13 court below said: We're only looking at the
14 prior two seconds, and we're not going to look
15 at anything before that.

16 And -- and so, again, even if there's
17 some kind of intra-circuit confusion going on in
18 the Fifth Circuit -- there might be. It
19 wouldn't be surprising if, on an issue like
20 this, there were some -- but we have two
21 opinions below, actually, both the circuit court
22 and the district court, who expressed a desire
23 to look beyond two seconds but said: We can
24 only look at the prior two seconds.

25 And -- and you seem to be saying:

1 Well, that is wrong. I mean, you -- you can
2 look back beyond the prior two seconds.

3 So that suggests to me that there's an
4 easy way of just, you know, vacating and
5 remanding and giving it back to the courts below
6 to address, okay, once we look behind -- beyond
7 the two seconds and we have a fuller scope of
8 evidence, then we'll make our reasonableness
9 inquiry, hopefully without our putting a thumb
10 on the scales either way.

11 MR. McCLOUD: So I have a couple of
12 responses on that.

13 First, I don't think that that's the
14 best reading of the panel decision. I
15 understand that that's what Judge Higginbotham
16 asserted in his solo concurrence, but that is
17 not the law, and he doesn't get to make the law
18 for the Fifth Circuit by just asserting things
19 in a solo --

20 JUSTICE GORSUCH: Okay. Fair enough.
21 I understand you read the opinion differently
22 than Justice Kagan does or maybe Justice --
23 Judge Higginbotham did, but what's wrong with
24 proceeding on that understanding?

25 MR. McCLOUD: Well, I think there are

1 a number of things wrong.

2 The first thing I would say is, to the
3 extent you are concerned about the breadth of
4 the statements in the panel decision, I think
5 the better course of action is to affirm the
6 judgment, which is clearly correct.

7 JUSTICE GORSUCH: If the only thing
8 we're concerned with is this two-minute -- this
9 two-second rule, whether it's there or not,
10 Mr. McCloud, and we just clarify that is not the
11 law, send it back, any objections to that?

12 MR. McCLOUD: Yes, because then you
13 would be sending it back for a remand that is
14 going to be pointless.

15 As I said before, the argument that
16 Petitioner wants to make on remand --

17 JUSTICE GORSUCH: Mr. McCloud, the
18 number of remands from this Court that lawyers
19 tell us are pointless --

20 (Laughter.)

21 JUSTICE GORSUCH: -- could fill
22 volumes.

23 MR. McCLOUD: Well, in this case, it's
24 not --

25 JUSTICE GORSUCH: Any other -- any

1 other -- any other objection besides your view
2 that it would be pointless?

3 MR. McCLOUD: Yes. My other objection
4 is it would be creating, I think, a dangerous
5 precedent because it could be seen as endorsing
6 the sort of officer-created danger argument that
7 Petitioner wants to make.

8 And, as Justice Barrett alluded to in
9 some of her questioning earlier --

10 JUSTICE GORSUCH: If we -- fine.
11 That -- that's a --

12 MR. McCLOUD: -- there is a --

13 JUSTICE GORSUCH: -- that's --
14 Mr. McCloud, that's a fair concern. But we've
15 also talked about putting that aside and
16 bracketing that and making clear, as we did in
17 Men -- Mendez, I believe?

18 MR. McCLOUD: Mendez.

19 JUSTICE GORSUCH: -- Mendez, that
20 footnote in Mendez reserved the question, we'd
21 reserve it again, possibly, possibly. Any -- if
22 we do that, any other objections?

23 MR. McCLOUD: So I guess, if I -- if I
24 could ask, if you do that, to do one additional
25 thing, which is to make clear that the standard

1 would have to be high, and mere negligence alone
2 would not be enough to satisfy this
3 officer-created --

4 JUSTICE GORSUCH: Well, now negligence
5 involves mens rea, and that's subjective. And
6 we've said in the Fourth Amendment it's an
7 objective test. So I -- I -- that one, I -- up
8 until then, you had me. But now you -- now I'm
9 afraid I'm getting off the train.

10 MR. McCLOUD: Well, I -- I think the
11 problem is -- I completely agree that negligence
12 is not a relevant consideration. And that's why
13 we object to that test.

14 JUSTICE GORSUCH: Okay. Good. All
15 right. Thank you.

16 MR. McCLOUD: But that is the test
17 that courts of appeals are applying in the
18 country right now. I don't think there's any
19 question about --

20 JUSTICE GORSUCH: Do you want a
21 negligence test or do you not want a negligence
22 test?

23 MR. McCLOUD: I do not want a
24 negligence test.

25 JUSTICE GORSUCH: Okay. All right.

1 All right.

2 MR. McCLOUD: I want a test that says:
3 You only look at conduct that actually is --

4 JUSTICE GORSUCH: You look at the --

5 MR. McCLOUD: -- regulated by the
6 Fourth Amendment. That's searches and seizures.
7 And so --

8 JUSTICE GORSUCH: Yes. And it's an
9 objective inquiry looking at the totality of the
10 circumstances, right?

11 MR. McCLOUD: It is an objective
12 inquiry that looks at the totality of the
13 circumstances to determine whether the officer
14 genuinely believed there was a threat.

15 You do not look at the totality to
16 determine, well, did the officer make a mistake
17 and should he have gotten himself in that
18 circumstance?

19 JUSTICE GORSUCH: No, whether he
20 genuinely believes or whether there was an
21 excessive use of force. I thought -- I thought
22 the latter was the question.

23 MR. McCLOUD: And this Court has
24 consistently said that when an officer confronts
25 a genuine threat, it is not excessive to use

1 force. And I would be very concerned about it
2 being --

3 JUSTICE GORSUCH: That's an objective
4 inquiry, though, isn't it?

5 MR. McCLOUD: That is an objective
6 inquiry, yes, sir.

7 JUSTICE GORSUCH: Okay. All right.
8 Thank you.

9 CHIEF JUSTICE ROBERTS: How broad is
10 the totality of circumstances under your view?
11 Do you get to put in: This is the training
12 record of the officer, and, look, he got D
13 minuses in all the -- the excessive force parts
14 of it?

15 MR. McCLOUD: No.

16 CHIEF JUSTICE ROBERTS: I mean, is
17 that part of the totality as you view it?

18 MR. McCLOUD: No, Your Honor. We
19 don't view that as relevant. I think Whren says
20 that very clearly. Those sorts of policies
21 and -- and procedures do not inform the
22 reasonableness question that is being asked by
23 the Fourth Amendment.

24 And Justice Alito's questioning
25 alluded to this before. The Fourth Amendment is

1 not a regulation on the reasonableness in a
2 general sense of everything that officers do.
3 It is a regulation of very specific conduct,
4 searches and seizures. And this Court has
5 established clear guidelines for determining
6 when searches and seizures are reasonable.

7 The problem with the other's side
8 position is they want to take literally anything
9 that an officer does and say: If a jury,
10 through the lens of hindsight, could say that
11 was a bad call, or if an expert could come in
12 and say I wouldn't have done that if I were in
13 the officer's shoes, that could be the basis for
14 a Fourth Amendment claim.

15 JUSTICE SOTOMAYOR: So it could be
16 that when this goes down below, the Fifth
17 Circuit will actually address that question.
18 But it didn't. It repeatedly said: We can't
19 look at any event ever.

20 You concede in your own brief that
21 there could be situations in which an officer is
22 the aggressor. Page 34, I think, is the page of
23 your brief. You admit that an officer could be
24 an aggressor and act unlawfully in doing so,
25 correct?

1 MR. McCLOUD: Yes. If an officer
2 comes up to mug someone --

3 JUSTICE SOTOMAYOR: But your
4 articulation of this rule is just trying to get
5 us to draw lines that haven't even been
6 addressed by the court below.

7 MR. McCLOUD: I think they have been,
8 Your Honor, respectfully. If you look at the
9 cases --

10 JUSTICE SOTOMAYOR: No, the --
11 respectfully, Mr. McCloud, the court repeatedly
12 said: We can only look at the actions in the
13 two minutes before the moment of threat.

14 If your answer had been -- if he had
15 walked up in an unmarked car, in plain clothes,
16 with a gun drawn, and this person -- and he
17 walked up to the car and this person took off
18 and/or accelerated slightly, and he jumped on
19 and shot blindly, do you think that's
20 reasonable?

21 MR. McCLOUD: I think that would not
22 be reasonable for a number of reasons.

23 JUSTICE SOTOMAYOR: All right. So
24 you've given the game away because, at that
25 point, you have to look at what the officer did.

1 MR. McCLOUD: And, Your Honor, we
2 agree that you can look at what the officer did.
3 And the Fifth Circuit does look at what the
4 officer did. The best example I can give you --

5 JUSTICE SOTOMAYOR: It didn't in this
6 case.

7 MR. McCLOUD: In this case, that's
8 because the only argument that Petitioner made
9 below, the only action she said you should look
10 at was an action based on officer-created
11 danger.

12 JUSTICE SOTOMAYOR: And we have three
13 judges who said: We shouldn't be limited in
14 this way in the mine-run of cases, and we -- and
15 so we're stuck with this. We think the -- the
16 judgment is right, but it wasn't addressed at
17 all. Officer-created danger wasn't addressed.

18 And the other side says clearly it's
19 not raising it here.

20 MR. McCLOUD: It is going to raise it
21 on remand. And I think it was addressed --

22 JUSTICE SOTOMAYOR: Then you want
23 an -- and you want an intense -- an anticipatory
24 ruling from us.

25 MR. McCLOUD: No, Your Honor. I think

1 it was addressed. And the best evidence I can
2 give you of that are the cases that the Fifth
3 Circuit itself cited for the proposition that we
4 don't look at the action of the officer.

5 All of those are cases in which the
6 argument that was being made was the argument
7 that they made below, that the officer created a
8 dangerous situation, and that was the basis for
9 liability.

10 So that is the argument the Fifth
11 Circuit said it's not considering. And that's
12 what Judge Higginbotham said he wanted to
13 consider. He said --

14 JUSTICE JACKSON: Mr. McCloud, did the
15 plaintiff argue that the court should be looking
16 at the totality of the circumstances?

17 MR. McCLOUD: Yes.

18 JUSTICE JACKSON: And did you object
19 to that as being the test that the court should
20 apply when it decided what it was going to look
21 at to make this determination?

22 MR. McCLOUD: No. Our objection was
23 that you should not be adopting this
24 officer-created danger theory in considering
25 whether Sargeant Felix escalated the situation.

1 That was our --

2 JUSTICE JACKSON: So you did not say
3 the moment of the threat doctrine is the -- the
4 test in the Fifth Circuit, and that's only what
5 you should be looking at, you should not be
6 looking at circumstances and facts and things
7 that happened before the moment of the threat?

8 If I look at the record, I'll find
9 that you're arguing that below?

10 MR. McCLOUD: So, in the Fifth Circuit
11 briefing, I don't believe we did because the
12 labeled moment of the threat doctrine didn't
13 come up until Judge Higginbotham's opinion in
14 this case. That was not a label that had been
15 recognized prior to that.

16 If you look in Westlaw for "moment of
17 the threat doctrine," I think there are four
18 hits for that, and this is the -- the one that
19 really originated that term.

20 So that was not our argument below.
21 Our argument below was whether Sergeant Felix
22 escalated the danger was irrelevant. And that's
23 consistent with Fifth Circuit precedent. That's
24 what Judge Higginbotham rejected.

25 JUSTICE JACKSON: All right. But do

1 you concede that that's not what the Fifth
2 Circuit held in this case, that it was
3 irrelevant whether or not he accelerated the
4 danger or he contributed to it? That's not
5 their holding in this case --

6 MR. McCLOUD: That is -- I believe
7 that is their holding. And that is what Judge
8 Higginbotham objected to.

9 So, if you look at page 15A of the
10 Petition Appendix, Judge Higginbotham says: I
11 would come out differently because I believe we
12 should consider the fact that Sergeant Felix
13 escalated the danger of this situation.

14 That was the argument that they made,
15 that he wanted them to consider. And that is
16 the whole basis for the disagreement between us
17 and the court of appeals and the disagreement
18 that actually divides the circuit courts on this
19 question.

20 JUSTICE SOTOMAYOR: Counsel, can I
21 read you three sentences from this opinion?

22 MR. McCLOUD: Certainly.

23 JUSTICE SOTOMAYOR: This is the
24 majority: We may only ask whether Officer Felix
25 was in danger at the moment of the threat that

1 caused him to use deadly force against Barnes.

2 It said its inquiry was "confined to
3 whether the officers or other persons who were
4 in danger at the moment of the threat resulted
5 in a" -- "in a officer's use of deadly force."

6 And it stated, "any of the officer's
7 actions leading up to the shootings are not
8 relevant for the purposes of an excessive force
9 inquiry in this circuit." So Higginbotham did
10 not make up the moment of the threat doctrine.
11 It's been used, it's been cited repeatedly by
12 other circuits. It's well-known by that name.
13 This is not a made up theory.

14 MR. McCLOUD: What, Your Honor --

15 JUSTICE SOTOMAYOR: Now, let me
16 finish. If you concede, in page 34, that if the
17 -- that if the officer was the aggressor, then
18 there are circumstances -- you don't think this
19 is one of them -- but there are circumstances in
20 which the officer's actions are relevant,
21 correct?

22 MR. McCLOUD: We agree that the
23 officer's actions are relevant. And the Fifth
24 Circuit considers officer actions. Cole versus
25 Carson is an en banc decision --

1 JUSTICE SOTOMAYOR: You just said the
2 officer's actions leading up to the shootings
3 are not relevant. That -- I -- I can't -- I
4 don't see how I can read that any other way.

5 MR. McCLOUD: So, Your Honor, I think
6 you have to read the --

7 JUSTICE SOTOMAYOR: Again, they didn't
8 say they're not relevant in this case. They
9 said they're never relevant.

10 MR. McCLOUD: And, Your Honor, I think
11 you have to read the opinion that's being cited
12 there. That's Harris versus Serpas. And that
13 is a case that says we apply totality of the
14 circumstances. And then when it makes the
15 statement that we don't consider the officer's
16 actions, it's referring to --

17 JUSTICE SOTOMAYOR: Totality of the
18 circumstances were not used by this court,
19 correct, in this opinion?

20 MR. McCLOUD: It was. They considered
21 the totality of the circumstances. What they
22 did not consider was Petitioner's argument that
23 Sergeant Felix created the danger.

24 JUSTICE SOTOMAYOR: Can you point me
25 to a place in the opinion where it used the

1 words "totality of the circumstances"?

2 MR. McCLOUD: I cannot, but that was
3 the argument that was made below.

4 JUSTICE JACKSON: Can you explain
5 Judge Higginbotham's concurrence sentence, "I
6 write separately to express my concern with this
7 Circuit's moment of the threat doctrine, as it
8 counters the Supreme Court's instruction to look
9 to the totality of the circumstances when
10 assessing the reasonableness of an officer's use
11 of deadly force"?

12 MR. McCLOUD: Yes, he is wrong about
13 that. And the best evidence I can give you of
14 that is Cole versus Carson.

15 JUSTICE JACKSON: I'm asking you, did
16 he believe that there was such a thing as the
17 moment of threat doctrine and that it was in
18 opposition to the totality of the circumstances
19 test, which is what he was hoping that the court
20 would be able to apply?

21 MR. McCLOUD: I don't know how he
22 could reasonably believe that, given that he
23 wrote Cole versus Carson, which is an en banc
24 decision of the Fifth Circuit that is all about
25 pre-shooting facts. In that case, the entire --

1 JUSTICE KAGAN: But I mean he did
2 believe it, and that belief produced the
3 decision below.

4 MR. McCLOUD: Well, I don't think that
5 you should attribute his statements in a solo
6 concurrence that others didn't join to the other
7 members of the panel. I -- I think you should
8 read the cases that they cited.

9 JUSTICE KAGAN: Well, he wrote both
10 and he was telling you exactly why he wrote the
11 majority opinion the way he did, because he felt
12 constrained to. And I understand that you think
13 he was not so constrained.

14 But we're supposed to be reviewing
15 this decision. And he was telling us: I, the
16 majority opinion writer, felt that I was
17 constrained to do nothing more than look at the
18 prior two seconds.

19 And you don't say that that's the
20 right rule. So it seems as though we should
21 kick it back and let you guys fight it out as to
22 the relevance of anything that happened beyond
23 the prior two seconds.

24 MR. McCLOUD: So I guess I would
25 encourage the Court, if it does end up

1 remanding, to say a little more than simply do
2 it again, Fifth Circuit. I think it is
3 important to say something about this issue of
4 officer-created danger because it has divided
5 the circuits for a number of years.

6 And the Court has gotten a number of
7 cases that present that issue. Mendez is one.
8 The Bond versus City of Talequah case from a few
9 term ago that was summarily reversed was
10 another. And so it is lurking in the background
11 of many of these excessive force cases. And it
12 is doing real harm in the circuits that apply
13 that, the -- the Ninth Circuit, the Tenth
14 Circuit. That is the reason we have amici from
15 California that say this standard makes it
16 impossible for us to train officers and give
17 them clear guidance.

18 So I think it's incumbent on the Court
19 to offer a little more clarity on that in an
20 opinion, even if it does remand.

21 JUSTICE BARRETT: And you want to --
22 just to make sure I have it, what -- what
23 clarity would you want us to give?

24 MR. McCLOUD: So if the Court is going
25 to offer or accept some version of

1 officer-created danger perhaps along the lines
2 that Your Honor's Biegert opinion suggested, I
3 think you would want to make clear that
4 something like negligence alone is not going to
5 be enough. It's going to be an extraordinary
6 case in which an officer's creation of the
7 danger is the basis for a Fourth Amendment
8 claim.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 JUSTICE THOMAS: As I understand you,
13 you're saying that it isn't so much that the --
14 a difference between whether to use the totality
15 of the circumstances but, rather, what evidence
16 would be available or could be used in that
17 analysis? And here you say the officer-created
18 danger should -- that the Fifth Circuit said it
19 could not -- it would not permit that
20 assessment.

21 MR. McCLOUD: That's correct.

22 JUSTICE THOMAS: Within the context of
23 totality of circumstances.

24 MR. McCLOUD: Exactly.

25 JUSTICE THOMAS: So it's a subcategory

1 of the totality of circumstances. I hear you.

2 MR. McCLOUD: It is a particular
3 argument that is off limits in the Fifth Circuit
4 and in the majority of the circuits, when you're
5 considering the totality of the circumstances.
6 You can still look to things that the officer
7 did prior to using force, but you cannot blame
8 the officer for creating a bad situation and --
9 and second-guess all of the decisions he made.

10 CHIEF JUSTICE ROBERTS: Justice Alito?
11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: I go back, you do
13 believe there are situations, you admitted it to
14 me earlier, where an officer's actions can be
15 considered to have created a danger
16 unreasonably?

17 MR. McCLOUD: I don't agree with that
18 framing. I agree that you can consider an
19 officer's actions, and I agree that an officer's
20 actions can make the use of force less
21 reasonable.

22 Again, the Cole versus Carson example
23 is -- is one that's instructive on that. That
24 is a case where the majority of the Fifth
25 Circuit en banc said things that the officers

1 did prior to using force made it unreasonable
2 for them to use force at a later point.

3 But what they did not do is say, well,
4 did they violate policies or could I have made a
5 better decision? And that is the fundamental
6 difference between my approach and Petitioner's
7 approach.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: So the question
10 presented that we took certiorari on is whether
11 courts should apply the moment of the threat
12 doctrine when evaluating an excessive force
13 claim.

14 So, to me, what that means is moment
15 of the threat doctrine, do you just look at the
16 second or two before or do you widen the -- your
17 scope to look at other things beyond that? What
18 we did not take cert on is the question that
19 you're raising, a very important question,
20 probably one on which there is some confusion,
21 wouldn't be a surprise to me, but definitely not
22 the question in this case, the question of what
23 weight to give the fact that or the possibility
24 that the officer created the danger, in the
25 reasonableness inquiry.

1 That's a completely different
2 question, which we didn't take cert on, which --
3 you know, it does not seem to me we're well
4 positioned in this case to discuss.

5 MR. McCLOUD: So if I can just
6 respectfully push back on that, I think in order
7 to answer the question presented as Petitioner
8 framed it, you have to understand what the
9 moment of threat doctrine is.

10 And for all of the reasons we explain
11 in our brief, it is absolutely not a doctrine
12 that says prior events are off limits. There is
13 no court in the country that is applying that
14 version of the standard.

15 The dispute between the courts and --
16 and what divides us in this case is whether,
17 when looking at those prior events, you can
18 identify something the officers did that was
19 unreasonable in a sort of general cosmic sense
20 and say that contributed to the danger. And
21 even though that is not itself a violation of
22 the Fourth Amendment, it is the basis for your
23 Fourth Amendment excessive force claim. That's
24 -- that's the nub of the issue.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice

2 Gorsuch?

3 Justice Kavanaugh?

4 Justice Barrett?

5 Justice Jackson?

6 Thank you, counsel.

7 MR. McCLOUD: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Pettit.

9 ORAL ARGUMENT OF LANORA PETTIT

10 FOR TEXAS, ET AL., AS AMICUS CURIAE,

11 SUPPORTING RESPONDENT FELIX

12 MS. PETTIT: Thank you, Mr. Chief

13 Justice, and may it please the Court:

14 In the last 15 years, this Court has
15 rejected at least three times that an officer's
16 otherwise liable conduct violates the Fourth
17 Amendment because an earlier split-second
18 decision made a confrontation more likely.

19 Properly understood, what Judge
20 Higginbotham dubbed the moment of threat
21 doctrine merely applies that rule. As this
22 Court recognized in cases like Mendez and
23 Sheehan, it is necessary because the Fourth
24 Amendment must be applied by thousands of real
25 cops in the real world without, in the words of

1 Kentucky against King, an unacceptable degree of
2 unpredictability.

3 The moment the officer-created risk
4 theory, which Petitioners have continuously
5 pressed at least until the reply brief in this
6 Court, is antithetical to that proposition
7 because it invites an open-ended, subjective
8 inquiry into the officer's intent that cannot be
9 conducted without the benefit of hindsight. It
10 also, as Mendez recognized, involves tricky
11 questions and fuzzy standards of causation that
12 cannot be easily be applied.

13 Because the Fifth Circuit has properly
14 rejected that proposition, its judgment should
15 be affirmed.

16 And I welcome the Court's questions.

17 JUSTICE THOMAS: Would you articulate
18 for us what you think the district court and the
19 court of appeals held?

20 MS. PETTIT: I think that the district
21 court held -- and I would point Your Honor to
22 Pet. App. page 17a and 24a of footnote 2 --
23 under the Fifth Circuit precedent that prior
24 actions that created a risk were not relevant
25 under the Fifth Circuit's test because that is

1 the argument that Petitioner was pursuing at
2 that time.

3 And to Justice Sotomayor's questions
4 earlier, the statements that she is referring to
5 have to be read in light of those arguments
6 because that is what the Fifth Circuit was
7 rejecting when it said the prior actions were
8 irrelevant.

9 JUSTICE JACKSON: I'm sorry, you're
10 saying the statements that the Fifth Circuit
11 made in its opinion regarding what its holding
12 was have to be read in light of the arguments
13 that were before it?

14 MS. PETTIT: I believe that's what
15 they're referring to when they say these actions
16 that you're talking to are irrelevant.

17 JUSTICE JACKSON: Well, what is --
18 what is Judge Higginbotham saying when he says
19 in his concurrence: I write separately to
20 express my concern with the circuit's moment of
21 the threat doctrine. And then he doesn't define
22 it in the way that you have. He says: This
23 doctrine counters the Supreme Court's
24 instructions to look at the totality of the
25 circumstances.

1 MS. PETTIT: Your Honor, I would point
2 your -- you to page 15A of his opinion, where he
3 also says that: In our reasonableness analysis,
4 references to our supposed obligation to
5 consider the totality of circumstances are
6 merely performative.

7 So the dispute here appears to be not
8 the formulation of the rule as I articulated it
9 but its application.

10 JUSTICE JACKSON: No, he says it's
11 performative -- you didn't read the first part
12 of the sentence -- if the moment of the threat
13 is the sole determinative factor in our
14 reasonableness analysis.

15 So he says: We have a moment of the
16 threat doctrine that tells us we only look at
17 this moment. And what that does is it makes any
18 references to totality merely performative
19 because we're not looking at the totality, we're
20 just looking at the moment of the threat.

21 So do you dispute that at least he
22 conceptualized the doc -- the doctrine in the
23 way that I'm describing and the way that
24 Petitioners have put it forward?

25 MS. PETTIT: There are certainly

1 statements to that effect. He has, for --
2 however, created a very similar concurrence in a
3 case called Mason against Lafayette City from
4 2015 --

5 JUSTICE JACKSON: No, I'm talking
6 about this case. So let me -- let me -- let me
7 tell you what I think is happening, and I just
8 want to get your reaction and then I'll be done.

9 It seems as though the question
10 presented here is asking us to decide which test
11 the courts should apply, and it sees the moment
12 of the threat doctrine as different, distinct,
13 from the totality of the circumstances.

14 Which test? The Fifth Circuit applied
15 moment of the threat. Is that right or wrong?

16 It seems now that you are arguing
17 which circumstances, assuming totality, is it
18 okay to include or consider the circumstance of
19 the officer's own conduct. You know, if courts
20 are doing that, is that a problem?

21 That is a separate question that is
22 not, I think, properly within the scope of the
23 question presented, which just asks us which
24 test.

25 So can you help me to understand why

1 we would get into whether or not the particular
2 circumstance you've identified is one that
3 courts should be looking at or not?

4 MS. PETTIT: Because I agree with
5 my -- my colleague that it is difficult to
6 answer the question -- the question presented
7 without getting into that.

8 And I would point this Court to pages
9 15, 23, 28, 32, and 41 to 42 of the Petitioner's
10 opening brief in which they are discussing
11 precisely this type of question.

12 So, while they claim to disclaim it,
13 they actually are talking about creation of the
14 risk. In fact, in responding to questions from
15 Justice Alito and Justice Thomas to articulate
16 their test, I heard them say at least twice that
17 they're asking why was he jumping up on the car.

18 I also heard from the United States
19 multiple times manufacturing the risk.

20 That is conflating the two questions
21 because they are quite related. In fact, they
22 are -- that is the source of the dispute between
23 the -- amongst the circuit courts. The Ninth
24 and the Tenth Circuit's say: Intentional and
25 deliberate conduct can -- creating the risk can

1 obviate the officer's ability to defend himself.
2 The Fifth Circuit says that's not the rule.

3 That's the nature of the dispute. And
4 so trying to take it out of that context and say
5 just are you considering two seconds or are you
6 considering 30 gets into the point where there's
7 not a circuit split, as my colleague mentioned.
8 They -- the Fifth Circuit is looking at those
9 issues.

10 In fact, I would point this Court to
11 Singleton against Casanova, in which Judge
12 Higginbotham joined an opinion six months after
13 this one and which -- like Cole v. Carson, which
14 he wrote three years earlier. The Fifth Circuit
15 was describing all pre-force conduct.

16 So the Fifth Circuit is not applying
17 the moment of the threat doctrine,
18 notwithstanding some of the comments in Judge
19 Higginbotham's opinion.

20 And this Court ultimately reviews
21 judgments, not -- not statements and opinions.

22 JUSTICE GORSUCH: Counsel, I -- I
23 appreciate that what happened below may be
24 different than what's happening here. At least
25 that's your view.

1 But we did take a question presented
2 about the moment of threat doctrine. I
3 understand you think it's not a thing. But
4 what's wrong with resolving just the question
5 presented? And putting aside your -- your
6 record-based concerns, it is a question. We
7 granted cert on it. I think everybody agrees
8 it's wrong.

9 Why -- what's the harm of saying that?

10 MS. PETTIT: As long as Your Honor is
11 very clear that you are not endorsing the
12 creation of the risk theory adopted by the Ninth
13 and Tenth Circuit, then I don't think there's
14 anything necessarily wrong.

15 JUSTICE GORSUCH: Okay.

16 MS. PETTIT: I agree with my colleague
17 that it is unnecessary, and the reason I say
18 that is I point the Court to page 5A of the Pet.
19 App, which the district court -- the -- sorry,
20 the Fifth Circuit quoted at length a district
21 court opinion that looked at those earlier
22 circumstances.

23 So I don't think it's necessary. As
24 long as the Court is clear that we are not
25 adopting the creation-of-the-risk theory, we

1 have no quarrel with such an action.

2 JUSTICE GORSUCH: Thank you.

3 MS. PETTIT: Going to the nature of
4 the questions here for just a minute, I would
5 point out that the inquiry here is -- I heard a
6 lot of concerns about line-drawing, and I find
7 that interesting because the Petitioner's
8 argument here was that they just wanted to
9 consider the jump as well as the shoot.

10 That itself is a line-drawing
11 question, and it -- and it's very deliberate
12 because they have actually litigated whether
13 everything up until the jump was reasonable, and
14 the district court concluded that it was,
15 because, again, courts below are not considering
16 just the two seconds. Instead, they are
17 considering the totality of the circumstances.

18 And to the question from the United
19 States about the subjective nature of the test,
20 this goes, again, to the arguments that had been
21 raised up until the -- the reply brief, which
22 was after our argument, in which -- or our
23 brief, in which the Petitioner was endorsing the
24 view of the Ninth and Tenth Circuit, which this
25 Court in Mendez expressly acknowledged was

1 subjective and therefore inconsistent with the
2 Fourth Amendment, which, again, is why we think
3 this Court, if it is going to remand, which,
4 again, is unnecessary, makes very clear that it
5 is not adopting that view because it would be a
6 fundamental shift in the Fourth Amendment.

7 And it also is a shift that, going to
8 Justice Kavanaugh's questions earlier, would
9 create an impossibility for -- for law
10 enforcement agencies to train their officers for
11 the reasons described in the California
12 Sheriffs' Association's brief.

13 If there are no further questions,
14 we -- I request that you affirm.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Sotomayor?

19 Justice Kagan?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 Okay. Thank you, counsel.

25 Rebuttal, Mr. Zelinsky.

1 REBUTTAL ARGUMENT OF NATHANIEL A.G.
2 ZELINSKY ON BEHALF OF THE PETITIONER
3 MR. ZELINSKY: I have five very brief
4 points.

5 First, Justice Jackson, you asked my
6 friend on the other side when they argued for
7 the test that was applied below. Listen to
8 minutes 28 and 29 of oral argument. Then you'll
9 hear that there.

10 Justice Sotomayor, you noted that my
11 friends on the other side agree in many cases
12 that the jump-in-front-of-car case, you need to
13 look at the whole picture of what the officer
14 did, the jump and the shoot. It is -- there is
15 no rule that -- they can't distinguish that case
16 from this case.

17 Third, Justice Kavanaugh, you had some
18 practical questions about how this is going to
19 impact effective policing. Officers receive
20 qualified immunity. As the Cato brief
21 discusses, 99-plus percent of the time they are
22 also indemnified by the municipality.

23 You have a brief of 22 former
24 high-ranking police chiefs who are in front of
25 you saying that you should rule for Petitioner

1 and it will not hamper but promote good
2 policing.

3 And then, third, the DHS rule is a
4 great example of why this is not going to harm
5 effective policing.

6 Fourth, Justice Alito, I want to be
7 very clear, we are not saying that every single
8 mistake is going to result in liability. What
9 we are saying is you have to look at the whole
10 picture, and, here, that's more than just two
11 seconds.

12 Finally, Justice Gorsuch, we agree
13 wholeheartedly this rule is inconsistent with
14 the common law. If you rule and adopt the
15 moment of the threat doctrine, you will
16 essentially enact a hereto unprecedented rule
17 permitting the killing of fleeing misdemeanants.
18 You should not do that. You should vacate and
19 remand.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:21 a.m., the case in
25 was submitted.)

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