No. 23-____

IN THE
Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
NATHANIEL A.G. ZELINSKY
ERIC S. ROYTMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

ADAM W. FOMBY
HOWARD R. FOMBY
FOMBY LAW FIRM
440 Louisiana Street, Suite 900
Houston, TX 77002

KATHERINE B. WELLINGTON
Counsel of Record
MATTHEW S. DORRITIE
RACHEL E. RECORD
HOGAN LOVELLS US LLP
125 High Street, Suite 2010
Boston, MA 02110
Telephone: (617) 371-1037
katherine.wellington@hoganlovells.com

Counsel for Petitioner

QUESTION PRESENTED

The Fourth Amendment prohibits a police officer from using "unreasonable" force. U.S. Const. amend. IV. In *Graham* v. *Connor*, this Court held that reasonableness depends on "the totality of the circumstances." 490 U.S. 386, 396 (1989) (quotation marks omitted). But four circuits—the Second, Fourth, Fifth, and Eighth—cabin *Graham*. Those circuits evaluate whether a Fourth Amendment violation occurred under the "moment of the threat doctrine," which evaluates the reasonableness of an officer's actions only in the narrow window when the officer's safety was threatened, and not based on events that precede the moment of the threat. In contrast, eight circuits—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits—reject the moment of the threat doctrine and follow the totality of the circumstances approach, including evaluating the officer's actions leading up to the use of force.

In the decision below, Judge Higginbotham concurred in his own majority opinion, explaining that the minority approach "lessens the Fourth Amendment's protection of the American public" and calling on this Court "to resolve the circuit divide over the application of a doctrine deployed daily across this country." Pet. App. 10a-16a (Higginbotham, J., concurring). The question presented—which has divided twelve circuits—is:

Whether courts should apply the moment of the threat doctrine when evaluating an excessive force claim under the Fourth Amendment.

PARTIES TO THE PROCEEDING

Janice Hughes Barnes was the Plaintiff-Appellant below and is the Petitioner in this Court, individually and as representative of the estate of Ashtian Barnes. Roberto Felix, Jr. and the County of Harris, Texas, were Defendants-Appellees below and are Respondents in this Court.

Tommy Duane Barnes was a *pro se* Plaintiff-Appellant below and is therefore treated as a Respondent in this Court. *See* Sup. Ct. R. 12.6.

STATEMENT OF RELATED CASES

All proceedings directly related to this Petition include:

- *Barnes* v. *Felix*, No. 22-20519 (5th Cir.)
- *Barnes* v. *Felix*, No. 21-20180 (5th Cir.)
- *Barnes* v. *Felix*, No. 4:18-CV-725 (S.D. Tex.)
- *Barnes* v. *Felix*, No. 2017-86034 (Tex. D. Ct.—Harris County [129th Dist.])

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OPINIONS BELOW

The Fifth Circuit's decision (Pet. App. 1a-16a) is reported at 91 F.4th 393 (5th Cir. 2024). The District Court's decision (Pet. App. 17a-32a) is reported at 532 F. Supp. 3d 463 (S.D. Tex. 2021).

JURISDICTION

The Fifth Circuit entered judgment on January 23, 2024. On March 27, 2024, this Court extended Petitioner's deadline to petition for a writ of certiorari up to and including May 22, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

U.S. Const. amend. IV.

INTRODUCTION

On an April afternoon in 2016, Ashtian Barnes was driving his girlfriend's rental car on the Sam Houston Tollway outside of Houston, Texas. That same afternoon, Officer Roberto Felix, Jr. was patrolling for toll violations. Through no fault of Barnes, there were toll violations associated with the rental car's license plate, and Felix initiated a traffic stop. Felix asked Barnes for his license and the rental car's insurance paperwork. Barnes indicated that the paperwork may be in the trunk, and Felix instructed Barnes to get out of the vehicle. A dash camera recorded what happens next: The car starts moving slowly forward, and

Officer Felix jumps onto the door sill of the vehicle. In the same instant, Officer Felix begins shooting inside the vehicle, striking Barnes twice. Officer Felix then holds Barnes at gunpoint until he bleeds to death in the rental car.

This tragic episode is just one of many recurring examples that demonstrate why this Court's intervention is necessary. Twelve circuits are divided—with a lopsided 8-4 split—over how to evaluate the reasonableness of a police officer's conduct in a situation like this one, where there is a threat to the officer's safety but other facts and circumstances demonstrate that the officer's conduct was deeply unreasonable (here, the officer jumped onto a moving vehicle without any apparent justification and killed a motorist over a toll violation that was not even the motorist's fault).

In eight circuits—the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits—Officer Felix's actions were *not* reasonable, and Barnes's Fourth Amendment rights were violated. Those circuits evaluate the totality of the circumstances when analyzing the reasonableness of an officer's actions, including the events leading up to the use of force. *See, e.g.*, *Young* v. *City of Providence ex rel. Napolitano*, 404 F.3d 4, 22-23 (1st Cir. 2005); *Abraham* v. *Raso*, 183 F.3d 279, 291 (3d Cir. 1999); *Kirby* v. *Duva*, 530 F.3d 475, 482 (6th Cir. 2008); *Est. of Starks* v. *Enyart*, 5 F.3d 230, 233-234 (7th Cir. 1993); *S.R. Nehad* v. *Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019); *Arnold* v. *City of Olathe*, 35 F.4th 778, 789-791 (10th Cir. 2022) (Tymkovich, C.J.); *Brown* v. *City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994); *Wardlaw* v. *Pickett*, 1 F.3d 1297, 1303-1304 (D.C. Cir. 1993).

In four other circuits—the Second, Fourth, Fifth, and Eighth—Officer Felix's actions *were* reasonable, and Barnes's Fourth Amendment rights were not violated. Those circuits have adopted the "moment of the threat doctrine," which evaluates the reasonableness of an officer's actions *only* during the narrow window when the officer's safety was threatened, without considering the events that led up to the moment of threat. *See, e.g.*, *Salim* v. *Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Anderson* v. *Russell*, 247 F.3d 125, 132 (4th Cir. 2001); Pet. App. 7a-8a (5th Cir.); *Banks* v. *Hawkins*, 999 F.3d 521, 526 (8th Cir. 2021).

This circuit split is deep, longstanding, and widely acknowledged. In the decision below, Judge Higginbotham wrote the majority opinion ruling that Barnes's Fourth Amendment rights were not violated under Fifth Circuit precedent. *See* Pet. App. 1a-9a. Judge Higginbotham then took the extraordinary step of concurring in his own majority opinion to explain that the Fifth Circuit's precedent is wrong, that eight circuits disagree with it, and that this Court should overturn it. *See id.* at 10a-16a (Higginbotham, J., concurring). As Judge Higginbotham explains, the "moment of threat doctrine" is contrary to this 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 10a. And it has serious consequences: It "lessens the Fourth Amendment's protection of the American public, devalues human life, and frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* (quotation marks omitted).

The petitioner in this case is Ashtian's mother, Janice Hughes Barnes. Janice lost her only son

because Officer Felix used excessive force and violated Ashtian's constitutional rights, over a toll violation. She respectfully requests that the Court grant certiorari and reverse the decision below. As Judge Higginbotham put it, "[i]t is time" for this Court "to resolve the circuit divide over the application of a doctrine deployed daily across this country." *Id.* at 16a (Higginbotham, J., concurring).

STATEMENT OF THE CASE

A. Statement of Facts

On the afternoon of April 28, 2016, 24-year-old Ashtian Barnes was driving a rental car on the Sam Houston Tollway. Pet. App. 2a. The license plate of the car, which had been rented by Barnes's girlfriend, was linked to outstanding toll violations incurred by another driver. *Id.* at 2a.

Respondent Roberto Felix, Jr. was "a traffic enforcement officer" for the Harris County Precinct Five Constable's Office. *Id.* at 1a-2a. Officer Felix heard a radio broadcast identifying Barnes's rental car as having "outstanding toll violations." *Id.* at 2a. Officer Felix spotted the vehicle and initiated a traffic stop by engaging his emergency lights. Barnes complied and pulled onto "the median on the left side of the Tollway out of the immediate traffic zone." *Id.*

Officer Felix exited his cruiser, approached the driver's side of the rental car, and asked Barnes for his license and proof of insurance. *Id.* Barnes replied that "he did not have the documentation" and began "digging around in the car." *Id.* at 2a (quotation marks omitted). Officer Felix told Barnes to stop searching the car, claiming that he smelled marijuana. *Id*. at 2a–3a. Barnes told Officer Felix that he "might have

the requested documentation in the trunk," opened his trunk, and turned off the car. *Id.* at 3a (quotation marks omitted). No marijuana, other drugs, or any kind of drug paraphernalia were ever found in the car.

The District Court provided a summary of events, as recorded by the dashboard camera on Officer Felix's cruiser:

> "• At about 2:45:43, Felix asks Barnes to step out of the vehicle, and it appears that Barnes opens the driver's-side door.
>
> "• As the door opens, Felix's right hand was on the holster of his gun.
>
> "• At about 2:45:48, the vehicle's taillights turn on.
>
> "• About one second later, Felix draws his gun, and the vehicle starts to move forward.
>
> "• Felix appears to step onto the door sill of the vehicle as the door begins to close.
>
> "• As the vehicle accelerates, Felix yells, 'Don't fucking move!' twice.
>
> "• Felix briefly pulls his gun hand out of the vehicle.
>
> "• At about 2:45:52, Felix fires his first shot.
>
> "• Two seconds later, the vehicle comes to a complete stop."

Id. at 26a-27a.[1]

For nearly two minutes, "Officer Felix held Barnes at gunpoint until backup arrived while Barnes sat

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[1] The dash cam video was in evidence below and can be viewed at: https://youtu.be/9gbM_22fUbY.

bleeding in the driver's seat." *Id*. at 4a. "Barnes was pronounced dead at the scene." *Id*.[2]

In total, the traffic stop lasted less than three minutes. *Id.* at 17a. Less than ten seconds passed between the moment Officer Felix ordered Barnes to exit the vehicle and the moment Officer Felix jumped on the vehicle, "shoved his gun into Barnes's head, pushing his head hard to the right," and shot Barnes. *Id*. at 4a (quotation marks omitted).

B. Procedural History

1. Petitioner Janice Hughes Barnes is Ashtian Barnes's mother. She filed suit in state court against Officer Felix and Harris County under 42 U.S.C. § 1983. Her complaint alleges that Felix used excessive force in violation of Ashtian Barnes's Fourth Amendment rights. Respondents removed to federal court. At summary judgment, the District Court held that Felix's use of deadly force was reasonable under the Fifth Circuit's "moment-of-the-threat doctrine." Pet. App. 17a-32a.

In this Court's landmark decision in *Graham* v. *Connor*, the Court explained that determining whether the use of force is "reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (quotation marks omitted). This test "is not capable of precise definition or

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[2] Police later found a firearm in the car. It is undisputed that Officer Felix did not know about the firearm when he shot Barnes.

mechanical application." *Id*. (quotation marks 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*. (quotation marks omitted).

Graham identified non-exhaustive factors to consider, "including 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*. This wholistic inquiry is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id*. at 396-397. The officer's actual "intent or motivation" is irrelevant to whether a use of force was constitutional. *Id*. at 397. What matters instead is whether the officer's use of force was "objectively reasonable." *Id*.

As the District Court explained, however, "in cases involving the use of deadly force, the Fifth Circuit has developed a much narrower approach." Pet. App. 23a-24a. 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 25a (quotation marks omitted) (emphasis in original). "The 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." *Id*. at 29a-30a (quotation marks omitted).

The District Court determined that "the moment of the threat" was the moment "*after* Felix jumped onto the door sill," "in the two seconds before Felix fired his first shot." *Id*. at 29a (emphasis in original). Applying the moment of the threat doctrine, the District Court concluded that it was prohibited from considering "the officer's conduct precipitating the shooting—which included *jumping onto a moving vehicle*." *Id.* at 17a-18a (emphasis added).

According to the District Court, in the brief two seconds before Felix had fired his weapon, "Felix was still hanging onto the moving vehicle and believed it would run him over." *Id*. at 29a. Viewing those two seconds in isolation, the District Court held that Officer Felix had acted reasonably when he shot and killed Ashtian Barnes. It did not matter that Officer Felix had unreasonably *placed himself* into danger in the preceding second, or that Barnes had been pulled over for a minor violation. *See id*. It mattered only that Officer Felix was objectively in danger at the very moment he fired the deadly shots.

The District Court criticized the moment of the threat doctrine, which "has effectively stifled a more robust examination of the Fourth Amendment's protections" in the circuits adopting that doctrine. *Id*. at 32a. The District Court noted that other circuits apply "a more nuanced framework" "when the officer's own conduct exacerbates the excessiveness of the deadly force used." *Id*. at 24a n.2. The District Court called on the Fifth Circuit to reevaluate its precedent and "consider the approach applied by its sister courts." *Id*. at 32a.

2. Petitioner appealed the District Court's adverse ruling. In a published opinion by Judge

Higginbotham, the Fifth Circuit affirmed under the moment of the threat doctrine. *Id*. at 1a-16a.

Writing for the panel, Judge Higginbotham explained that the moment of the threat doctrine is "well-established" in the Fifth Circuit. *Id*. at 7a (quoting *Amador* v. *Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020)). Under that circuit's governing precedent, the "excessive-force inquiry is confined to whether the officers or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force." *Id*. at 7a-8a (quoting *Amador*, 961 F.3d at 728). As a result, the Fifth Circuit may consider only "the act that led the officer to discharge his weapon." *Id*. at 8a (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." *Id*. (quoting *Harris* v. *Serpas*, 745 F.3d 767, 772 (5th Cir. 2014)).

The Fifth Circuit agreed with the District Court that "the moment of threat occurred in the two seconds before Barnes was shot." *Id*. According to the Fifth Circuit, in that two-second window, Officer Felix was holding on to a moving vehicle, and could "reasonably believe his life was in imminent danger." *Id*. (quotation marks omitted). As a result, the Fifth Circuit found that Officer Felix had acted reasonably in the instant in which he killed Barnes. *Id*.

Like the District Court, the Fifth Circuit did not consider Felix's decision to jump on to a moving vehicle, or the minor nature of the toll violation, when analyzing the reasonableness of Felix's actions.

3. Judge Higginbotham concurred in his own majority opinion "to express" his serious "concern" with

the "moment of threat doctrine." Pet App. 10a (Higginbotham, J., concurring). His concurrence highlighted the deep split among twelve circuit courts and called on this Court "to resolve the circuit divide." *Id*. at 16a.

Judge Higginbotham explained that the Fifth Circuit's moment of the threat doctrine "counters the Supreme Court's instruction to look to the totality of the circumstances." *Id*. at 10a. In Judge Higginbotham's view, that doctrine improperly "narrow[s]" the "inquiry by circumscribing the reasonableness analysis of the Fourth Amendment to the precise millisecond at which an officer deploys deadly force." *Id*. at 12a. As a result, the moment of the threat doctrine ignores "the reality of the role the officers played in bringing about the conditions said to necessitate deadly force." *Id*. at 13a.

According to Judge Higginbotham, this case provides a "paradigmatic" example of why the moment of the threat doctrine is wrong. *Id.* at 15a. Under that doctrine, the Fifth Circuit was "prohibited from considering Officer Felix's decision to jump onto the sill of the vehicle with his gun already drawn, and—in the span of two seconds—his decision to elevate and fire his handgun into the vehicle—this for driving with an outstanding toll violation." *Id*. Had Judge Higginbotham been allowed to consider the totality of Officer Felix's actions that day, Judge Higginbotham would have held "that Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force." *Id*. at 16a.

Judge Higginbotham cited decisions from eleven other circuits showing that the Fifth Circuit's "approach to the reasonableness analysis is the minority

position, joined by the Second, Fourth, and Eighth Circuits." *Id.* at 13a-14a & n.13. In contrast, the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits would have considered the totality of the circumstances. *Id*.

Judge Higginbotham emphasized that this deep circuit split is particularly concerning in the context of traffic stops. "Today, traffic stops and the use of deadly force are too often one and the same—with Black and Latino drivers overrepresented among those killed." *Id*. at 11a n.5. Judge Higginbotham described the moment of the threat doctrine as an "impermissible gloss" on this Court's Fourth Amendment precedent, stifling "a robust examination of the Fourth Amendment's protections for the American public." *Id*. at 16a.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND ACKNOWLEDGED TWELVE-CIRCUIT SPLIT.

This Petition presents an acknowledged, entrenched, and unusually deep circuit split on a constitutional question of enormous importance that calls for this Court's review. *See* Sup. Ct. R. 10(a). As Judge Higginbotham detailed, eight courts of appeals have rejected the moment of the threat doctrine. In each of those jurisdictions, the court would have evaluated more than the brief two seconds before Felix shot Barnes when determining whether the officer's use of force was reasonable. *See* Pet. App. 13a-14a n.13 (Higginbotham, J., concurring). In contrast, four courts of appeals have embraced the moment of the threat doctrine, following the Fifth Circuit's approach

and examining only the narrow window where the police officer's safety was threatened. *See id.* The issue has percolated enough. "It is time" for this Court "to resolve the circuit divide over the application of a doctrine deployed daily across this country." *Id.* at 16a.

A. The First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, And D.C. Circuits Reject The Moment Of The Threat Doctrine.

The vast majority of circuits reject the moment of the threat doctrine and would have reached the opposite result from the Fifth Circuit's decision below.

The First Circuit evaluates the "totality of the circumstances" when analyzing whether an officer's use of force was reasonable, rejecting the position that an "officers' actions or inactions leading up to the moment in question cannot be considered." *Lachance* v. *Town of Charlton*, 990 F.3d 14, 26 n.11 (1st Cir. 2021); *see Est. of Rahim by Rahim* v. *Doe*, 51 F.4th 402, 418 n.14 (1st Cir. 2022) ("[P]re-seizure conduct may be relevant in the reasonableness analysis.").

In *Young* v. *City of Providence ex rel. Napolitano*, 404 F.3d 4 (1st Cir. 2005), for example, two police officers argued that the district court erred when it instructed "the jury that 'events leading up to the shooting' could be considered by it in determining the excessive force question," *id*. at 22. The First Circuit rejected the officers' argument and explained that "police officers' actions" "need not be examined solely at the 'moment of the shooting.' " *Id*. (quoting *St. Hilaire* v. *City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995)). The First Circuit recognized that the "circuits have taken somewhat different positions on the question." *Id*. at 22 n.12. But the First Circuit concluded that

analyzing the events prior to the shooting is "most consistent with the Supreme Court's mandate" to "consider these cases in the 'totality of the circumstances.' " *Id*. (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985)).

The Third Circuit has likewise rejected the moment of the threat doctrine. In *Abraham* v. *Raso*, 183 F.3d 279 (3d Cir. 1999), the Third Circuit "disagree[d] with those courts" that decline to consider "any evidence of events preceding the actual 'seizure,' " *id.* at 291. The Third Circuit explained that a "rigid rule" excluding "all context and causes prior to the moment the seizure is finally accomplished" is incompatible with this Court's decision in *Graham*. *Id*. Analyzing only the precise moment of the threat, the Third Circuit concluded, would raise difficult line-drawing questions, because courts would be "left without any principled way of explaining" at what moment to "start" the analysis, "and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded." *Id*. at 291-292; *see also Rush* v. *City of Philadelphia*, 78 F.4th 610, 621 n.10 (3d Cir. 2023) (considering "the entirety of the stop"); *Johnson* v. *City of Philadelphia*, 837 F.3d 343, 351 (3d Cir. 2016) (recognizing that an "officer's own reckless or deliberate conduct" may "unreasonably create[] the need to use deadly force"); *Curley* v. *Klem*, 499 F.3d 199, 216 (3d Cir. 2007) (holding that "the inquiry cannot be collapsed into a single instant"); *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.").

The Sixth Circuit has adopted a similar approach. It answers the question "how broadly to view the

circumstances relevant to the excessive force issue" by analyzing "excessive force claims in segments." *Dickerson* v. *McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996). The court identifies each use of force and analyzes an appropriate segment of "preceding" time. *Id*. at 1162; *see Barton* v. *Martin*, 949 F.3d 938, 952 (6th Cir. 2020). Unlike courts that apply the moment of the threat doctrine, the Sixth Circuit does not impose rigid "guidelines on what constitutes an analyzable unit of time." *Kirilova* v. *Braun*, No. 21-5649, 2022 WL 247751, at *4 (6th Cir. Jan. 27, 2022). Instead, the Sixth Circuit considers "the preceding seconds or minutes" prior to a "use of force" if there is "some casual connection" between those prior moments and the subsequent use of force. *Id*.

As a result, the Sixth Circuit considers "events" "in close temporal proximity to the shooting" when evaluating the reasonableness of an officer's actions—the very thing the Fifth Circuit refused to do in this case. *Bletz* v. *Gribble*, 641 F.3d 743, 752 (6th Cir. 2011); *see, e.g.*, *Richards* v. *City of Jackson*, 788 F. App'x 324, 335 (6th Cir. 2019) (applying *Bletz* and considering officer's "unlawful entry preceding the shooting").

In *Kirby* v. *Duva*, 530 F.3d 475 (6th Cir. 2008), for instance, the Sixth Circuit held that where "a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive," *id*. at 482. There, an officer had "placed himself in potential danger by moving towards" a moving vehicle. *Id*. As the Sixth Circuit explained, this unreasonable action rendered the officer's subsequent shooting

unconstitutional—an analysis directly at odds with the Fifth Circuit's analysis below. *Id*.

Similarly, in *Latits* v. *Phillips*, 878 F.3d 541 (6th Cir. 2017), an officer "rammed" a suspect's car, exited his vehicle, ran to the suspect's car, and shot the suspect, *id*. at 545-546. The Sixth Circuit held that the officer acted unreasonably. The court considered "it relevant that" before the shooting, the officer had "repeatedly violated police procedures in both ramming [the suspect's car] and running up to his car." *Id*. at 552; *see also Palma* v. *Johns*, 27 F.4th 419, 439 (6th Cir. 2022) (holding that officer "should have waited for backup before engaging with a mentally ill man who posed no immediate threat to anyone").

The Seventh Circuit likewise considers "all of the events that occurred around the time of the shooting" and does not limit the inquiry "to the precise moment" of the threat. *Deering* v. *Reich*, 183 F.3d 645, 649, 652 (7th Cir. 1999); *see id*. at 652 (jurors properly considered how officers "approached" a suspect's "house" in the middle of the night before a deadly confrontation, "how dark it was" at the time, and how the suspect responded).

In *Estate of Starks* v. *Enyart*, 5 F.3d 230 (7th Cir. 1993), a plaintiff claimed that a police officer had stepped in front of a moving car, "without leaving" the driver "time to stop," *id*. at 234. The Seventh Circuit held, based on the plaintiff's account, that the officer "unreasonably created the encounter that ostensibly permitted the use of deadly force." *Id*.; *see also Sledd* v. *Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) ("[O]fficer had unreasonably created the encounter that led to the use of force."). In *Strand* v. *Minchuk*, 910 F.3d 916 (7th Cir. 2018), the Seventh Circuit likewise ruled for

a plaintiff after an officer unnecessarily escalated an altercation over a parking ticket and then shot him. In its analysis, the Seventh Circuit considered "the broader circumstances that led to the shooting," including the fact that the officer "allowed the situation to escalate and boil over." *Id*. at 916.

The Seventh Circuit recently reiterated that under its precedent, "an officer may not step into the path of a moving vehicle and then justify the use of deadly force by claiming to be threatened by the use of the car as a deadly weapon"—a result directly contrary to the Fifth Circuit's approach below. *Tousis* v. *Billiot*, 84 F.4th 692, 701 (7th Cir. 2023) (emphasis omitted); *see also Est. of Biegert by Biegert* v. *Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (describing Seventh Circuit precedent holding that "an officer acted unreasonably because he created a situation where deadly force became essentially inevitable" and "was almost entirely a result of the officer['s] actions").[3]

The Ninth Circuit likewise examines "the facts and circumstances" when evaluating whether the use of force was reasonable, including the "events leading up to the shooting." *Hung Lam* v. *City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) (quotation marks omitted). In *S.R. Nehad* v. *Browder*, 929 F.3d 1125 (9th

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[3] The Seventh Circuit has noted that its precedent has at times been unclear "as to the relevance" of an officer's conduct prior to a shooting, demonstrating the longstanding confusion among the courts of appeals with respect to the question presented. *Williams* v. *Ind. State Police Dep't*, 797 F.3d 468, 483 (7th Cir. 2015). In some cases, the Seventh Circuit has divided incidents into segments and analyzed each segment as a unit of time, akin to the Sixth Circuit's approach. *See Plakas* v. *Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994).

Cir. 2019), for example, the Ninth Circuit recognized that officers "must often make split-second judgments," but concluded that officers cannot "unnecessarily create their own sense of urgency," *id*. at 1135 (quotation marks and brackets omitted). Courts in the Ninth Circuit therefore consider whether "an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, with undue haste" when evaluating whether a plaintiff's Fourth Amendment rights were violated. *Id*. (quotation marks omitted).

In *Winkler* v. *City of Phoenix*, 849 F. App'x 664 (9th Cir. 2021) (mem.), the Ninth Circuit held that a trial court had improperly instructed jurors that they could not consider whether "the officer contributed to the need for force" in a Section 1983 case, *id*. at 667. The Ninth Circuit concluded that this instruction improperly "undermined the requisite fact-intensive inquiry into *all* circumstances pertinent to the need for the force used." *Id*. at 666-667 (quotation marks omitted). In *Vos* v. *City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), the Ninth Circuit similarly explained that "the events leading up to the shooting, including the officers[']s tactics, are encompassed in the facts and circumstances for the reasonableness analysis," *id*. at 1034.

The Tenth Circuit has acknowledged the split, explaining that some "circuits consider an officer's reckless conduct when evaluating the reasonable use of force," and others "examine only the facts that existed at the moment of seizure to determine if the officer's use of force was reasonable." *Arnold* v. *City of Olathe*, 35 F.4th 778, 789-790 (10th Cir. 2022) (Tymkovich, C.J.). "Tenth Circuit precedent" follows the majority approach. *Id*. at 790. In *Surat* v. *Klamser*, 52 F.4th

1261 (10th Cir. 2022), for instance, the Tenth Circuit analyzed not only "the facts and circumstances as they existed at the moment the force was used," but also "the events leading up to that moment," *id.* at 1271 (quotation marks omitted). In *Estate of Taylor* v. *Salt Lake City*, 16 F.4th 744 (10th Cir. 2021), the Tenth Circuit likewise held that "the Fourth Amendment excessive-force inquiry is not limited to" "the precise moment that lethal force was used," and instead includes "officer conduct prior to the seizure," *id.* at 762, 771.

The Tenth Circuit's rejection of the moment of the threat doctrine does not inure solely to the benefit of Section 1983 plaintiffs. Consider *Thomson* v. *Salt Lake County*, 584 F.3d 1304 (10th Cir. 2009). There, the plaintiff had argued that, at the moment the shot was fired, the suspect had not pointed his gun at the police. *Id.* at 1318. The Tenth Circuit, however, refused to artificially limit its inquiry to "the precise moment" of the shooting. *Id*. Instead, viewing "the totality of the circumstances," the court concluded "it was reasonable for the officers" to treat the suspect as "an immediate threat." *Id*. (quotation marks omitted); *see also, e.g.*, *Phillips* v. *James*, 422 F.3d 1075, 1083 (10th Cir. 2005) ("[A]lthough the precise moment before [the officer] shot is a critical factor, the events leading up to that moment are also extremely relevant.").

Other Tenth Circuit opinions have adopted the same approach. *See also, e.g.*, *Fogarty* v. *Gallegos*, 523 F.3d 1147, 1159-1160 (10th Cir. 2008) (considering an "officer's own reckless or deliberate conduct" that contributes "to the need to use force" (quotation marks omitted)); *Hastings* v. *Barnes*, 252 F. App'x 197, 203 (10th Cir. 2007) (rejecting focus on "precise moment" of force and examining "whether the officers' own

conduct" "unreasonably created the need to use such force").

The Eleventh Circuit also falls on the majority side of the split. That court is careful to "not mechanically apply [the *Graham*] factors," and emphasizes that a court must "slosh" "through the factbound morass of reasonableness." *Salvato* v. *Miley*, 790 F.3d 1286, 1293 (11th Cir. 2015) (W. Pryor, J.) (quotation marks and brackets omitted) (reversing grant of summary judgment to officer who used deadly force without warning suspect). As a result, the Eleventh Circuit has considered events that occur prior to the seconds in which an officer uses force. *See, e.g.*, *Brown* v. *City of Hialeah*, 30 F.3d 1433, 1436 (11th Cir. 1994) ("In focusing on the totality of circumstances confronting officials at the time of an arrest, the facts and circumstances surrounding the arrest include the full atmosphere at the time.").

For instance, in *Vaughan* v. *Cox*, 343 F.3d 1323 (11th Cir. 2003), the Eleventh Circuit emphasized an officer's failure to warn a suspect "of the potential use of deadly force" in the "thirty to forty-five seconds before firing his weapon," *id*. at 1331. In *Pace* v. *Capobianco*, 283 F.3d 1275 (11th Cir. 2002), the Eleventh Circuit considered the "15 minutes" prior to a shooting, during which a suspect had fled in a car at "high-speed" before stopping in a "dead-end cul-de-sac," *id*. at 1277, when evaluating the reasonableness of the officer's actions. The Eleventh Circuit rejected a bystander's assessment that the suspect was not "a threat to any officer" at the precise moment of the shooting, because the bystander had not seen—and therefore had not considered—"legally material events that [had] occurred" "before and during the car

chase." *Id*. at 1280 (quotation marks omitted). And in *Ayers* v. *Harrison*, 650 F. App'x 709, 711-712 (11th Cir. 2016) (per curiam), the Eleventh Circuit affirmed a jury's verdict in favor of the family of a reverend who had been shot and killed by police in a parking lot. The Eleventh Circuit concluded that the jury properly considered that the officer was driving an unmarked vehicle and approached the reverend "with his gun drawn." *Id.* at 712. This caused the reverend to try "to back away in reverse because he did not know that" the officer "was a law enforcement official, and reasonably believed that he was about to be robbed by unknown assailants," leading to the fatal confrontation. *Id*.

The D.C. Circuit hears fewer excessive force cases, but it too has adopted the majority approach. *See* Pet. App. 14a n.13 (Higginbotham, J., concurring). In *Wardlaw* v. *Pickett*, 1 F.3d 1297 (D.C. Cir. 1993), the D.C. Circuit held that a Deputy U.S. Marshal had acted reasonably in hitting a plaintiff who had tried to intervene in the removal of a spectator from a courthouse. The court considered the fact that "the Marshal's office had taken additional security precautions" and "expected a demonstration of some sort." *Id*. at 1303. As a result, the Deputy U.S. Marshal in question, "having been warned of a demonstration, reasonably could have anticipated a confrontation." *Id*. at 1303-1304. As *Wardlaw* demonstrates, the D.C. Circuit thus considers the totality of the circumstances, and not just the moment of the threat, when conducting the Fourth Amendment analysis. *See also DeGraff* v. *District of Columbia*, 120 F.3d 298, 302 (D.C. Cir. 1997) (requiring district court to develop

record on "the surrounding circumstances" to evaluate excessive force claim).

B. The Second, Fourth, Fifth, And Eighth Circuits Apply The Moment Of The Threat Doctrine.

In sharp contrast, four circuits apply the moment of the threat doctrine. *See* Pet. App. 13a (Higginbotham, J., concurring).

The Fifth Circuit has repeatedly held that it cannot consider "any of the officers' actions leading up to the shooting" as part of the Fourth Amendment inquiry. *Harris*, 745 F.3d at 772; *see Crane* v. *City of Arlington*, 50 F.4th 453, 466 & n.57 (5th Cir. 2022) (acknowledging "split among the Circuits" and declining to consider how officer "escalat[ed] the confrontation"). Thus, in this case, the Fifth Circuit evaluated *only* the two seconds prior to Felix shooting Barnes, and disregarded "Felix's role in drawing his weapon and jumping on the running board" just a second earlier. Pet. App. 16a (Higginbotham, J., concurring). The Fifth Circuit likewise ignored "the gravity of the offense at issue"—driving a rental car with outstanding toll violations. *Id*. at 15a.

Other Fifth Circuit cases reach the same conclusion. In *Harmon* v. *City of Arlington*, 16 F.4th 1159 (5th Cir. 2021), a police officer pulled the victim over "for driving a large SUV with an expired registration tag," *id*. at 1162. There, like here, an officer stepped "onto the running board" of the car. *Id*. at 1164. The driver "started the car" and began "to drive" away. *Id*. "[A]bout a second after the car lurched forward," the officer shot and killed the driver. *Id*. In *Harmon*, just as in this case, the Fifth Circuit limited its

reasonableness analysis to the "brief interval" after the officer had stepped onto the running board. *Id*. The Fifth Circuit concluded the officer had "reasonably believed he was at risk of serious physical harm" because he was standing on a moving car—while declining to take into account that the officer had "clambered onto the running board of the SUV." *Id*. at 1162, 1164.

Similarly, in *Davis* v. *Romer*, 600 F. App'x 926 (5th Cir. 2015) (per curiam), a police officer pulled over a driver for traffic infractions, *id*. at 927. During the stop, an officer reached into the car, and the car began to move. *Id.* at 927-928. Just as in this case, the officer "jumped on the running board" and shot and killed the driver. *Id*. at 928. And just as in this case, the Fifth Circuit refused to consider the officer's decision to "grab a hold of a moving vehicle" as part of the reasonableness analysis. *Id.* at 929; *see also, e.g.*, *Cass* v. *City of Abilene*, 814 F.3d 721, 731 (5th Cir. 2016) (per curiam); *Royal* v. *Spragins*, 575 F. App'x 300, 305 (5th Cir. 2014) (per curiam); *Rockwell* v. *Brown*, 664 F.3d 985, 992-993 (5th Cir. 2011).

The Fourth Circuit similarly considers only "the moment force was used" when analyzing whether a police officer's actions were reasonable. *Elliott* v. *Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996). As the Fourth Circuit has explained, "[t]hat determination must focus on the moment that deadly force was used, not the whole episode." *Stanton* v. *Elliott*, 25 F.4th 227, 233 (4th Cir. 2022); *see, e.g.*, *Greenidge* v. *Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (affirming exclusion of "evidence of the officer's actions leading up to the time immediately prior to the shooting."). In the Fourth Circuit, an "officer's actions in creating the dangerous situation" are

therefore "not relevant to the Fourth Amendment analysis." *Waterman* v. *Batton*, 393 F.3d 471, 477 (4th Cir. 2005).

The Fourth Circuit justifies its adoption of the moment of the threat doctrine based on its reading of this Court's decision in *Graham*. According to the Fourth Circuit, *Graham* "seemed to have relied upon the 'split-second judgments' that were required to be made and focused on the reasonableness of the conduct 'at the moment' when the decision to use certain force was made." *Greenidge*, 927 F.2d at 792. Contrary to the majority approach, the Fourth Circuit interprets *Graham* to mean that any "conduct prior to that moment is not relevant." *Elliott* v. *Leavitt*, 99 F.3d at 643.

Consider the Fourth Circuit's decision in *Anderson* v. *Russell*, 247 F.3d 125 (4th Cir. 2001). There, an officer mistook an innocent bulge in a victim's pocket for a gun and shot the victim. *Id.* at 128. The jury found that the shooting was unreasonable, but the Fourth Circuit applied the moment of the threat doctrine and reversed the jury verdict. *Id.* at 128-129. In its analysis, the Fourth Circuit recognized that under *Graham*, "the severity of the crime at issue is one factor" a court should evaluate when determining reasonableness. *Id*. at 131 (citing *Graham*, 490 U.S. at 393). But after assuming "the suspected criminal activity at issue was relatively minor"—namely, a misdemeanor violation of Maryland's concealed weapons law—the Fourth Circuit held that the "factor would prove *irrelevant* to [its] excessive force analysis." *Id*. at 132 (emphasis added). Instead, all that mattered was that, at "the precise moment that [the officer] used deadly force, he reasonably believed that [the victim] posed a deadly threat." *Id*. The Fourth Circuit recognizes,

however, that "circuits differ on the question of how pre-shooting conduct should be weighed in an excessive force case." *Waller* v. *City of Danville*, 212 F. App'x 162, 171 (4th Cir. 2006).

The Second Circuit has likewise adopted the moment of the threat doctrine, limiting its Fourth Amendment analysis to the moment in which an officer makes "the split-second decision to employ deadly force." *Salim* v. *Proulx,* 93 F.3d 86, 92 (2d Cir. 1996); *accord O'Bert ex rel. Est. of O'Bert* v. *Vargo*, 331 F.3d 29, 37 (2d Cir. 2003); *see Terebesi* v. *Torreso*, 764 F.3d 217, 234 n.16 (2d Cir. 2014) (describing *Salim* as consistent with those courts viewing the use of force "in isolation").

The Second Circuit thus does not consider an officer's "actions leading up to the shooting"—including whether the officer's prior actions "created a situation in which the use of deadly force became necessary"—as part of the Fourth Amendment inquiry. *Salim*, 93 F.3d at 92. In *Salim*, the Second Circuit accordingly reversed the denial of summary judgment and ruled in favor of an officer who sought to apprehend, and ultimately killed, a 14-year-old child. *See id.* The court declined to consider the officer's unreasonable decisions not to "carry a radio," not to "call for back-up," and not to "disengage" when a group of "children entered the fray"—all of which precipitated the tragic shooting. *Id*.

The Eighth Circuit also follows the minority approach, focusing on "the precise moment" of "the seizure." *Banks* v. *Hawkins*, 999 F.3d 521, 525 (8th Cir. 2021) (quotation marks omitted); *see also, e.g.*, *Gardner* v. *Buerger*, 82 F.3d 248, 252 (8th Cir. 1996) ("[O]ur analysis focuses on the reasonableness of the seizure

itself—here, the shooting—and not on the events leading up to it."). The Eighth Circuit does not consider whether officers "created the need to use force by their actions prior to the moment of seizure." *Schulz* v. *Long*, 44 F.3d 643, 649 (8th Cir. 1995).

In *Kong* v. *City of Burnsville*, 960 F.3d 985, 993-994 (8th Cir. 2020), for example, police officers confronted a mentally disabled man brandishing a knife inside his car. The officers broke the car's windows and tased the victim, who fell out of the car and took off running. *Id*. at 990, 993 (quotation marks omitted). "Within seconds," the officers shot him in the "back and side." *Id*. at 990. The Eighth Circuit explained that it did not matter whether the "officers created the need to use deadly force" by breaking the car windows, tasing the man, and triggering his flight. *Id*. at 993-994 (quotation marks omitted). Under that circuit's precedent, reasonableness turned on the threat posed seconds later "during the shooting." *Id*. at 994.

There is thus a clear, longstanding split over the question presented, as both the courts and commentators have recognized. *See, e.g.*, Lora A. Lucero, *Evidence of Officer's Actions Leading Up to Use of Excessive Force in Federal Excessive Force Cases*, 84 A.L.R. Fed. 3d art. 4 § 1 (2023) ("The federal circuit courts are split."); Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1369-1370 (2021) (The question "has split the lower federal courts."); Seth W. Stoughton et al.,

EVALUATING POLICE USES OF FORCE 54 (2020) ("Courts of Appeals are split.").[4]

This Court should grant the Petition and finally resolve this entrenched, nationwide conflict. Sup. Ct. R. 10(a).

II. THE FIFTH CIRCUIT'S APPROACH IS WRONG.

1. The decision below is profoundly wrong.

The Fourth Amendment guarantees the "right of the people to be sure in their persons" "against unreasonable" "seizures." U.S. Const. amend. IV. A use of force is a seizure of the person. *See Torres* v. *Madrid*, 592 U.S. 306, 325 (2021). To determine whether that seizure is reasonable, a court balances "the nature and quality of the intrusion" "against the countervailing governmental interests." *Graham*, 490 U.S. at 396 (quotation marks omitted). This wholistic analysis requires a court to examine "the totality of the circumstances," including the crime a suspect committed and his dangerousness. *Id*. (quotation marks omitted). The court then determines how an objectively reasonable officer "on the scene" would have acted under those circumstances. *Id*.

In this case, "Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force." *Id*. at 16a (Higginbotham, J., concurring). The harm to Barnes's "fundamental interest in his own life" was

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[4] Some commentators categorize the circuits in slightly different terms. *See, e.g.*, Lucero, *supra* § 2 (describing a 4-2-5 split); Lee, *supra* at 1398-1399 (describing a 6-5 split). However the split is described, there is no dispute that the circuits are divided, and this Court's intervention is urgently needed.

"unmatched." *Garner*, 471 U.S. at 9. There is no greater intrusion on individual liberty than deadly force. *Id*. It is thus "unreasonable for an officer to use deadly force to stop a fleeing suspect"—as Ashtian Barnes allegedly was—"*unless* the suspect poses an immediate physical danger to the officer or others." Pet. App. 12a. (Higginbotham, J., concurring) (emphasis in original) (footnote omitted) (citing *Garner*, 471 U.S. at 21).

But Barnes was no threat. The governmental interest in taking Barnes's life was non-existent. "[T]he offense at issue" was a minor traffic violation—driving a rental car with outstanding tolls. *Id*. at 15a. It was objectively unreasonable for Officer Felix to shoot Barnes in these circumstances. *See id.* at 16a. Yet that is precisely what Felix did. In one fluid moment, Felix "stepped on the running board of the car and shot Barnes within two seconds, lest he get away with driving his girlfriend's rental car with an outstanding toll fee." *Id.*

Nor was Officer Felix's excessive force any more reasonable because he had "intentionally placed himself" into "danger" immediately before shooting Barnes. *Scott* v. *Harris*, 550 U.S. 372, 384 (2007). This conclusion makes sense at multiple levels: As Judge Higginbotham explained, Felix's "use of lethal force against" Barnes "preceded any real threat to Officer Felix's safety." Pet. App. 16a (Higginbotham, J., concurring). "Barnes's decision to flee was made before Officer Felix stepped on the running board. His flight prompted Officer Felix to jump on the running board and fire within two seconds." *Id*. In other words, when viewed in context, Felix's use of deadly

force began even before Felix placed himself into danger.

Meanwhile, there was no "countervailing governmental interest" in Officer Felix putting himself in danger—only to shoot Barnes a second later. *Deering*, 183 F.3d at 652; *Starks*, 5 F.3d at 234. And the threat that Officer Felix faced from the moving vehicle was the immediate consequence of his unreasonable act of jumping onto the car. Officer Felix should bear responsibility for the foreseeable result of his own actions. *See* PROSSER AND KEETON ON THE LAW OF TORTS, 272-319 (W. Page Keeton et al. eds., 5th ed. 1984). Indeed, in *Scott*, this Court held that a dangerous *driver's* "relative culpability" in placing "himself and the public in danger" was "relevant" in evaluating "the reasonableness" of the police's use of force against *the driver*. *Scott*, 550 U.S. at 384 & n.10 (emphasis omitted). So too, when Felix unnecessarily placed himself into danger, Felix's relative responsibility should factor into the unreasonableness of his use of deadly force against Barnes.

2. The Fifth Circuit did not examine this fatal traffic stop in its entirety. *See Graham*, 490 U.S. at 396. Instead, applying the moment of the threat doctrine, the Fifth Circuit evaluated *only* the two seconds after Officer Felix had jumped onto Barnes's car. That blinkered perspective "starve[d] the reasonableness analysis" and produced a deeply unjust result. Pet. App. 15a (Higginbotham, J., concurring). This Court should reject the moment of the threat doctrine and reverse the Fifth Circuit for four reasons.

First, the Fifth Circuit's approach is incompatible with this Court's repeated instructions to evaluate reasonableness based on "the totality of the

circumstances." *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 9); *see also, e.g.*, *County of Los Angeles* v. *Mendez*, 581 U.S. 420, 427-428 (2017); *Plumhoff* v. *Ricard*, 572 U.S. 765, 774 (2014). " 'Totality' is an encompassing word." *Abraham*, 183 F.3d at 291. It requires balancing "all of the factors bearing on the officer's use of force." *Id*. Events immediately preceding the moment an officer pulls the trigger necessarily bear on the reasonableness of that act. As Justice Sotomayor explained at oral argument in *Mendez*, the court should "look at everything the officer and the victim did that led up to the moment of confrontation." Oral Arg. Tr. 17, *County of Los Angeles* v. *Mendez*, No. 16-369 (U.S. 2017). Or as Justice Alito explained, if an officer jumps in front of—or in this case onto—a moving vehicle, "you look at the entire seizure, the jumping in front of the car, plus the ultimate shooting to determine whether it's reasonable." *Id*. at 34.[5]

Indeed, courts that apply the moment of the threat doctrine often ignore factors this Court has specifically instructed lower courts to consider as part of the totality of the circumstances. For instance, *Graham* held that courts should evaluate "the severity of the crime at issue," *Graham*, 490 U.S. at 396, based on the commonsense principle that "police do not approach the arrest of a jaywalker and a cop killer in the same fashion," *Deering*, 183 F.3d at 650. Yet because the Fifth Circuit evaluates "the moment of threat" only, the Fifth Circuit disregards this portion of *Graham* and ignores "the gravity of the offense." Pet. App. 15a

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[5] Because the question presented here was not presented in *Mendez*, this Court acknowledged but did not answer it. *See infra* p. 33.

(Higginbotham, J., concurring); *accord Anderson*, 247 F.3d at 132 (holding severity of crime "irrelevant").

In other cases, this Court has instructed courts to determine whether an officer provided a "warning" before using deadly force, *Garner*, 471 U.S. at 12, or sought "to temper or to limit the amount of force" deployed, *Lombardo* v. *City of St. Louis*, 594 U.S. 464, 467 (2021) (per curiam) (quoting *Kingsley* v. *Hendrickson*, 576 U.S. 389, 397 (2015)). Just a few Terms ago in *Lombardo*, this Court directed the Court of Appeals to evaluate on remand (among other things) "the duration of the restraint" that ultimately led to a prisoner's death. *Id*. at 468. But the Fifth Circuit's moment of the threat doctrine requires courts to ignore warnings, de-escalatory actions, or aspects of a deadly restraint prior to the precise instant an officer deploys deadly force.

Second, the moment of the threat doctrine presents difficult line drawing questions regarding "what circumstances, if any, are left to be considered." *Abraham*, 183 F.3d at 291. For example, if an incident occurs over an extended period, courts may struggle to identify the precise moment to evaluate. *Cf*. *Lombardo*, 594 U.S. at 466 (officers apply prone restraint and kill plaintiff over fifteen minutes). Choosing the timeframe for analysis will often dictate the outcome. In this case, the Fifth Circuit pegged the critical moment as "the two seconds before Barnes was shot," in which Felix appeared to be "hanging onto the moving vehicle," and concluded that Felix acted reasonably. Pet. App. 8a (quotation marks omitted). Add a second or two more, and the conclusion changes dramatically, because it would allow the Court to consider Felix's actions in jumping onto the vehicle. Instead of

struggling to identify what moment to analyze, courts should apply "ordinary ideas of causation," which allows them to consider relevant "preceding events" and exclude irrelevant information. *Abraham*, 183 F.3d at 292.

Third, some courts have incorrectly read *Graham* to require the moment of the threat doctrine. *See, e.g.*, *Greenidge*, 927 F.2d at 791. These courts highlight *Graham*'s warning that officers "make split-second judgments," that courts should avoid "the 20/20 vision of hindsight" from "the peace of a judge's chambers," and that for all claims "of excessive force, the same standard of reasonableness at the moment applies." *Graham*, 490 U.S. at 396-397 (quotation marks omitted).

But nothing in *Graham* limits a court's analysis to the precise instant in which an officer uses force. Quite the opposite. *Graham* requires analysis of the "totality of the circumstances," including factors that precede the moment of the threat. *Id*. at 396 (quotation marks omitted). Courts can heed *Graham*'s warning against Monday morning quarterbacking while also evaluating the relevant factors surrounding an incident.

Fourth, when courts examine the totality of the circumstances, they protect responsible police officers, in addition to vindicating important constitutional rights. Examining the totality of the circumstances may provide "justification for police action" by encompassing "some fact or another which validates a search, a seizure, or such things as the reasonableness of force used to carry out an arrest." *Deering*, 183 F.3d at 650. In sharp contrast, the moment of the threat doctrine can prevent courts from considering

information that justifies an officer's conduct. *Cf. Banks*, 999 F.3d at 526. Meanwhile, in this case, the doctrine absolves an officer who unreasonably placed himself into unnecessary danger, and shot and killed a man, all because of outstanding toll violations on a rented car.[6]

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT, AND THIS CASE OFFERS AN IDEAL VEHICLE TO ADDRESS IT.

1. The question presented is extraordinarily important. Janice Barnes is not the only parent grieving the unnecessary loss of a child. Every year, law enforcement officers deploy force or the threat of force against approximately 1 million people in the United States, leading to 75,000 injuries requiring hospital treatment, and between 600 and 1,000 deaths.[7] The Fourth Amendment and its reasonableness standard governs each interaction. *See Graham*, 490 U.S. at 396. The issue at the heart of this case—what facts and circumstances a court may analyze when evaluating reasonableness—is critical to distinguishing the constitutional use of force from unlawful encounters that violate the foundational liberty protections

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[6] The Fifth Circuit disposed of the municipal liability claim against Harris County on the basis that Felix did not violate Barnes's rights. *See* Pet App. 9a. If this Court reverses the Fifth Circuit on that issue, it will revive Petitioner's claims against both Respondents.

[7] *Facts and Figures on Injuries Caused by Law Enforcement*, LAW ENF'T EPIDEMIOLOGY PROJECT, UNIV. OF ILL. CHI.: SCH. OF PUB. HEALTH, https://policeepi.uic.edu/data-civilian-injuries-law-enforcement/facts-figures-injuries-caused-law-enforcement/ (last visited May 20, 2024).

embodied in the Fourth Amendment.

It is troubling that federal courts frequently reach divergent results on a fundamental right of this magnitude. The Constitution's protections against excessive force should not vary depending on whether an individual lives in Houston or New York, rather than Boston or Los Angeles. Nor should a police officer face unnecessary liability because he serves in a jurisdiction that applies the moment of the threat doctrine and may improperly penalize him based on a blinkered analysis of a dangerous encounter. This is precisely the kind of important, nationwide conflict that merits this Court's review, as Judge Higginbotham's concurrence demonstrates. Further percolation is plainly unwarranted: Twelve circuits have addressed the question presented, resulting in an 8-4 split.

This Court has recently heard two cases, moreover, that implicated the question presented. In *Mendez*, Respondents had argued that—under *Graham*—a court should take "into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Mendez*, 581 U.S. at 429 n*. Because this Court did not grant "certiorari on that question, and the decision below did not address it," the Court did not answer it and allowed the Ninth Circuit to address the issue on remand. *Id*. Meanwhile, in *City of Tahlequah* v. *Bond*, 595 U.S. 9 (2021), this Court sidestepped a similar question of whether the Tenth Circuit properly evaluates officers' "reckless or deliberate conduct" in creating "a situation requiring deadly force," *id*. at 12. Instead, the Court held that the officers in that case had not violated clearly established law. *Id*. These cases further demonstrate that the question presented is recurring, including before

this Court.

This case is an ideal vehicle to resolve this important issue once and for all. The question presented was fully litigated below, and the moment of the threat doctrine was the sole basis for the Fifth Circuit decision on review. As Judge Higginbotham explained, under the majority approach of eight circuits, he would have held that Officer Felix violated Ashtian Barnes's Fourth Amendment rights—leading to the opposite ruling on appeal. *See* Pet. App. 16a (Higginbotham, J., concurring).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NEAL KUMAR KATYAL
NATHANIEL A.G. ZELINSKY
ERIC S. ROYTMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

ADAM W. FOMBY
HOWARD R. FOMBY
FOMBY LAW FIRM
440 Louisiana Street
Suite 900
Houston, TX 77002

KATHERINE B. WELLINGTON
Counsel of Record
MATTHEW S. DORRITIE
RACHEL E. RECORD
HOGAN LOVELLS US LLP
125 High Street, Suite 2010
Boston, MA 02110
Telephone: (617) 371-1037
katherine.wellington@hoganlovells.com

Counsel for Petitioner

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