No. 23-1239

IN THE
Supreme Court of the United States

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

Petitioner,

v.

ROBERTO FELIX JR.; COUNTY OF HARRIS, TEXAS,

Respondents.

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

BRIEF FOR PETITIONER

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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) (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985)). 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.

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INTRODUCTION

On an April afternoon in 2016, Ashtian Barnes was driving a rental car on the highway outside Houston, Texas on his way to pick up his girlfriend's daughter from daycare. Through no fault of his own, the rental car's license plate was associated with unpaid toll fees.

A camera on the toll road flagged Barnes's vehicle due to the unpaid tolls, and Respondent Officer Roberto Felix, Jr. initiated a traffic stop. When Barnes could not immediately locate his license, Officer Felix asked Barnes to step out of the car. The car started moving forward, with the driver's side door open. In the span of three seconds, Officer Felix drew his gun, jumped onto the door sill of the moving car, and shot Barnes. A second later, Officer Felix shot Barnes again, and the car came to a stop. Felix held Barnes at gunpoint as Barnes—who was still alive—bled to death in the driver's seat.

Petitioner Janice Hughes Barnes is Ashtian Barnes's mother. She brought this lawsuit under Section 1983 because Officer Felix violated her son's Fourth Amendment right to be free from "unreasonable" seizures. U.S. Const. amend. IV. For decades, this Court has provided a clear roadmap for evaluating her claim. A court should determine whether Officer Felix's seizure was objectively reasonable based on "the totality of the circumstances." *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985); *accord County of Los Angeles* v. *Mendez*, 581 U.S. 420, 427-428 (2017); *Plumhoff* v. *Rickard*, 572 U.S. 765, 774 (2014); *Graham* v. *Connor*, 490 U.S. 386, 396 (1989).

The totality of the circumstances test flows from the fact-intensive nature of deciding whether a seizure is

"unreasonable." U.S. Const. amend. IV. Courts must pay "careful attention to the facts and circumstances of each particular case," and balance "the nature and quality of the intrusion on the individual[]" "against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quotation marks omitted). This requires considering, among other factors, "the severity of the crime at issue," "whether the suspect poses an immediate threat to the safety of the officers or others," *id.*, and the "relative culpability" of the victim and those the officers sought to protect. *Scott* v. *Harris*, 550 U.S. 372, 384 (2007). The inquiry "is not capable of precise definition or mechanical application." *Graham*, 490 U.S. at 396 (quotation marks omitted). In Justice Scalia's memorable formulation, we must "slosh our way through the factbound morass of 'reasonableness.' " *Scott*, 550 U.S at 383.

But in the decision below, the Fifth Circuit applied a special rule known as the "moment of the threat" doctrine. This doctrine is employed by just the Second, Fourth, Fifth, and Eighth Circuits. It applies exclusively in deadly force cases and dramatically narrows the Fourth Amendment reasonableness inquiry.

Under the moment of the threat doctrine, courts cannot evaluate "the totality of the circumstances." *Garner*, 471 U.S. at 8-9. Instead, courts identify the specific instant in which an officer faced a threat and ignore everything that occurred prior to that moment. This effectively circumscribes the reasonableness analysis "to the precise millisecond at which an officer deploys deadly force." Pet. App. 12a (Higginbotham, J., concurring).

In a majority opinion by Judge Higginbotham, the Fifth Circuit defined the moment of the threat in this

case as occurring in the "two seconds" *after* Officer Felix had jumped onto Barnes's moving car. *Id*. at 8a. The Fifth Circuit concluded that, while "hanging on to the moving vehicle," Officer Felix feared for his life—and so reasonably shot and killed Barnes. *Id*. Under the moment of the threat doctrine, the Fifth Circuit could *not* evaluate *the second before*, when Officer Felix jumped onto the moving car to stop Barnes from driving away with someone else's toll violations.

This case is about whether the Fifth Circuit could consider three seconds—not just two—when determining whether Officer Felix committed an "unreasonable" "seizure." U.S. Const. amend. IV.

Judge Higginbotham concurred in his own majority opinion to express vigorous disagreement with his circuit's precedent. He stressed that "the moment of threat doctrine is an impermissible gloss" on this Court's cases and "stifles" the "Fourth Amendment's protections for the American public." Pet. App. 16a (Higginbotham, J., concurring). Had Judge Higginbotham been permitted to evaluate the totality of the circumstances—as the majority of circuits would have—Judge Higginbotham would have found "that Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force." *Id*.

Judge Higginbotham is right, the moment of the threat doctrine is profoundly wrong, and this Court should reject it. The doctrine carves out a special rule for deadly force cases that has no basis in the Constitution's text, this Court's precedent, or the common law tradition. In this case, the Fifth Circuit could consider neither "the severity of the crime" that prompted Felix to seize Barnes (a minor traffic violation), nor the fact that Barnes had posed no "immediate threat"

to Officer Felix when he initiated the seizure—despite *Graham* instructing courts to evaluate those factors when considering the totality of the circumstances. *Graham*, 490 U.S. at 396. Nor could the Fifth Circuit balance the competing private and public interests at stake or consider the parties' "relative culpability"—also factors which this Court has stressed are critical to evaluating reasonableness. *Scott*, 550 U.S. at 384; *see Graham*, 490 U.S. at 396. The moment of the threat doctrine conflicts with the common law tradition, in which officers who acted unreasonably faced civil and even criminal liability for their actions. It produces deeply unjust outcomes. And it bears no relationship to "policies adopted by" "police departments." *Garner*, 471 U.S. at 15-16, 18.

This Court should not enshrine this Kafkaesque doctrine into constitutional law. To rule for Petitioner on the question presented, the Court need only hold that the moment of the threat doctrine is wrong. On remand, the lower courts should evaluate in the first instance whether Officer Felix used unreasonable force under the totality of the circumstances.

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 to May 22, 2024. The Petition was filed on May 22, 2024, and granted on October 4, 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.

STATEMENT

A. Factual Background.

1. 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. He was on his way to pick up his girlfriend's daughter from daycare. 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.*

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." *Id.* Barnes complied and pulled onto "the median on the left side of the Tollway." *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 looking for it. *Id.* Officer Felix told Barnes to stop searching and claimed that he smelled marijuana. *Id.*

at 2a–3a. No marijuana, other drugs, or any kind of drug paraphernalia were ever found in the car.

Barnes told Officer Felix that he "might have the requested documentation in the trunk" and opened his trunk. *Id.* at 3a (quotation marks omitted).

2. At summary judgment, the District Court provided this summary of what happened next, 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[[1]] 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[[2]] shot."

"• Two seconds later, the vehicle comes to a complete stop."

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[1] The video suggests Officer Felix opened Barnes's door.

[2] Felix fired another shot a second later.

Id. at 26a-27a.[3]

Barnes remained alive. JA 93. For nearly two minutes, "Officer Felix held Barnes at gunpoint until backup arrived while Barnes sat bleeding in the driver's seat." Pet. App. 4a. Even after another officer arrived, Officer Felix continued to hold Barnes at gunpoint for an additional minute. Dashcam Video, *supra* note 3, at 14:47:35-14:48:44. Multiple other officers then arrived, but still no one provided Barnes aid for approximately two more minutes. *Id*. at 14:48:44-14:50:36; *see* JA 96-98. "Barnes was pronounced dead at the scene." Pet. App. 4a.[4]

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 onto the vehicle, "shoved his gun into Barnes's head, pushing his head hard to the right," and shot Barnes. *Id*. at 3a-4a (quotation marks omitted).

Officer Felix later testified that he had been "determined to prevent Barnes from fleeing, even before the vehicle began to move, ostensibly to protect the general public." *Id*. at 28a; *see* JA 71-79, 100, 156-160, 168.

B. Procedural History.

1. Petitioner Janice Hughes Barnes is Ashtian Barnes's mother. She brought this suit against Officer Felix and Harris County under 42 U.S.C. § 1983

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[3] The entire dashcam video is in evidence, *see* JA 13; D. Ct. Dkt. 19 ("Dashcam Video"), and a portion can be viewed at https://youtu.be/9gbM_22fUbY.

[4] A firearm was later found in the car. It is undisputed Officer Felix did not know about the firearm when he shot Barnes.

because Felix used excessive force in violation of Ashtian Barnes's Fourth Amendment rights. At summary judgment, the District Court rejected her Fourth Amendment claim, holding that Felix's use of deadly force was reasonable under the "moment of the threat" doctrine. Pet. App. 17a-32a.

In *Tennessee* v. *Garner* and *Graham* v. *Connor*, this 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*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8). This test "is not capable of precise definition or mechanical application." *Id*. (quotation marks omitted). A court must consider "whether the totality of the circumstances" justified an officer's use of deadly force. *Id*. (quoting *Garner*, 471 U.S. at 8-9).

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 holistic 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." *Id*. at 396-397. The officer's actual subjective "intent or motivation" is irrelevant. *Id*. at 397. What matters instead is whether the officer's use of force was "objectively reasonable." *Id*.

But "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 (emphasis in original) (quotation marks omitted). 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). Because it considers only the fact that the officer faced a threat, the Fifth Circuit also deems "the use of deadly force" "presumptively reasonable." *Id*. at 24a (quotation marks omitted).

In this case, 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).

In the two seconds before Felix fired his weapon, the District Court explained that "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's use of force was "presumptively reasonable" and did not violate the Fourth Amendment. *Id*. at 30a (quotation marks omitted). It did not matter that Officer Felix jumped onto Barnes's car to stop Barnes from getting away with outstanding tolls (that were incurred by another driver). *See id*. at 29a. Nor did it matter

whether "any danger perceived by Felix was created solely by" Felix, not Barnes. *Id.* (quotation marks omitted). It mattered only that Officer Felix faced danger at the instant he fired the deadly shots.

The District Court criticized the moment of the threat doctrine, explaining that it "has effectively stifled" "the Fourth Amendment's protections." *Id.* at 32a.

2. The Fifth Circuit affirmed. *Id.* at 1a-9a. Writing for the panel, Judge Higginbotham explained that under the moment of the threat doctrine, 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 (quotation marks omitted). "Any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit." *Id.* at 8a (quotation marks omitted).

The Fifth Circuit agreed with the District Court that "the moment of threat occurred in the two seconds before Barnes was shot." *Id.* In that two-second window, Officer Felix was standing on a moving vehicle, and could "reasonably believe his life was in imminent danger." *Id.* (quotation marks omitted). The Fifth Circuit found that Officer Felix had thus 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 onto a moving vehicle a second prior, or the minor nature of the offense 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," and to highlight the deep

split among twelve circuit courts. Pet App. 10a, 13a & n.13, 16a (Higginbotham, J., concurring).

Judge Higginbotham explained that the moment of the threat doctrine "counters the Supreme Court's instruction to look to the totality of the circumstances." *Id*. at 10a. The 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, courts ignore "the reality of the role the officers played in bringing about the conditions said to necessitate deadly force." *Id*. at 13a.

The Fifth Circuit purports to apply this Court's precedent, but Judge Higginbotham explained that it does so in name only. Any "references to" the "supposed obligation to consider the totality of the circumstances are merely performative." *Id*. at 15a. Under the moment of the threat doctrine, the Fifth Circuit cannot even consider "the gravity of the offense at issue"—despite this Court specifically instructing courts to weigh that factor. *Id*.

Judge Higginbotham explained that this case provides a "paradigmatic" example of why the moment of the threat doctrine is wrong. *Id.* "[T]he use of lethal force against" Barnes "preceded any real threat to Officer Felix's safety." *Id*. at 16a. "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*. Under the moment of the threat doctrine, however, 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*. at 15a.

Had Judge Higginbotham been allowed to consider the totality of the circumstances, Judge Higginbotham would have held "that Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force." *Id*. at 16a.

4. This Court granted review to resolve a longstanding circuit split on the application of the moment of the threat doctrine. Pet. 12-26.

SUMMARY OF ARGUMENT

I. The moment of the threat doctrine conflicts with this Court's landmark precedent and the common law tradition.

I.A. The Fourth Amendment prohibits "unreasonable" "seizures." U.S. Const. amend. IV. Under *Garner* and *Graham*, courts evaluate the reasonableness of a seizure based on "the totality of the circumstances," balancing "the nature and quality of the intrusion on the individual[]" against the government's interest in the seizure. *Garner*, 471 U.S. at 8-9 (quotation marks omitted). The same Fourth Amendment standard of reasonableness applies to "*all* claims that law enforcement officers have used excessive force." *Graham*, 490 U.S. at 395.

The Court's high-speed car chase cases provide a useful example. The Court evaluates the reasonableness of an officer's use of force based on facts that preceded the precise instant in which an officer deployed force. In *Scott*, an officer used force to terminate a lengthy car chase. Writing for the Court, Justice Scalia rejected the notion that the Fourth Amendment establishes "a magical on/off switch," "rigid" rules, or

"an easy-to-apply legal test." 550 U.S. at 382-383. Courts must "slosh" "through the factbound morass of 'reasonableness.' " *Id*. at 383. Justice Scalia emphasized that the comparative "[c]ulpability" of the person killed and the persons the officers sought to protect "is relevant * * * to the reasonableness of the seizure." *Id*. at 384 n.10 (emphasis omitted). He then evaluated the six-minute car chase, analyzed the relative culpability of the reckless driver and innocent bystanders, and concluded that the officer used reasonable force to terminate the chase and protect the bystanders. *Id*. at 383-384.

The Court has elsewhere explained that police conduct prior to deploying force—such as whether they provided a warning—bears on the reasonableness of the officer's actions. *See Garner*, 471 U.S. at 11-12. In the search context, moreover, this Court examines police conduct preceding the precise moment officers enter a home to evaluate the reasonableness of the search. *See Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995). Finally, in *Mendez*, the Court reaffirmed that an officer should bear responsibility "for the foreseeable consequences" of his earlier unreasonable actions. 581 U.S. at 430-431. All of this adds up to the same conclusion: Under the Fourth Amendment, the reasonableness of an officer's use of force should be analyzed by the totality of the circumstances, including facts that immediately precede the moment an officer pulls the trigger.

I.B. The moment of the threat doctrine is fundamentally inconsistent with that precedent. It prevents courts from considering "the totality of the circumstances" and sloshing through the "factbound morass." *Scott*, 550 U.S. at 383; *Garner*, 471 U.S. at 8-9.

In this case, the Fifth Circuit considered only the brief period *after* Officer Felix had jumped onto the moving vehicle. As a result, the court did not consider the reality of what happened: Officer 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." Pet. App. 16a (Higginbotham, J., concurring).

Contrary to *Graham*, 490 U.S. at 395, the moment of the threat doctrine imposes a special rule exclusively for deadly force cases. Contrary to *Garner*, 471 U.S. at 8-9, the doctrine prevents courts from balancing competing Fourth Amendment interests. In this case, the state had no interest in Officer Felix placing himself in danger to prevent Barnes from driving away with a minor traffic violation. But the Fifth Circuit could not consider that important fact. Contrary to *Scott*, 550 U.S. at 384, the moment of the threat doctrine does not permit courts to consider the relative culpability of the parties, including the fact that Officer Felix "intentionally placed himself" "in danger" for no good reason, *id*. And contrary to *Mendez*, 581 U.S. at 430-431, the doctrine does not hold Officer Felix responsible for the foreseeable—indeed, immediate—consequences of his unreasonable actions. Instead, the doctrine rewards Officer Felix for unnecessarily placing himself into danger by jumping onto a moving car.

I.C. The moment of the threat doctrine conflicts with the common law tradition. At common law, officers faced civil and even criminal liability if they overstepped their authority and were warned "to be very careful that they do not misbehave themselves in the discharge of their duty." Sir Michael Foster, *Crown*

Law 319 (3d ed. 1792). In evaluating the lawfulness of an officer's actions, the common law considered facts that the moment of the threat doctrine excludes, including: the severity of the offense at issue; whether the officer identified himself before using force; and whether an officer who used force brought the "peril upon himself by his own unlawful act." Harvey Cortlandt Voorhees, *The Law of Arrest in Civil and Criminal Actions* 111 (1904). That the moment of the threat doctrine conflicts with history and tradition provides a strong reason to reject it.

II. This Court should additionally reject the moment of the threat doctrine because it produces untenable outcomes, raises impossible line drawing questions, and undermines effective policing.

II.A. It is objectively unreasonable for an officer to jump onto—or in front of—a moving vehicle, shoot the driver a heartbeat later, and claim the action was justified because the officer could have been injured by the moving vehicle. Officer Felix's actions became *less reasonable*, not more reasonable, because he jumped onto Barnes's car. This Court should not endorse a doctrine that produces such bizarre outcomes.

In some cases, the moment of the threat doctrine harms officers who act in good faith, because it excludes facts that explain why an officer's conduct was reasonable. *See, e.g.*, *Banks* v. *Hawkins*, 999 F.3d 521 (8th Cir. 2021); *Cole* v. *Carson*, 935 F.3d 444, 482 (5th Cir. 2019) (en banc) (Duncan, J., dissenting). In every case, moreover, the moment of the threat doctrine poses impossible line drawing questions regarding precisely what conduct a court may consider. In this case, the courts below were forced to splice what was

essentially a single action into artificial, second-by-second segments.

II.B. Officers serve their communities with extraordinary bravery. Ruling for Petitioner will strike the right balance between protecting individual rights and ensuring that officers can do their jobs safely and effectively. This Court's existing precedent affords officers discretion to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-397. Officers who make reasonable mistakes—and use more force than necessary—do not face liability. Moreover, even where officers act unreasonably, they still receive qualified immunity.

By contrast, the moment of the threat doctrine promotes bad policing. Major police departments train officers to avoid unreasonable actions that require them to use deadly force. Departments also specifically train officers not to jump in front of cars. The moment of the threat doctrine, however, immunizes officers who unnecessarily place themselves into jeopardy and improperly use deadly force.

III. Respondents and a few courts have advanced a handful of arguments in favor of the moment of the threat doctrine, none of which hold merit.

III.A. Some courts root the moment of the threat doctrine in *Graham*'s instruction to avoid 20/20 hindsight. But this misreads *Graham*. *Graham* stressed that reasonableness "is not capable of precise definition or mechanical application," and instructed courts to pay "careful attention to the facts and circumstances of each particular case." 490 U.S. at 396 (quotation marks omitted). Courts can afford officers the leeway to make reasonable mistakes under pressure

while also evaluating the totality of the circumstances.

III.B. Other courts have read *California* v. *Hodari D.*, 499 U.S. 621 (1991), to require the moment of the threat doctrine. That is wrong. *Hodari D.* involves the antecedent question of whether and when a seizure occurs. No one disputes there was a seizure here. The question is whether the lower courts could evaluate the totality of the circumstances to determine the reasonableness of that seizure. Under this Court's precedent, they could.

III.C. At the certiorari stage, Respondents argued that *Mendez* supports the moment of the threat doctrine. Not so. The footnote in *Mendez* reserved the question presented. 581 U.S. at 429 n.*. The Court emphasized that normal tort principles apply in the Fourth Amendment context, and that officers should be responsible for the foreseeable consequences of their actions. The moment of the threat doctrine is plainly inconsistent with those basic legal principles: It immunizes officers from the immediate results of their unreasonable conduct.

At the certiorari stage, Respondents recognized that under *Mendez*, Petitioner could recover damages for Officer Felix's shooting Barnes based on an independent Fourth Amendment violation that foreseeably resulted in the shooting. According to Respondents, Petitioner should have litigated a distinct Fourth Amendment claim based on Officer Felix's trespass onto the car. That makes no sense. Petitioner is not bringing this case because Officer Felix trespassed onto Ashtian Barnes's rental car. She is bringing this case because Officer Felix violated her son's fundamental rights when Felix shot him dead. There is "no

need to dress up" that "excessive force claim" as some other "Fourth Amendment claim." *Id*. at 431.

ARGUMENT

I. THE MOMENT OF THE THREAT DOCTRINE IS WRONG.

The Fourth Amendment protects the "right of the people to be secure in their persons" "against unreasonable" "seizures," which includes the right to remain free from excessive force. U.S. Const. amend. IV; *see Torres* v. *Madrid*, 592 U.S. 306, 309 (2021). A staple of Fourth Amendment jurisprudence is that the question of whether an officer's use of force is reasonable in a particular case turns on "the totality of the circumstances." *Garner*, 471 U.S. at 8-9; *accord Mendez*, 581 U.S. at 427-428; *Plumhoff*, 572 U.S. at 774; *Scott*, 550 U.S. at 383; *Graham*, 490 U.S. at 396. In this context, the Fourth Amendment does not supply "rigid" rules or "magical on/off switch[es]," *Scott*, 550 U.S. at 382. A court must "slosh" "through the factbound morass of 'reasonableness.' " *Scott*, 550 U.S. at 383.

The moment of the threat doctrine is an impermissible gloss on the Fourth Amendment. The doctrine narrows "the reasonableness analysis" "to the precise millisecond at which an officer deploys deadly force," excluding everything else from the court's purview. Pet. App. 12a (Higginbotham, J., concurring). The Fifth Circuit's blinkered analysis fundamentally conflicts with how this Court has evaluated seizures in prior cases. It has no basis in the principles underlying the Fourth Amendment and lacks any foundation in the nation's history and tradition. This Court should rule for Petitioner on the question presented and reject the doctrine. On remand, the lower courts

should determine the reasonableness of Officer Felix's seizure based on the totality of the circumstances. *See McLane Co.* v. *EEOC*, 581 U.S. 72, 85 (2017).

A. For Decades, This Court Has Evaluated Fourth Amendment Reasonableness Based On "The Totality Of The Circumstances."

To determine whether an officer's use of force violated the Fourth Amendment, a court determines whether the officer's actions were reasonable based on the totality of the circumstances.

1. The Fourth Amendment provides that 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.

"As that text makes clear, the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Lange* v. *California*, 594 U.S. 295, 301 (2021) (some quotation marks omitted). This commonsense constitutional standard asks whether the officer's actions were rational. *See* Joseph E. Worcester, *A Dictionary of the English Language* (1860) (defining unreasonable as "contrary to reason; irrational; unwise; foolish; absurd"); Noah Webster, *An American Dictionary of the English Language* (5th ed. 1830) (similar); Nathan Bailey, *A Universal Etymological English Dictionary* (25th ed. 1790) (defining unreasonable as "unjust" and reasonable as "agreeable to the Rules of Reason; just, right, conscionable"); Thomas Dyche & William Pardon, *A New General English Dictionary* (8th ed. 1754) (similar).

In *Tennessee* v. *Garner*, this Court addressed whether and when it is reasonable for officers to use deadly force to apprehend fleeing felons. Drawing on earlier Fourth Amendment precedent, the Court explained that "the key principle" animating the Fourth Amendment's reasonableness standard is "the balancing of competing interests." *Garner*, 471 U.S. at 8 (quoting *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981)). To determine whether a seizure is reasonable, a court weighs "the nature and quality of the intrusion on the individual[]" "against the importance of the governmental interests alleged to justify the intrusion." *Id*. (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)). The Court surveyed its then-existing precedent and explained "the question" in each case "was whether the totality of the circumstances justified a particular sort of search or seizure." *Id*. at 8-9.

In *Garner*, the Court concluded that it was unreasonable for an officer to "seize an unarmed, non-dangerous suspect by shooting him dead." *Id*. at 11. The "intrusiveness of a seizure by means of deadly force is unmatched," and the "suspect's fundamental interest in his own life" is at its peak. *Id*. at 9. On the other side of the ledger, the state has little interest in using deadly force against a non-dangerous suspect. *See id*. at 10-11.

The Fourth Amendment's prohibition against "unreasonable" seizures does not differentiate between deadly and non-deadly seizures. In *Graham*, this Court held that the Fourth Amendment's standard of reasonableness applies to "*all* claims that law enforcement officers have used excessive force—deadly or not." *Graham*, 490 U.S. at 395. Much like *Garner*, *Graham* stressed that the "test of reasonableness

under the Fourth Amendment is not capable of precise definition or mechanical application." *Id*. at 396 (quotation marks omitted). It "requires careful attention to the facts and circumstances of each particular case," and protects officers who make reasonable mistakes under the stress of the moment. *Id*. The Court, however, identified three non-exhaustive factors that warrant consideration: (1) "the severity of the crime at issue"; (2) "whether the suspect poses an immediate threat to the safety of the officers or others"; and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*.

2. In recent excessive force cases involving high speed chases, this Court has evaluated reasonableness based on the totality of the circumstances. Notably, the Court considered the preceding moments of a chase to determine the reasonableness of the seizure, not just the precise instant in which an officer deployed force.

In *Scott* v. *Harris*, a suspect led officers on a dangerous, nighttime chase for six minutes, and an officer terminated the pursuit by colliding his car with the suspect's vehicle. 550 U.S. at 375. In evaluating the constitutionality of that officer's actions, the Court rejected the notion that the Fourth Amendment provides "rigid" rules or "a magical on/off switch." *Id*. at 382. There is no "easy-to-apply legal test," and courts must "slosh" "through the factbound morass of 'reasonableness.' " *Id*. at 383.

How the Court evaluated the "factbound morass" is particularly instructive: The Court examined the "relative culpability" of the driver and innocent bystanders based on an evaluation of the entire chase. *Id*. at 384. The driver had "intentionally placed himself and

the public in danger" by engaging in "reckless, high-speed flight," "for nearly 10 miles," all the while ignoring officers' "warning to stop." *Id*. "By contrast, those who might have been harmed had [the officer] not" acted "were entirely innocent." *Id*. Based on the driver's far more culpable behavior, the Court had "little difficulty in concluding it was reasonable for" the officer "to take the action that he did." *Id*.

In *Plumhoff*, the Court again considered the entirety of a car chase in assessing reasonableness. There, the Court emphasized the chase had "exceeded 100 miles per hour"; the driver had "passed more than two dozen other vehicles"; and the driver's "outrageously reckless driving posed a grave public safety risk." *Plumhoff*, 572 U.S. at 776. Based on that assessment, the Court held that officer had "acted reasonably in using deadly force." *Id.* at 777; *see Mullenix* v. *Luna*, 577 U.S. 7, 14 (2015) (per curiam) ("[Suspect] had led police on a 25–mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location."); *Brosseau* v. *Haugen*, 543 U.S. 194, 201 (2004) (per curiam) ("[T]his area is one in which the result depends very much on the facts of each case."); *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989) (directing courts on remand to consider "the circumstances of" a roadblock, including whether officers set "up the roadblock in such manner as" to make the driver's death "likely").

In other cases, this Court has noted that the totality of the circumstances includes factors such as whether officers made "any effort" "to temper or to limit the amount of force," *Lombardo* v. *City of St. Louis*, 594 U.S. 464, 467 (2021) (per curiam) (quotation marks

omitted); whether officers used dangerous forms of force which they had been taught to avoid, *id*. at 467-468; and whether officers provided "some warning" prior to using deadly force. *Garner*, 471 U.S. at 11-12; *see White* v. *Pauly*, 580 U.S. 73, 80 (2017) (per curiam) (recognizing a "failure to shout a warning" may give rise to a Fourth Amendment violation); *id*. at 81 (Ginsburg, J., concurring); *Tolan* v. *Cotton*, 572 U.S. 650, 658 (2014) (per curiam) (considering whether suspect's mother was agitated).

More broadly, this Court evaluates the reasonableness of searches based on police conduct before the moment police consummate the search, such as "whether law enforcement officers announced their presence and authority *prior to entering*" a home. *Wilson*, 514 U.S. at 931 (emphasis added); *see Kentucky* v. *King*, 563 U.S. 452, 462 (2011) ("[T]he exigent circumstances rule justifies a warrantless search when the conduct of the police *preceding the exigency* is reasonable * * * ." (emphasis added)). Meanwhile, when the Court evaluates the reasonableness of arrests pursuant to a warrant, it looks beyond the moment of the arrest and asks whether the officer's *earlier* "application for a warrant was not objectively reasonable." *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986); *see* Rutherford Institute Cert.-Stage *Amicus* Br. 9-11.

3. Finally, in *County of Los Angeles* v. *Mendez*, the Court recently confirmed that, under the Fourth Amendment, an officer should bear liability "for the foreseeable consequences" of his prior actions. 581 U.S. at 430-431.

In *Mendez*, this Court declined to decide the question presented in this case. *Id*. at 429 n.*. Instead, *Mendez* rejected the Ninth Circuit's so-called

provocation rule. Under that unusual rule, an officer faced liability for an otherwise *reasonable* use of force if the officer had "committed a separate constitutional violation"—there, a warrantless entry—"that in some sense set the table for the use of force." *Id*. at 429. This Court faulted the Ninth Circuit for utilizing "a vague causal standard" and not the more "familiar proximate cause standard." *Id*. at 430. In the process, the Court stressed that it had not decided the question presented, and that ordinary principles of proximate cause apply under the Fourth Amendment. *Id*. at 429 n.*, 431.

B. The Moment Of The Threat Doctrine Conflicts With This Court's Landmark Precedent.

The moment of the threat doctrine is impossible to square with that foundational precedent.

Start with the most obvious flaw. The moment of the threat doctrine prohibits courts from considering "the totality of the circumstances" and "slosh[ing]" through "the factbound morass of 'reasonableness.' " *Garner*; 471 U.S. at 8-9; *Scott*, 550 U.S. at 383. " 'Totality' is an encompassing word," and implies reasonableness "should be sensitive to all of the factors bearing on the officer's use of force." *Abraham* v. *Raso*, 183 F.3d 279, 291 (3d Cir. 1999). But under the moment of the threat doctrine, any references to the "supposed obligation to consider the totality of circumstances are merely performative." Pet. App. 14a (Higginbotham, J., concurring).

In this case, the lower courts focused exclusively on the two seconds after Officer Felix jumped onto the car. But as Judge Higginbotham underscored, Officer Felix's "use of lethal force" "preceded any real threat

to Officer Felix's safety." *Id*. at 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*. Because the Fifth Circuit applied the moment of the threat doctrine, however, the Fifth Circuit could consider only the fact that Officer Felix was on a moving car when he shot Barnes—*and not the fact that Officer Felix jumped onto the moving car a second beforehand*.

That is not how courts evaluate reasonableness under the totality of the circumstances standard. A court should "look at the entire seizure, the jumping in front of the car, plus the ultimate shooting to determine whether it's reasonable." Oral Arg. Tr. 34, *Mendez*, 581 U.S. 420 (No. 16-369) (Alito, J.); *see, e.g.*, *Underwood* v. *City of Bessemer*, 11 F.4th 1317, 1331-32 (11th Cir. 2021); *Carabajal* v. *City of Cheyenne*, 847 F.3d 1203, 1210 (10th Cir. 2017); *Est. of Starks* v. *Enyart*, 5 F.3d 230, 234 (7th Cir. 1993).

Indeed, the moment of the threat doctrine specifically prevented the Fifth Circuit from considering "the gravity of the offense" that prompted Officer Felix to seize Barnes—here, Barnes's driving a vehicle with outstanding toll violations. Pet. App. 14a-15a (Higginbotham, J., concurring); *see Anderson* v. *Russell*, 247 F.3d 125, 132 (4th Cir. 2001) (holding the suspected criminal activity is "irrelevant"). That blinkered analysis conflicts with *Graham*, where this Court explained that "the severity of the crime at issue" is a critical factor for courts to consider. 490 U.S. at 396. Nor could the Fifth Circuit evaluate the fact that Barnes did *not* pose an "immediate threat" to Officer Felix's safety—another *Graham* factor—when Felix

drew his gun and jumped onto the car to prevent Barnes from driving away. *Id*.

The moment of the threat doctrine is likewise irreconcilable with *Scott* and *Plumhoff*—in which this Court evaluated the reasonableness of the seizure based on the moments preceding the precise instant in which an officer deployed deadly force. *See supra* pp. 21-22. And it is inconsistent with this Court's other instructions to examine factors prior to the moment officer uses force, such as whether an officer provided a warning or attempted to temper the amount of force used. *See supra* pp. 22-23.

The moment of the threat doctrine is separately wrong because this special rule applies exclusively "in cases involving the use of deadly force." Pet. App. 23a. As Respondents agree (BIO 11), for all other Fourth Amendment use of force claims, courts may consider the totality of the circumstances.[5] But neither the Constitution's text nor this Court's precedent distinguish between deadly and non-deadly use of force claims. Instead, "*all* claims that law enforcement officers have used excessive force—deadly or not—* * * should be analyzed under" the same " 'reasonableness' standard." *Graham*, 490 U.S. at 395. There are no mechanical "on/off switch[es]" in the Fourth Amendment. *Scott*, 550 U.S. at 382. "Whether or not [Felix's] actions constituted application of 'deadly force,' all that matters is whether [Felix's] actions were reasonable." *Id.* at 383; *see Mullenix*, 577 U.S. at 19 (Scalia, J., concurring in the judgment). If anything, the

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[5] Only Respondent Felix filed a brief in opposition. For simplicity, however, we refer to both Respondents when referencing the brief in opposition.

moment of the threat doctrine has it completely backwards: Courts should more closely scrutinize an officer's use of deadly force because it represents the ultimate intrusion on individual liberty. *See Garner*, 471 U.S. at 9.

Finally, the moment of the threat doctrine fatally conflicts with the three important legal principles that animated *Garner*, *Graham*, and their progeny.

First, because courts that apply the moment of the threat doctrine do not consider the totality of the circumstances, they cannot balance a private person's interest against a seizure with the state's interest in apprehension. This is a glaring problem. *Garner* stressed that the "balancing of competing interests" is "the key principle of the Fourth Amendment." *Garner*, 471 U.S. at 8 (quotation marks omitted).

In this case, Ashtian Barnes's liberty interest—his interest in his own life—was at its peak. The state, meanwhile, had no meaningful interest in Officer Felix jumping onto Barnes's car, shooting Barnes, and then holding Barnes at gunpoint, as Barnes bled to death—all to stop Barnes from getting away with a suspected toll violation incurred by someone else. But the courts below could not balance these competing interests because they could not evaluate Officer Felix's act of jumping onto the car and shooting Barnes. Instead, they could evaluate only the "precise millisecond" in which Officer Felix pulled the trigger. Pet. App. 12a (Higginbotham, J., concurring).

Second, the moment of the threat doctrine similarly prevents courts from evaluating relative culpability, which *Scott* stressed "is relevant * * * to the reasonableness of the seizure." *Scott*, 550 U.S. at 384 n.10 (emphasis omitted).

In *Scott*, the Court explained that it had been reasonable for an officer to use deadly force because the reckless driver had "intentionally placed himself and the public in danger." *Id.* at 384. In this case, however, the courts below could not evaluate Barnes's or Officer Felix's relative culpability. In particular, the District Court could not "consider" whether "any danger perceived by Felix was created solely by himself, and not through the actions of Barnes." Pet. App. 29a (quotation marks and brackets omitted).

This is deeply unjust. The Fourth Amendment's standard of reasonableness is not a one-way rachet. Seth W. Stoughton Cert.-Stage *Amicus* Br. 15-16. Just as a court should consider Barnes's culpability, a court should also be permitted to consider the fact that Felix "intentionally placed himself" into danger immediately before shooting Barnes. *Scott*, 550 U.S. at 384.

Third, the moment of the threat doctrine prevents courts from holding officers accountable for the obviously foreseeable—indeed, truly immediate—consequences of their unreasonable actions, a tort principle this Court recently reaffirmed in *Mendez*. *See Mendez*, 581 U.S. at 430-431; Rutherford Institute Cert.-Stage *Amicus* Br. 12-15 (discussing conflict with other tort principles).

That makes no sense. An officer should not be rewarded for jumping in front of or onto a moving vehicle and shooting the driver because the officer faces danger as a result of his own actions. *See Est. of Starks*, 5 F.3d at 234. There may be circumstances where an officer's decision to jump onto or in front of a moving vehicle is reasonable. But there may also be circumstances—like this case—where that decision is plainly *not* reasonable. A court should be permitted

to consider the totality of the circumstances, including patently unreasonable actions that immediately precipitate the use of deadly force.

* * *

This Court has provided consistent guidance for decades: When evaluating reasonableness under the Fourth Amendment, courts should consider the totality of the circumstances. The moment of the threat doctrine fatally conflicts with that longstanding rule. This Court should reject it.

C. The Moment Of The Threat Doctrine Conflicts With The Common Law Tradition.

The moment of the threat doctrine conflicts with the Anglo-American common law tradition. That is unsurprising. The courts that have adopted this counterintuitive rule root it in a misreading of modern precedent. *See infra* pp. 43-46. That the moment of threat doctrine is of such comparatively recent vintage provides yet another reason to reject it. *See Lange*, 594 U.S. at 309; Cato Institute et al. Cert.-Stage *Amicus* Br. 3-9.

At common law, officers could not "use more force than [wa]s necessary." Voorhees, *supra*, at 106. They faced civil liability "in trespass" for using excessive force, and they were "guilty of manslaughter, or even murder," if they killed a suspect unnecessarily. *Id.* Officers were specifically warned "to be very careful that they do not misbehave themselves in the discharge of their duty," lest they "forfeit" their "special protection" from prosecution. Foster, *supra*, at 319; *see* 4 William Blackstone, Commentaries *180 ("[T]here must be an apparent necessity on the officer's side * * * without such absolute necessity, it is not justifiable."); *cf.* Due Process Institute et al. Cert.-

Stage *Amicus* Br. 15-18 (discussing original purpose of Section 1983).

When assessing the propriety of an officer's use of force, common law courts evaluated the totality of the circumstances. *See, e.g.*, *Barrett* v. *United States*, 64 F.2d 148, 150 (D.C. Cir. 1933) (holding court improperly "restricted the inquiry of the jury to the occasion of the arrest and ignored precedent circumstances"); *Colorado ex rel. Little* v. *Hutchinson*, 9 F.2d 275, 278 (8th Cir. 1925) (allowing jury to decide whether "under all the circumstances" officer reasonably jumped onto car and shot driver); *Jackson* v. *State*, 5 So. 690, 692 (Miss. 1888) (explaining that officer who used deadly force against fleeing felon must show other "means had failed," and jury must consider "all the circumstances attending the officer and the deceased at the time"); *Reneau* v. *State*, 70 Tenn. (2 Lea) 720, 722 (1879) (officers "will not be excused for taking life in any case, where, with diligence and caution, the prisoner could be otherwise held").

In particular, the lawfulness of an officer's actions at common law depended on facts and circumstances that the moment of the threat doctrine forbids courts from considering. This is a powerful indication that the Framers would have rejected the moment of the threat doctrine's blinkered analysis.

Consider the fleeing felon rule. Under that common law doctrine, officers could use deadly force "to effect the arrest of a fleeing felon, though not a misdemeanant." *Garner*, 471 U.S. at 12; *see* 1 Sir Matthew Hale, *Historia Placitorum Coronae* 481 (1736). In other words, at common law, the lawfulness of an officer's use of force often hinged on "the severity of the crime at issue." *Graham*, 490 U.S. at 396. In this case, the

offense at issue was a trivial misdemeanor: Barnes was driving with outstanding toll violations. A common law court *would* have considered the nature of Barnes's offense in determining whether to impose civil or criminal liability on Officer Felix. *See* Hale, *supra*, at 481 ("If a man be in danger of arrest by a *Capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder * * * ."). In sharp contrast to the common law, the moment of the threat doctrine prevented the Fifth Circuit from evaluating the minor nature of the offense which prompted Officer Felix's deadly seizure. Pet. App. 15a (Higginbotham, J., concurring).

In *Garner*, this Court rejected the fleeing felon doctrine because criminal law evolved in ways that undermined the foundations of the common law rule. Felonies are no longer universally "punishable by death," as they were at common law, and many "misdemeanors" "at common law are now felonies." *Garner*, 471 U.S. at 13-14. But the fact that a common law court would consider the severity of Barnes's offense—and the Fifth Circuit could not—demonstrates how the moment of the threat doctrine conflicts with the common law tradition.

In addition, at common law, officers who overstepped their authority and placed themselves in dangerous situations faced liability for using deadly force. As one treatise explained, "[i]f an officer has brought peril upon himself by his own unlawful act, * * * he will not be justified in taking the life of his prisoner." Voorhees, *supra*, at 111; *see Commonwealth* v. *Weathers*, 7 Luzerne Legal Reg. 1 (Pa. 1892); *Carter* v. *State*, 17 S.W. 1102, 1105 (Tex. App. 1891) (explaining that where officer placed himself "in a situation where" "it

was necessary for him to defend himself," "the law justly limits his right of self-defense, and regulates it according to the magnitude of [the officer's] wrong"); *Roberson* v. *State*, 14 S.W. 902, 903 (Ark. 1890) ("[H]e could not justify a homicide, though done in self-defense, for its necessity grew out of his wrongful act."). This common law principle is flatly inconsistent with the moment of the threat doctrine, which ignores "the role the officers played in bringing about the conditions said to necessitate deadly force." Pet. App. 13a (Higginbotham, J., concurring).[6]

The common law also placed great emphasis on whether an officer attempting arrest identified himself prior to using deadly force. *See State* v. *Bryant*, 65 N.C. 327, 329 (1871) ("It is necessary in all cases that the person making the arrest should make known his purpose; else he may be treated as a trespasser."); *Bellows* v. *Shannon*, 2 Hill 86, 92 (N.Y. Sup. Ct. 1841) ("[I]t is his duty to inform the party * * * that he comes * * * as an officer * * * . The contrary doctrine would be likely to lead to violence and bloodshed." (citation omitted)); Foster, *supra*, at 310-311 (officer must provide notice of purpose, especially at night); 1 Francis Wharton, *A Treatise on Criminal Law* 407 (8th ed. 1880) ("[I]t is essential to the dignity of the State that its servants * * * give notice * * * ."); James Parker,

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[6] *See also, e.g.*, 13 William M. McKinney & Burdett A. Rich, eds., *Ruling Case Law* 878 (1916) ("A peace officer who attempts illegally to make an arrest * * * cannot plead self-defense in justification of the killing of such person, where the necessity grows out of resistance to such arrest."); *Coleman* v. *State*, 49 S.E. 716, 718 (Ga. 1905); *Peter* v. *State*, 5 S.W. 228, 230 (Tex. App. 1887).

Conductor Generalis 31 (1764) (officer may kill fleeing felon only if felon has "notice of the reason of the pursuit"); Hale, *supra*, at 461 (explaining "in the night-time" "there" must "be some notification[] that he is the constable").

Here too, the moment of the threat doctrine is in deep tension with the Anglo-American tradition. Again, unlike at common law, the moment of the threat ignores everything the officer did prior to "the millisecond at which an officer deploys deadly force." Pet. App. 12a (Higginbotham, J., concurring). As a result, unlike at common law, a court applying the moment of the threat doctrine cannot ask whether an officer identified himself immediately prior to shooting a suspect. *See supra* p. 26.

II. THE MOMENT OF THE THREAT DOCTRINE IS UNJUST AND UNNECESSARY.

The moment of the threat doctrine produces deeply unjust results, is unadministrable, and bears little relationship to how many major police departments train their officers. This Court should not enshrine this illogical doctrine into constitutional law.

A. The Moment Of The Threat Doctrine Produces Troubling Outcomes And Poses Impossible Line Drawing Questions.

1. Laypeople and lawyers alike intuitively understand that an officer should not be allowed to jump onto (or in front of) a moving vehicle and shoot the driver—and then justify the action solely by saying that the car presented a threat to the officer.

That intuition make sense: If Officer Felix had *not* jumped onto Ashtian Barnes's car, it would have been obviously unreasonable to shoot Barnes. Officer

Felix's use of deadly force did not become *more* reasonable, or less culpable, because he jumped onto a moving vehicle to stop Barnes from driving away with an unpaid toll violation. "The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Scott*, 550 U.S. at 385-386.

But in this and similar cases, the Fifth Circuit incentivizes officers to engage in unreasonable conduct. *See, e.g.*, *Harmon* v. *City of Arlington*, 16 F.4th 1159, 1164 (5th Cir. 2021) (court could not consider fact that officer "stepped onto the running board" of a moving car"); *Davis* v. *Romer*, 600 F. App'x 926, 929 (5th Cir. 2015) (per curiam) (court could not consider officer's decision to "grab a hold of a moving vehicle"); *Drewitt* v. *Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (court found it "irrelevant" that officer ran in front of a car with his gun drawn and failed to identify himself). The moment of the threat doctrine bears no relationship to how ordinary people evaluate reasonableness in the real world. It would be deeply damaging for this Court to bless patently unreasonable uses of force.

The moment of the threat doctrine leads to troubling and counterintuitive results in other contexts, too. Consider an officer who aggressively confronts a civilian without warning, in plain clothes or at night. The civilian draws a firearm in response to perceived danger. And the officer immediately shoots the victim. Versions of that heartbreaking scenario are unfortunately common. *See Sledd* v. *Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996); *St. Hilaire* v. *City of Laconia*, 71 F.3d 20, 26-27 (1st Cir. 1995); *Yates* v. *City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991). These tragedies may be avoidable if the police identify themselves a second before using deadly force.

But under the moment of the threat doctrine, a court *must* approve the officer's use of force because the court homes on the threat and evaluates only the fact that an officer saw a firearm. *See Cass* v. *City of Abilene*, 814 F.3d 721, 731-732 (5th Cir. 2016) (per curiam). That outcome is particularly concerning. It undermines not only the victim's Fourth Amendment right to remain free from unreasonable seizures, but also her Second Amendment right to keep and bear arms for self-defense. *See New York State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 33 (2022).

2. At times, the moment of the threat doctrine imposes unwarranted liability on officers who act reasonably. *See* Rutherford Institute Cert.-Stage *Amicus* Br. 16-19.

As the Seventh Circuit has explained, "the totality of the circumstances" often "encompasses some fact or another which validates * * * a seizure." *Deering* v. *Reich*, 183 F.3d 645, 650 (7th Cir. 1999); *cf. In re Est. of Bleck ex rel. Churchill*, 643 F. App'x 754, 756 (10th Cir. 2016) (Gorsuch, J.) (explaining that, under the "fuller appreciation of the facts," "responding officers faced a great personal risk"). When courts blind themselves to the entirety of the seizure, they ignore critical evidence that justifies deadly force.

Consider the Eighth Circuit, which applies the moment of the threat doctrine. In *Banks* v. *Hawkins*, 999 F.3d 521 (8th Cir. 2021), an officer had responded to a domestic disturbance, heard a woman inside saying "no, no, no," kicked on the door, and tragically shot the person who opened it. *Id.* at 523-524. The Eighth Circuit ignored the potential threat to the woman inside the home because the court evaluated only "the threat present *at the time*" the officer "deployed the deadly

force." *Id*. at 525-526 (emphasis in original). As a result, the Eighth Circuit concluded that the officer had acted unreasonably. *Id*. A broader analysis of the totality of the circumstances, however, may have vindicated the officer's actions.

Similarly, in *Cole* v. *Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc), police had been tracking a distraught and suicidal suspect armed with a handgun. *Id*. at 481-482 (Duncan, J., dissenting). The suspect startled some of the officers, who shot him. *Id*. at 482. The majority resolved the case on other grounds. *Id*. at 456 (majority op.). But Judge Duncan, joined by Judges Smith, Owen, Ho, and Oldham, dissented on the ground that the "district court" had "erred by" applying the moment of the threat doctrine and "excluding everything that happened before the officers' five-second encounter with" the suspect. *Id*. at 482 (Duncan, J., dissenting). In the dissenters' view, those facts and circumstances—which the district court excluded under the moment of the threat doctrine—justified the defendant officers' use of deadly force. *Id*. at 482-483.

Finally, at the certiorari stage, Respondents (BIO 17-18) argued that "if a totality review was conducted," Barnes's pre-moment of the threat actions would exonerate Officer Felix. Petitioner vigorously disagrees. Nothing Barnes did justified Felix jumping onto his car and shooting him. But Respondents' argument only underscores how the moment of the threat doctrine prevents courts from considering facts which officers believe justify their use of force.

3. Finally, the moment of the threat is unadministrable and raises impossible line drawing questions.

A constitutional seizure occurs "the instant" an officer's "bullets" strike a suspect. *Torres*, 592 U.S. at 318. In evaluating whether a shooting was reasonable, courts must necessarily consider some "facts and circumstances" that preceded the moment the bullets hit their target. *Graham*, 490 U.S. at 396. Otherwise, "virtually every shooting would appear unjustified" because courts "would be unable to supply any rationale for the officer's conduct." *Abraham*, 183 F.3d at 291. Courts that apply the moment of the threat doctrine, however, lack a "principled way of explaining when 'pre-seizure' events start" and what "conduct prior to that chosen moment should be excluded." *Id.* at 291-292. As a result, they splice what is effectively a single action—*e.g.*, Felix's jumping onto the car and immediately shooting the driver—into artificial segments.

This case demonstrates the difficulty of identifying a specific moment to analyze. The courts below defined the moment of the threat as the two seconds *after* Officer Felix jumped onto the car to seize Barnes. Pet. App. 5a-6a. At the certiorari stage, however, Respondents contended that Felix was "in danger of being dragged or run over by the car" and so "instinctively jumped onto the door sill." BIO 1; *see id*. at 16 (arguing Barnes put Felix in danger by "turning the car back on").[7] But if Officer Felix truly faced danger

[7] Petitioner disputes that Felix was in danger prior to jumping onto the vehicle. The BIO (at 6) insinuates that the driver-side door "swung back, hitting Felix on his left side" *before* "Felix jumped onto the door sill of the vehicle." The video shows that the door began to make contact with Felix only after he drew his gun, lunged, and jumped onto the vehicle. Dashcam Video, *supra* note 3, at 14:45:48-50.

before he jumped onto the vehicle, the threat *preceded* his jump. As a result, the courts below should have been able to evaluate more than the two seconds *after* Officer Felix jumped onto the car—to include the second *before* in which Officer Felix jumped onto the car. That extra second would have made all the difference: Had Judge Higginbotham been able to consider an additional second, he would have concluded that Officer Felix violated the Fourth Amendment. *See* Pet. App. 16a (Higginbotham, J., concurring). That even Respondents cannot consistently identify the moment of the threat—and that the outcome of this case potentially turns on an arbitrary line-drawing exercise regarding a single action by an officer that took place over three seconds—confirms the doctrine's fundamental flaws.

In contrast, courts can comfortably apply "ordinary ideas of causation" to distinguish between facts and circumstances proximately related to the use of force, and those "too attenuated" to come into the reasonableness calculus. *Abraham*, 183 F.3d at 292; *see Mendez*, 581 U.S. at 430 (faulting the Ninth Circuit for not incorporating "the familiar proximate cause standard"); *Paroline* v. *United States*, 572 U.S. 434, 446 (2014); *cf. Est. of Biegert by Biegert* v. *Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (Barrett, J.) (concluding suspect's "actions were an intervening cause of the deadly force" that broke the chain of causation between the officer's unreasonable actions and use of force).

The moment of the threat doctrine poses an additional line drawing problem: Courts must distinguish between deadly force (where the doctrine applies) and other uses of force (where the doctrine does not). As

Justice Scalia has explained, not "all use[s] of force that happen[] to kill the arrestee" are considered "the application of deadly force." *Mullenix*, 577 U.S. at 19 (Scalia, J., concurring in the judgment). Instead, this Court has typically "reserved" the term "deadly force" to mean force "sufficient to kill" directed "at the person of the desired arrestee." *Id*. (emphasis omitted). As a result, in some cases, it may be unclear whether to apply the highly restrictive moment of the threat doctrine—or whether courts should instead evaluate the totality of the circumstances.

B. Ruling For Petitioner Will Promote Effective Law Enforcement.

Ruling for Petitioner will promote "effective law enforcement." *Garner*, 471 U.S. at 19. The totality of the circumstances standard provides officers a wide measure of discretion to respond to dangerous circumstances. The moment of the threat doctrine, by contrast, has no relationship to real-world policing.

1. Every day, police officers serve their communities with courage. Ruling for Petitioner will not prevent officers from defending themselves or the public. This Court's existing precedent already provides officers ample authority to use deadly force.

Under *Graham*, judges cannot second guess officers with "the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Instead, courts must evaluate an officer's conduct from the perspective of that particular officer "on the scene." *Id*. Where officers make reasonable, "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"—they do not run afoul of the Fourth Amendment. *Id*. at 396-397.

This generous standard permits officers to make reasonable "mistake[s]" in the heat of the moment—including mistakes that run counter to training, mistakes that violate police procedure, and mistakes that lead to unnecessary use of deadly force. *Id.*; *see Saucier* v. *Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."); *Molitor*, 968 F.3d at 698 (Barrett, J.) (recognizing that officers may make reasonable mistakes without violating the Fourth Amendment).

In addition, in every Section 1983 case, officers receive the added protection of qualified immunity. *See Saucier*, 533 U.S. at 205. An officer will thus not face civil liability unless he *both* uses objectively unreasonable force *and* "existing precedent" "placed the statutory or constitutional question beyond debate." *White*, 580 U.S. at 78-79 (quotation marks omitted). The combination of *Graham*'s lenient standard and qualified immunity dramatically reduces the chance that "an officer" who "acts in good faith" will be accidentally penalized. *Kingsley* v. *Hendrickson*, 576 U.S. 389, 399-400 (2015). Moreover, because reasonableness is "a pure question of law," and the denial of "qualified immunity is immediately appealable," any potential errors are quickly correctable. *Scott*, 550 U.S. at 376 n.2, 381 n.8.

2. Ruling for Petitioner will reinforce how police use force in the real world. Police departments train officers on *Graham* v. *Connor* and the totality of the

circumstances standard.[8] The moment of the threat doctrine, by contrast, conflicts with many "policies adopted by" "police departments" around the country. *Garner*, 471 U.S. at 18.

For example, officers are taught to "avoid intentionally and unreasonably placing themselves in positions in which they have no alternative to using deadly force." U.S. Dep't of Homeland Sec., Policy Statement 044-05 (Revision 01), at 3 (Feb. 6, 2023); *see also, e.g.*, Denver Police Dep't, Operations Manual, § 105.01(4)(a)(2) – Use of Force Policy (Rev. May 23, 2024) ("Officers will avoid * * * deliberate actions that precipitate the use of force."); Minneapolis Police Dep't, Policy and Procedure Manual, No. 5-300, § 5-301(III)(D) (Sept. 6, 2024) (directing officers to avoid "actions that unnecessarily place themselves, suspects, or the public at risk"); Philadelphia Police Dep't, Directive 10.2, § 2(B) ("Personnel will not unnecessarily or unreasonably endanger themselves and others * * * ."); Metro. Police Dep't, GO-RAR-901.07, § II.A.8.a.(3) (Mar. 28, 2024) (instructing officers that the "totality of the circumstances" encompasses "[w]hether any conduct by the [officer] prior to the use of deadly force unreasonably increased the risk of confrontation" in which force was necessary).

Officers are similarly taught to de-escalate encounters to avoid using force, to provide warnings prior to using deadly force, and—particularly relevant here—to avoid placing themselves into the path of moving vehicles. *See* Seth W. Stoughton Cert.-Stage *Amicus*

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[8] *See, e.g.*, U.S. Dep't of Justice, Justice Manual § 1-16.100 (updated July 2022); Miami Police Dep't, Departmental Order 17, § 1.4 (Mar. 8, 2022).

Br. 6-7; *see, e.g.*, U.S. Dep't of Justice, Justice Manual §§ 1-16.200, 1-16.300 (updated July 2022); Phoenix Police Dep't, Operations Order 1.5, at 8 (Jan. 2023) ("Employees shall not position themselves in the path of a moving vehicle or one capable of immediate movement so that the employee avoids creating a situation in which they may have no option other than to use Deadly Force."); City of Cleveland, Div. of Police, General Police Order 2.01.03, § VIII(A)(13) (rev. Mar. 20, 2023) ("[O]fficers shall not * * * [r]each into or place themselves in the path of a vehicle."); City of Columbus, Div. of Police, Directive 2.01(II)(B) (rev. June 30, 2023) ("Reaching into an occupied vehicle can place an officer in grave danger."); St. Louis County Police Dep't, GO 029 (General Order 10-29), § VIII.B.2 (Apr. 7, 2010) (instructing officers to "avoid tactics that could place them in a position where a vehicle could be used as a weapon against them"); Los Angeles Police Dep't, Departmental Manual § 1/556.10, Policy on the Use of Force (rev. Nov. 17, 2021) (stating that a "moving vehicle itself" does not "presumptively constitute a threat that justifies an officer's use of deadly force"); Miami Police Dep't, Departmental Order 17, § 1.5.6 (Mar. 8, 2022) ("An officer threatened by an oncoming vehicle shall move out of its path instead of discharging a firearm at it or any of its occupants."); Chicago Police Dep't, General Order G03-02-03, § II.E.6 (June 28, 2023) ("When a vehicle is the only force used against a member, the member will not place themselves in the path of the moving vehicle and will make every effort to move out of the path of the vehicle."); Seth W. Stoughton et al., Evaluating Police Uses of Force 216 (2020) ("[O]fficers should avoid placing themselves in a vehicle's path * * * .").

Under the moment of the threat doctrine, a court cannot consider whether an officer took *any* of those steps immediately prior to discharging a firearm when evaluating whether an officer acted reasonably. It makes no sense for federal courts' test for excessive force to conflict, so fundamentally, with many "policies adopted by the police departments themselves." *Garner*, 471 U.S. at 18.

III. ARGUMENTS IN FAVOR OF THE MOMENT OF THE THREAT DOCTRINE LACK MERIT.

Respondents and courts that have adopted the moment of the threat doctrine had advanced a handful of arguments in its favor. None hold water.

A. *Graham* Does Not Support The Moment Of The Threat Doctrine.

Respondents and some courts root the moment of the threat doctrine in *Graham*'s statement that the Fourth Amendment applies a "standard of reasonableness at the moment," under which courts evaluate an officer's action "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396-397; *see Greenidge* v. *Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991); BIO 23.

But it is always "a mistake to read judicial opinions like statutes," *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2281 (2024) (Gorsuch, J., concurring), and *Graham* in no way adopted the moment of the threat doctrine. That passage merely instructs courts to assess reasonableness from the perspective of the officer on the scene. Courts can heed *Graham*'s warning against Monday morning quarterbacking while also evaluating the entirety of a seizure. It bears

repeating: Officers who make reasonable mistakes under pressure do not face liability under *Graham*'s totality of the circumstances test. *See supra* pp. 39-40.

The moment of the threat doctrine, moreover, is fundamentally inconsistent with *Graham*, which requires courts to pay "careful attention to the facts and circumstances of each particular case." 490 U.S. at 396. *Graham* stressed that the same Fourth Amendment standard applies to "*all* claims that law enforcement officers have used excessive force—deadly or not." *Id*. at 395. Yet the moment of the threat doctrine carves out a special constitutional standard exclusively for deadly force cases. And *Graham* required courts to evaluate "the severity of the crime at issue," a factor which the Fifth Circuit ignored under the moment of the threat doctrine. *Id*. at 396. In short, *Graham* plainly cannot supply the legal basis for the moment of the threat doctrine.

At the certiorari stage, Respondents also pointed to stray language in other cases, but they do not support the moment of the threat doctrine. For example, Respondents (BIO 25) highlighted a sentence in *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600 (2015), in which the Court observed that plaintiffs "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided," *id*. at 615 (quotation marks omitted). That sentence stands for the unremarkable proposition that, where officers reasonably "misjudge[] the situation" and make a tactical mistake, *Graham* does not hold them liable in hindsight for tragic consequences. *Id*. Respondents similarly emphasized (BIO 31) a snippet of *Plumhoff*

in which the Court noted that "at the moment when the shots were fired," the suspect was "intent on resuming his flight," 572 U.S. at 777. But the remainder of the paragraph analyzed the suspect's dangerous conduct in the "five minutes" prior, which the moment of the threat doctrine excludes. *Id*. at 776; *see supra* p. 22.

B. *Hodari D.* Does Not Support The Moment Of The Threat Doctrine.

Other courts justify the moment of the threat doctrine based on *California* v. *Hodari D.*, 499 U.S. 621 (1991), which involved the predicate constitutional question of whether and when a seizure occurs. Those courts conclude that because a Fourth Amendment seizure does not occur until a bullet strikes a suspect, the court may "scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." *Cole* v. *Bone*, 993 F.2d 1328, 1332-33 (8th Cir. 1993).

That logic conflates two distinct questions: the threshold question of whether and when a seizure occurs (the issue in *Hodari D.*) and the subsequent question of how to evaluate the reasonableness of that seizure. *St. Hilaire*, 71 F.3d at 26 n.4. No one disputes there *was* a seizure in this case. Officer Felix stopped Barnes from driving away by jumping onto his car, immediately shooting him, and then holding him at gunpoint until he died. Officer Felix seized Barnes by any metric. *See Torres*, 592 U.S. at 318, 322 (majority op.); *id*. at 330 (Gorsuch, J., dissenting). The question presented is whether the courts below may evaluate what Officer Felix actually did or just a snippet of his actions. *Hodari D.* does not speak to that question. *Garner*, *Graham*, and their progeny do.

Indeed, "[h]ow is the reasonableness of a bullet striking someone to be assessed if not by examining preceding events?" *Abraham*, 183 F.3d at 291. Courts must consider *some* surrounding facts to determine whether the seizure was reasonable, lest "virtually every shooting would appear unjustified" because the court "would be unable to supply any rationale for the officer's conduct." *Id.*; *see supra* pp. 36-39. In this case, when evaluating the reasonableness of Officer Felix's shooting Barnes, the Fifth Circuit should have been able to consider Officer Felix's decision to jump onto Barnes's moving car a second beforehand.

C. *Mendez* Does Not Support The Moment Of The Threat Doctrine.

Finally, at the certiorari stage, Respondents suggested *Mendez* supported the moment of the threat doctrine. BIO 25-26. That is wrong. *Mendez* expressly reserved the question presented here. *See Mendez*, 581 U.S. at 429 n.*. The logic of the Court's decision in *Mendez*, moreover, firmly supports Petitioner's approach here.

In *Mendez*, "the Ninth Circuit did not dispute" that the officers' use of force was "reasonable under *Graham*." *Id*. at 426. Under the Ninth Circuit's provocation rule, however, even "after a forceful seizure ha[d] been judged to be reasonable under *Graham*," a plaintiff could still prevail *on the excessive force claim* by pointing to "a *different* Fourth Amendment violation that [wa]s somehow tied to the eventual use of force." *Id*. at 427-428.

In rejecting that rule, this Court emphasized that it was not "clear what causal standard" the Ninth Circuit required the plaintiff to establish between an antecedent Fourth Amendment violation and the

excessive force claim. *Id*. at 430. Under the Ninth Circuit's provocation doctrine, the antecedent violation needed to "in some sense set the table for the use of force"—but that "vague causal standard" was not "the familiar proximate cause standard." *Id*. at 429-430. Moreover, the Ninth Circuit's doctrine apparently *also* looked "to the subjective intent of the officers who carried out the seizure," which was inconsistent with an objective reasonableness standard. *Id*. at 430.

In sharp contrast to *Mendez*, Petitioner is simply asking the Court to apply its longstanding test and hold that the objective reasonableness of an officer's use of force depends on the totality of the circumstances. *Mendez*, 581 U.S. at 427-428; *Plumhoff*, 572 U.S. at 774; *Scott*, 550 U.S. at 383; *Graham*, 490 U.S. at 396; *Garner*, 471 U.S. at 8-9. Unlike the plaintiff in *Mendez*, Petitioner is *not* arguing that Officer Felix's unrelated conduct renders an otherwise reasonable seizure unreasonable. Petitioner is arguing that the Fifth Circuit should have been able to consider the totality of the circumstances—"the jumping" on "the car, plus the ultimate shooting"—"to determine whether it's reasonable." Oral Arg. Tr. 34, *Mendez*, 581 U.S. 420 (No. 16-369) (Alito, J.).

Moreover, *Mendez* confirmed that officers *should* be held responsible for "the foreseeable consequences" of their actions. *Mendez*, 581 U.S. at 430-431. But the moment of the threat doctrine immunizes Officer Felix and others who engage in egregious conduct—and then attempt to justify the use of deadly force based on a blindingly obvious and entirely self-created threat. That result has no basis in "familiar" tort principles. *Id*. at 430. Quite the opposite. The moment of

the threat doctrine insulates Officer Felix *because* he unreasonably jumped onto Barnes car, created a foreseeable danger, and used unnecessary deadly force.

Finally, *Mendez* confirmed that a plaintiff *can* recover for a deadly shooting if the shooting was the foreseeable consequence of another, independent Fourth Amendment violation—such as a warrantless entry into a home. *Id*. at 431-432. At the certiorari stage, Respondent implied that Petitioner should have litigated a claim that Officer Felix committed a predicate Fourth Amendment violation when he stepped onto Barnes's vehicle—and then sought damages for Felix foreseeably shooting of Barnes a *second* later. BIO i, 2-3, 9, 11-12.

This argument is too clever by half, and it confirms why the moment of the threat doctrine is wrong. Petitioner did *not* bring this case because Officer Felix trespassed on her son's car. She brought this case because Officer Felix intruded on her son's most sacred constitutional right to life. It makes no sense to say that a plaintiff like Petitioner can recover *only if* she litigates a separate, predicate Fourth Amendment violation—and not for the unreasonable use of force itself. There should be "no need to dress up" "an excessive force claim"—which sounds in one of the most fundamental constitutional values—in the guise of some other "Fourth Amendment claim." *Mendez*, 581 U.S. at 431. Petitioner should be able to assert her core constitutional claim: Officer Felix violated the

Fourth Amendment when he shot and killed her only son.[9]

Nor should the outcome of this case turn on the happenstance of whether Officer Felix initially jumped onto the car (which may be a Fourth Amendment violation), instead of in front of it (which likely is not). It bears emphasis: Under Respondent's theory of the Fourth Amendment, if an officer jumps *in front of* a moving vehicle for no reason and shoots a suspect, *see Est. of Starks*, 5 F.3d at 234, there would be no predicate Fourth Amendment claim, and thus no ability to recover for the unreasonable shooting. That cannot be right. The fact that the moment of the threat doctrine treats otherwise identical uses of force in such radically different ways based on immaterial differences confirms the doctrine has no merit.

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[9] Below, Respondent argued the moment of the threat doctrine foreclosed an independent Fourth Amendment claim based on Officer Felix jumping onto Barnes's car because such a claim would improperly "parse and analyze the deadly force encounter." D. Ct. Dkt. 67 at 1. If this Court announces a new rule that Petitioner must recover for Officer Felix's use of excessive force by litigating a claim based on Felix jumping onto Barnes's vehicle, in the interests of justice, the Court should at least remand and direct the lower courts to consider that theory of liability.

CONCLUSION

For the forgoing reasons, this Court should vacate the judgment and remand.

Respectfully submitted,

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