

No. _____

IN THE
Supreme Court of the United States

JANICE HUGHES BARNES, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF
ASHTIAN BARNES, DECEASED,

Applicant,

v.

ROBERTO FELIX, JR.; COUNTY OF HARRIS, TEXAS,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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March 22, 2024

APPLICATION

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Janice Hughes Barnes, individually and as representative of the Estate of Ashtian Barnes, respectfully requests a 30-day extension of time, to and including May 22, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

1. The Fifth Circuit entered judgment on January 23, 2024. *See App. 35a.* Unless extended, the time to file a petition for a writ of certiorari will expire on April 22, 2024. This application is being filed more than ten days before a petition is currently due. *See Sup. Ct. R. 13.5.* The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. This case presents a fundamental question of Fourth Amendment law that has divided twelve circuits and is worthy of this Court's review. At around 2:40pm on April 28, 2016, Ashtian Barnes was driving a rental car on the Sam Houston Tollway, a major beltway outside of Houston, Texas. Through no fault of Barnes, the rental car had outstanding toll violations associated with its license plate. *See App. 2a.*

3. Respondent Roberto Felix, Jr. ("Officer Felix") was a traffic enforcement officer for the Harris County Precinct 5 Constable's Office. *Id.* at 1a. Officer Felix spotted the rental car and "initiated a traffic stop by engaging his emergency lights."

Id. at 2a. Barnes “pulled over to the median on the left side of the Tollway out of the immediate traffic zone.” *Id.* Felix then parked his car behind Barnes, “approached the driver’s side window and asked Barnes for his driver’s license and proof of insurance.” *Id.*

4. Barnes told Officer Felix that the documents might be in the trunk. *Id.* “What happened next was captured on Officer Felix’s dash cam,” *id.*, as detailed by the Fifth Circuit’s opinion below:

- “At 2:45:28, Felix orders Barnes to open the trunk of his vehicle. At this time, Barnes’s left blinker is still on, indicating that the keys are still in the ignition.”
- “At 2:45:33, Barnes opens the trunk of the vehicle.”
- “At 2:45:36, Barnes’s left blinker turns off.”
- “At 2:45:43, Felix asks Barnes to get out of the vehicle.”
- At 2:45:44, Barnes’s driver side door opens.”
- “At 2:45:47, Barnes’s left blinker turns back on.”
- “At 2:45:48, Felix draws his weapon.”
- “At 2:45:49, Felix points his weapon at Barnes and begins shouting ‘don’t fucking move’ as Barnes’s vehicle begins moving.”

Id. at 3a.

5. Felix was still standing by Barnes’s open car door. “At this point, Officer Felix stepped *onto the car* with his weapon drawn and pointed at Barnes.” *Id.* (emphasis added). As recounted by the Fifth Circuit, Felix then “‘shoved’ his gun

into Barnes's head, pushing his head hard to the right." *Id.* The car accelerated. As the car moved, "Officer Felix shot inside the vehicle with 'no visibility' as to where he was aiming." *Id.* A second later, "Officer Felix fired another shot." *Id.* "After two seconds, the vehicle came to a full stop." *Id.*

6. "Officer Felix held Barnes at gunpoint until backup arrived while Barnes sat bleeding in the driver's seat." *Id.* Barnes was pronounced dead at the scene. *Id.*

7. Applicant Janice Hughes Barnes is Ashtian Barnes's mother and the representative of the Estate of Ashtian Barnes. She filed this action under 42 U.S.C. § 1983, alleging that Officer Felix's lethal use of force against her son was unreasonable and violated his Fourth Amendment rights. At summary judgment, the District Court held that—under binding Fifth Circuit precedent—Felix's use of deadly force was objectively reasonable.

8. This Court has explained that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation and alterations omitted). A court should consider "whether the totality of the circumstances" justified an officer's use of deadly force, paying "careful attention to the facts and circumstances of each particular case." *Id.* (quotations omitted). Non-exhaustive factors in that wholistic calculus "include[] the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

9. But the District Court explained that “in cases involving the use of deadly force, the Fifth Circuit has developed a much narrower approach.” App. 28a. The Fifth Circuit asks only “whether the officer or another person was in danger at the moment of the threat that resulted in the officer’s use of deadly force.” *Id.* at 29a (quotation and emphasis omitted). “[T]he Fifth Circuit does not consider what had transpired up until the shooting itself in assessing the reasonableness of an officer’s use of deadly force, even when the officer’s conduct departs from established police procedures.” *Id.* at 32a (quotation omitted).

10. In this case, the District Court determined that “the moment of the threat” “occurred *after* Felix jumped onto the door sill,” “in *the two seconds before* Felix fired his first shot.” *Id.* at 31a (second emphasis added). As a result, under Fifth Circuit precedent, the District Court could not consider “the officer’s conduct precipitating the shooting—which included jumping onto a moving vehicle and blindly firing his weapon inside.” *Id.* at 23a.

11. On appeal, the Fifth Circuit affirmed. Writing for the court, Judge Higginbotham explained that the Fifth Circuit’s moment-of-the-threat precedent is “well-established.” *Id.* at 6a (quoting *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020)). As a result, the Fifth Circuit may consider only “the act that led the officer to discharge his weapon.” *Id.* at 7a (quoting *Amador*, 961 F.3d at 728). “Any of the officers’ actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in [that] Circuit.” *Id.* (quoting *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014)).

12. Judge Higginbotham concurred in his own majority opinion, however, “to express” his “concern” with the Fifth Circuit’s “moment of threat doctrine,” *id.* at 9a (Higginbotham, J., concurring), and to call on “the Supreme Court to resolve the circuit divide over the application of a doctrine deployed daily across the country.” *Id.* at 14a. According to Judge Higginbotham, the Fifth Circuit’s moment of threat doctrine “counters the Supreme Court’s instruction to look to the totality of the circumstances when assessing the reasonableness of an officer’s use of deadly force.” *Id.* at 9a. As a result, the Fifth Circuit ignores “the reality of the role the officers played in bringing about the conditions said to necessitate deadly force.” *Id.* at 11a.

13. Judge Higginbotham explained that, had he been allowed to consider the totality of Officer Felix’s actions that day, Judge Higginbotham would have found “that Officer Felix violated Barnes’s Fourth Amendment right to be free from excessive force.” *Id.* at 14a.

14. In his concurrence, Judge Higginbotham called for this Court’s review, explaining that the question presented in this case has divided *twelve circuits*. *Id.* at 12a n.13. Judge Higginbotham described four circuits—the Second, Fourth, Fifth, and Eighth—as applying the “moment of the threat doctrine.” *See* App. 11a-12a; *see also* *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) (“[T]he reasonableness of an officer’s actions is determined based on the information possessed by the officer at the moment that force is employed.”); *Banks v. Hawkins*, 999 F.3d 521, 525–526 (8th Cir. 2021) (“[W]e evaluate the

reasonableness of Hawkins’s conduct by looking primarily at the threat present *at the time* he deployed the deadly force.” (emphasis in original)).

15. Judge Higginbotham described eight circuits—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits—as rejecting the “moment of the threat” doctrine. See App. 12a n.13; see *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (“We first reject defendants’ analysis that the police officers’ actions need be examined for ‘reasonableness’ under the Fourth Amendment only at the moment of the shooting. We believe that view is inconsistent with Supreme Court decisions.”); *Carswell v. Borough of Homestead*, 381 F.3d 235, 243 (3d Cir. 2004) (“All of the events leading up to the pursuit of the suspect are relevant.”); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) (“[W]e want to express our disagreement with those courts which have held that analysis of ‘reasonableness’ under the Fourth Amendment requires excluding any evidence of events preceding the actual ‘seizure.’ ”); *Estate of Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) (“Where a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.”); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (“Police officers who unreasonably create a physically threatening situation in the midst of a Fourth Amendment seizure cannot be immunized for the use of deadly force.”); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018) (“[T]he events leading up to the shooting, including the officer[']s tactics, are encompassed in the facts and circumstances for the reasonableness analysis.”); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159–60 (10th Cir. 2008) (“We also consider whether an officer’s own ‘reckless or

deliberate conduct’ in connection with the arrest contributed to the need to use the force employed.”); *Ayers v. Harrison*, 650 F. App’x 709, 719 (11th Cir. 2016) (“Officer Harrison’s argument that our precedent precluded Ms. Ayers from advancing an ‘officer created danger’ theory at trial is both factually and legally incorrect.”); *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (“In applying this test to Wardlaw’s account of events, we must consider all of the facts as well as the inferences arising from the facts.”).

16. Applicant submits that given the acknowledged, twelve-circuit split over the Fourth Amendment question presented here, this Court’s review is urgently needed “to resolve the circuit divide.” App. 14a (Higginbotham, J., concurring).

17. Katherine Wellington and Neal Katyal of Hogan Lovells U.S. LLP were recently retained to file a petition for certiorari in this Court. Over the next several weeks, counsel are occupied with briefing deadlines and argument in a variety of matters. These include preparing for oral argument in the First Circuit in *Financial Oversight & Management Board for Puerto Rico v. AmeriNational Community Services, LLC* (No. 23-1747) on April 3, 2024; preparing for oral argument in the Ninth Circuit in *Wolford v. Lopez* (No. 23-16164) on April 11, 2024; a reply brief in *Chatom Primary Care v. Merck* (No. 23-3089) due on April 12, before the Third Circuit; a reply in support of a motion to dismiss due on April 19, 2024 in *Roberts v. Progressive Preferred Insurance Company* (23-cv-01597), before the Northern District of Ohio; post-trial briefing in *Epic Games, Inc. v. Google LLC* (20-cv-05671), in the Northern District of California; a petition for certiorari from the Fifth Circuit to this

Court in *Duffey v. United States* (No. 22-10265), due on May 2, 2024; an *amicus* brief due before the Ninth Circuit on May 15, 2024, in *Poe v. Northwestern Mutual Life Insurance Company* (No. 23-03124); and a reply brief due in this Court on May 22, 2024, in *Bassett v. Arizona* (No. 23-830). Counsel also recently sought an expedited decision on a motion to enforce an injunction in the Northern District of California in *Mendoza v. Hyundai Motor Company, Ltd.* (No. 5:15-cv-01685), and expects additional briefing in this matter over the next several weeks. Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

18. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including May 22, 2024.

Respectfully Submitted,

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March 22, 2024