No. 23-1239

In the Supreme Court of the United States

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

Petitioner,

v.

ROBERTO FELIX, JR. et al.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND THE CENTER FOR POLICING EQUITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Constitutional Provisions

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 275 criminal justice professionals advising on police community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

The Center for Policing Equity (CPE) is a racial justice non-profit that provides leaders with data, stories, and relationships to facilitate changes that are bold, innovative, and lasting. CPE gathers and analyzes data on behaviors within public safety systems and uses those data to help communities achieve safer policing outcomes. This work is also the basis of CPE's National Justice Database, the nation's first database tracking national statistics on police behavior. This database allows CPE to provide others with a clearer picture of the approaches, measures, and methods that work best in redesigning public safety to better keep vulnerable communities safe.

BACKGROUND AND SUMMARY OF ARGUMENT

Yet again, an unarmed Black American has been needlessly killed during a routine traffic stop. Respondent Constable Roberto Felix pulled over Ashtian Barnes for unpaid toll violations on a car his girlfriend had rented. J.A. at 2a. During their encounter, Mr. Barnes's left blinker turned back on, at which point Constable Felix drew and aimed his sidearm. *Id.* at 3a. As the car started to move, Constable Felix stepped onto the car's runner and shoved his gun into Mr. Barnes's head. *Id.* at 3a–4a. He then opened fire, killing Mr. Barnes. *Id.* at 4a.

Mr. Barnes's parents brought a Section 1983 suit against Constable Felix and Harris County. *Id.* The district court granted the defendants qualified

immunity. *Id.* at 5a. It applied Fifth Circuit precedent requiring it to consider only "the exact moment" Constable Felix used deadly force in assessing the reasonableness of the killing. *Id.* at 32a. The Fifth Circuit affirmed that decision. *Id.* at 9a. This Court granted certiorari on October 4, 2024.

The moment of threat test requires courts to ignore facts that are plainly relevant to determining whether a seizure was reasonable under the Fourth Amendment's original public meaning. Besides being inconsistent with historical tradition, the moment of threat test frustrates accountability and contributes to an overreliance on the use of force by police, thereby undermining public confidence in law enforcement. And even putting aside those serious flaws, the test is not needed to filter out meritless claims, because there are multiple other layers of insulation for officers' reasonable decisions.

ARGUMENT

I. AT COMMON LAW, THE TOTALITY OF THE CIRCUMSTANCES DETERMINED WHETHER A SEIZURE WAS REASONABLE.

The moment of threat test has again prevented courts from undertaking a historically faithful inquiry into whether the encounter had to be fatal.[2] The moment of threat test should be discarded because it contradicts longstanding common law rules for assessing the reasonableness of a seizure. The common law helps define what counts as an unreasonable

[2] *Barnes v. Felix*, 91 F.4th 393, 398 (5th Cir. 2024) (Higginbotham, J., concurring).

seizure.[3] At common law, seizures were defined as the intentional "application of physical force" to an arrestee.[4] Shooting someone would easily qualify as a seizure under this definition.[5] Historically, whether a seizure was reasonable depended on the totality of the circumstances—not just what was happening at the moment of threat.

The common law sought to protect human life. Death was not justified "simply to prevent an escape."[6] No "arbitrary judge" with a gun could replace the "thorough and solemn scrutiny" afforded a criminal suspect by legal procedures.[7] To be sure, a fleeing accused felon could be stopped with deadly force.[8] But that now-superseded rule was justified by historical and technological realities. Nearly all felonies were at one time capital crimes, and deadly force to prevent flight was understood as "merely a speedier execution of someone who ha[d] already forfeited his life."[9] Additionally, deadly force "could be inflicted almost solely in a hand-to-hand struggle during which,

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[3] U.S. CONST. amend. IV; *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

[4] *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

[5] *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

[6] *Caldwell v. State*, 41 Tex. 86, 98 (1874).

[7] *State v. Smith*, 103 N.W. 944, 945 (1905), cited approvingly by *Garner*, 471 U.S. at 12; *State v. Campbell*, 12 S.E. 441, 443 (1890); *accord Garner*, 471 U.S. at 9–10.

[8] *Holloway v. Moser*, 136 S.E. 375, 376 (1927), cited approvingly by *Garner*, 471 U.S. at 12.

[9] *Garner*, 471 U.S. at 14.

necessarily, the safety of the arresting officer was at risk."[10]

But over time, criminal codes grew both in size and in scope. Many acts once classified as misdemeanors—or that were previously lawful—are now felonies.[11] This Court ensured the continued vitality of the Fourth Amendment by holding in *Tennessee v. Garner* that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable."[12] Context still matters, and legislatures' broad (but not limitless) discretion to classify offenses as felonies rather than misdemeanors supplies no power to extinguish by fiat core constitutional protections like the prohibition on unreasonable seizures.

That prohibition is consistent with public safety and effective enforcement of the laws. *Garner* observed that "laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies."[13] Rules restricting the use of deadly force to contexts where it is truly necessary had not "been difficult to apply [n]or . . . led to a rash of litigation involving inappropriate second-guessing of police officers' split-

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[10] *Id.* at 14–15.

[11] *Id.* at 14.

[12] *Id.* at 11.

[13] *Id.* at 19 (citation omitted).

second decisions."[14] Instead, they had, and have, saved lives, thus promoting the common law's sound humanitarian aims without undermining the safety or efficacy of law enforcement.

At common law, the underlying reason for a seizure that resulted in flight mattered. Killing a non-resisting accused misdemeanant was murder.[15] Thus, "[t]he dictates of humanity" forbade killing a fleeing petty offender like Mr. Barnes. An officer had "no more right to kill him than he would have if the offender were to lie down and refuse to go."[16] Allowing a suspect to escape was better than killing someone "in a case where the extreme penalty would be a trifling fine or a few days' imprisonment."[17] "The law value[d] human life too highly to give an officer the right to proceed to the extremity of shooting one whom he is attempting to arrest for a violation" of a petty law.[18] Few offenses are as petty as the one for which Mr. Barnes was stopped, ultimately leading to his death. Driving a car with unpaid toll violations is not even an arrestable infraction in Texas.[19]

The common law even protected the life of someone resisting arrest, with numerous early cases holding that deadly force could be used only when truly

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[14] *Id.* at 20.

[15] *Holloway*, 136 S.E. at 376 (quoting 2 BISHOP ON CRIMINAL LAW §§ 662–63).

[16] *Head v. Martin*, 3 S.W. 622, 624 (1887).

[17] *Smith*, 103 N.W. at 946; *see also Holloway*, 136 S.E. at 377.

[18] *Holmes v. State*, 62 S.E. 716 (1908).

[19] *Barnes*, 91 F.4th at 395 (majority op.); *id.* at 399 (Higginbotham, J., concurring).

necessary, given the totality of the circumstances. An arresting officer would break the law if he used "any greater force than [was] reasonably and apparently necessary for his protection."[20] Whether an officer "arbitrarily and grossly abused the power confided to him" was a question for the jury.[21]

Of course, early American common law did not have occasion to consider the power to arrest in the context of automobiles, but using a vehicle to flee should not categorically vitiate the common law's limits on the use of deadly force. Whether Mr. Barnes's manner of alleged flight so endangered the public as to justify shooting him dead is a fact-bound question depending on the totality of the circumstances[22]—and one the Fifth Circuit never addressed.

Even arrestees guilty of contributory negligence were entitled to expect that officers would observe

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[20] *Head*, 3 S.W. at 623, cited approvingly by *Holloway*, 136 S.E. at 377.

[21] *State v. Pugh*, 7 S.E. 757, 757–58 (1888); *see also Smith*, 103 N.W. at 946; *accord Barnes*, 91 F.4th at 399–400 & n.13 (Higginbotham, J., concurring); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Garner*, 471 U.S. at 8–9); *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) ("[I]f preceding conduct could not be considered, remand in *Brower* [*v. County of Inyo*, 489 U.S.593 (1989)] would have been pointless, for the only basis for saying the seizure was unreasonable was the police's pre-seizure planning and conduct.").

[22] *See, e.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 595 (1989) ("Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.").

these limits—and could recover damages from those who used needless force.[23] Officers had a duty to secure people "without resorting to the use of fire-arms or dangerous weapons" if the totality of the circumstances allowed them to do so.[24] They could be held liable for taking human life without "diligence and caution."[25] Even if an arrestee used deadly force, an officer could be held liable for using excessive force.[26] A 1908 case noted that an officer who used excessive force was guilty of assault and battery.[27] The arrestee could use even deadly force to resist such an unlawful arrest.[28] The common law thus required a court to consider the totality of the circumstances and not just the moment of threat. A court had to assess the suspected criminal activity, alternatives to deadly force, and whether force was justifiable. At common law, it would have mattered that Mr. Barnes was stopped for unpaid toll violations on a car his girlfriend had rented. It would have mattered that Constable Felix chose to step onto the rolling car. It would have

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[23] *Head*, 3 S.W. at 624.

[24] *Reneau v. State*, 70 Tenn. 720, 722 (1879), cited approvingly by *Garner*, 471 U.S. at 12.

[25] *Id.*; *see also Smith*, 103 N.W. at 946 (holding that killing someone engaged in felony escape was justifiable only if it was "the only reasonably apparent method" available "for the honest and non-negligent purpose of preventing the felony, and not for some other reason").

[26] *Head*, 3 S.W. at 623 ("If the offender puts the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection.").

[27] *Holmes*, 62 S.E. at 716.

[28] *Id.* (citing *Miers v. State*, 29 S.W. 1074 (Tex. Crim. App. 1895)).

mattered that Constable Felix started shooting into Mr. Barnes's car before he could even see inside.[29] Even today, under *Graham v. Connor*, a jury in this case should have been allowed to weigh "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether the suspect [was] actively resisting arrest or attempting to evade arrest by flight."[30] A jury should have been charged with giving "careful attention to the facts and circumstances."[31]

That did not happen. The Fifth Circuit's moment of threat rule "starves the reasonableness analysis by ignoring relevant facts to the expense of life."[32] Accordingly, the Fifth Circuit has paid this Court's precedent, and the common law norms it reflects, "merely performative" respect.[33] The moment of threat rule sets aside entirely "the gravity of the offense at issue" and confines its view to only the very instant when Constable Felix pulled the trigger.[34] The common law required courts to consider more when life was on the line.

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[29] *Barnes*, 91 F.4th at 395–96 & n.2, 401.

[30] *Graham*, 490 U.S. at 396.

[31] *Id.* at 396; *see also Brower*, 489 U.S. at 599–600 (remanding for further consideration of the facts leading up to a driver striking a roadblock).

[32] *Barnes*, 91 F.4th at 400 (Higginbotham, J., concurring).

[33] *Id.* at 401.

[34] *Id.*

II. POOR TACTICAL DECISIONS COST PEOPLE THEIR LIVES.

Juxtaposed against the common law's holistic solicitude for human life, modern-day horror stories of officers inventing dangers as a justification for killing people defy sound legal reasoning. Here are some illustrative examples:

Willie McCoy was unresponsive, slumped over in his car at a Taco Bell drive-through with a gun in his lap.[35] Rather than taking up a secure position and then ordering Mr. McCoy out of the car, officers stood directly in the line of fire and shouted at him.[36] Within four seconds of rousing him, six officers fired 55 shots and killed Mr. McCoy.[37]

Philando Castile was stopped for a broken brake light.[38] He told the officer he had a gun.[39] The officer ordered Mr. Castile to retrieve his license and not reach for the gun.[40] Mr. Castile assured the officer that

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[35] David French, *The Underexamined Factor in Too Many Police Shootings*, NAT'L REV. (Apr. 4, 2019), https://tinyurl.com/2s39eehp.

[36] *Id.*

[37] Colleen Shalby, *Police Fired More than 55 Rounds at Willie McCoy in Less than 4 Seconds, Report Shows*, L.A. TIMES (June 27, 2019), https://tinyurl.com/24uxuka8.

[38] David French, *The Unwritten Law That Helps Bad Cops Go Free,* NAT'L REV. (June 21, 2017), https://tinyurl.com/4k8u5ejk; *Philando Castile Death: Police Footage Released*, BBC (June 21, 2017), https://www.bbc.com/news/world-us-canada-40357355.

[39] BBC, *supra* n.38.

[40] French, *supra* n.38.

he would do so.[41] But as soon as Mr. Castile reached for his license, the officer shot and killed him.[42]

Officers told Daniel Shaver to both crawl towards them in a motel corridor and not to put his hands down.[43] He was shot to death as he begged for his life, unsure of what officers wanted him to do.[44]

Andrew Scott, startled by pounding on his door late at night, grabbed his lawfully owned pistol and answered the door.[45] He had no way of knowing that the people on the other side were police because the officers did not identify themselves or activate their emergency lights before approaching the wrong apartment.[46] When Mr. Scott saw unidentified armed people and retreated inside, officers killed him.

Officers' poor decisions and tactical errors sometimes cause the very dangers that they subsequently use to shield themselves from legal scrutiny under the moment of threat doctrine. This is particularly regrettable in cases like this one, where the initial police stop resulting in an armed

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[41] *Id.*

[42] *Id.*

[43] French, *supra* n.35.

[44] David French, *The Police Murder of Daniel Shaver*, NAT'L REV. (Dec. 9, 2017), https://www.nationalreview.com/corner/police-murder-daniel-shaver/.

[45] David French, *Another Federal Court of Appeals Attacks the Second Amendment*, NAT'L REV. (Mar. 20, 2017), https://www.nationalreview.com/2017/03/andrew-scott-case-second-amendment-attacked-eleventh-circuit-appeals-court/ .

[46] *Id.*

confrontation represents a questionable policy choice in the first place.

III. DANGEROUS POLICING WAS ESPECIALLY UNCALLED-FOR HERE.

Mr. Barnes lost his life over unpaid toll fees and his decision to flee a routine traffic stop. When he stopped Mr. Barnes, Constable Felix was effectively functioning as a county revenue collector, rather than as a keeper of the peace.[47] Stopping a driver for unpaid toll fees—like many of the millions of other low-level traffic stops conducted nationwide each year—is entirely unrelated to public safety. However, the Harris County Toll Road Authority pays the salaries of many Harris County constables.[48] Using officers to raise revenue through debt collection sets the stage for unnecessary conflict and avoidable tragedies while displacing higher-social-value police work. For instance, while Harris County constables make only six percent of the county's arrests for jailable offenses—and often function only as bailiffs and process servers in other counties—they receive over 80 percent of the budget Harris County allocates for patrol officers.[49]

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[47] Eric Dexheimer, *Drivers Pay for 160 Constables to Patrol Sam Houston Tollway, Even When There's Little Road to Cover*, HOUS. CHRON. (Mar. 18, 2024), https://tinyurl.com/27ueashm.

[48] *See id.* (noting that officers nationwide often have financial incentives to conduct low-level traffic stops).

[49] Neena Satija et al., *What Is a Constable, and Why Are Harris County's 'Contract Deputies' in the News?*, HOUS. CHRON. (Mar. 18, 2024), https://tinyurl.com/2stem2de; Mike Morris et al., *How Did Constables Acquire Unprecedented Power in Harris County? Local Leaders Let Them.*, HOUS. CHRON. (Mar. 19, 2024), https://tinyurl.com/4f2a436m (noting that most constables

Using police to chase down unpaid toll fees diverts scarce law-enforcement resources from activities that more directly advance public safety. Police officers typically spend only a fraction of their time responding to violent crimes like homicide, robbery, rape, and aggravated assault.[50] But these violent crimes are precisely the issues that should be at the heart of officers' training and duties—not collecting toll debts and taking on other social issues for which they are ill-suited and ill-prepared to address.

Sending armed officers out to collect toll revenue increases the risk that an officer will create a moment of threat and then rely on it as justification for using excessive force. A report by *amicus* Center for Policing Equity confirms that "when police pull people over for non-safety violations and search them for evidence of crimes, there is a greater likelihood of police use of force."[51] The report concludes that "limiting routine stops for non-safety offenses has the potential to reduce the likelihood of police use of force."[52]

Fortunately, violence against police during traffic stops is rare. An officer is feloniously killed in only 1 in every 6.5 million routine traffic stops.[53] An assault

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elsewhere in Texas work as courtroom guards and process servers).

[50] Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (Nov. 8, 2021), https://tinyurl.com/2nuybezx.

[51] Matthew A. Graham et al., *Racial Disparities in Use of Force at Traffic Stops* 7 (2024), https://tinyurl.com/3zarcnpe.

[52] *Id.*

[53] Jordan B. Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 640 (2019).

results in serious injury to an officer in just 1 of every 361,111 stops.[54] Overall, an officer is assaulted in only 1 of every 6,959 stops.[55] Still, officers are taught to approach every traffic stop as if their lives are on the line. They are "trained to presume danger" in virtually every encounter, and they often react in ways that increase the likelihood of "anticipatory killings."[56] As a result, police tend to escalate already-tense situations and create moments of threat.

The law authorizes officers to take "unquestioned command" of stops, which increases the likelihood of unnecessary escalation.[57] Officers engaged in a traffic stop can readily order the driver out of the vehicle and conduct a pat-down.[58] They can often order passengers to step out and then frisk them, too.[59] They need only reasonable suspicion that a weapon is present to search a car's compartments.[60] Officers can do all this even during pretextual stops.[61] Ready opportunities exist, then, for poor policing to create needless moments of threat. The moment of threat rule ends up

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[54] *Id.*

[55] *Id.*

[56] David Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Oct. 31, 2021), https://tinyurl.com/mr3yvm63. From 2016 to 2021, more than 400 unarmed people were killed by law enforcement during traffic stops. *Id.*

[57] *Michigan v. Summers*, 452 U.S. 692, 703 (1981).

[58] *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

[59] *Arizona v. Johnson*, 555 U.S. 323 (2009); *Maryland v. Wilson*, 519 U.S. 408 (1997).

[60] *Michigan v. Long*, 463 U.S. 1032 (1983).

[61] *Whren v. United States*, 517 U.S. 806 (1996).

justifying the killing of motorists in stops over infractions as petty as broken taillights and view-obstructing air fresheners.

The moment of threat test leaves no room for what this Court has prescribed: "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[62] The moment of threat doctrine invites and insulates police misconduct, which in turn threatens public safety and lives.

IV. SHIELDING EXCESSIVE FORCE FROM SCRUTINY ERODES PUBLIC TRUST AND UNDERMINES THE RULE OF LAW.

The criminal justice system cannot be effective if the public perceives policing to be abusive. Perceptions of abuse abound when there is no accountability for needless police killings. Nearly a thousand Americans a year lost their lives to police shootings from 2015 to 2017.[63] Tens of thousands more were wounded or injured, to say nothing of those harmed without obvious physical effects.[64] "More people were killed by U.S. law enforcement in 2023 than any other year in

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[62] *Graham*, 490 U.S. at 396 (quotation marks and citation omitted).

[63] *See* Julie Tate et al., *Fatal Force*, WASH. POST DATABASE, https://tinyurl.com/59v6mt2k.

[64] *See* Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017), https://tinyurl.com/38dt9x97.

the past decade . . . ."[65] The moment of threat test only heightens the risk that more Americans will die.

Unnecessary killings threaten a further loss of public confidence in police.[66] Citizens are digitally documenting police encounters more frequently than ever. In the aftermath of many widely publicized police killings—most notably, the video-recorded murder of George Floyd by Minnesota police in May 2020—Gallup reported that trust in police officers had reached a 27-year low.[67] For the first time, fewer than half of Americans reported placing confidence in the police.[68] Public confidence has not recovered.[69]

Racial disparities are part of the reason that public confidence in the police remains low. *Amicus* Center for Policing Equity found that in some jurisdictions, Black drivers were *five times likelier* to be searched by police than white drivers.[70] This was the case even though in most jurisdictions, they were no likelier—

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[65] E.D. Cauchi & Scott Pham, *County Sheriffs Wield Lethal Power, Face Little Accountability: "A Failure of Democracy"*, CBS NEWS (May 20, 2024), https://tinyurl.com/v2ec9scz.

[66] *See* Cedric L. Alexander, *Ex-Cop: Atatiana Jefferson's Killing Further Erodes Police Legitimacy*, CNN (Oct. 14, 2019), https://tinyurl.com/37vxd9dy.

[67] Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://tinyurl.com/4y4n9kbt.

[68] *See id.*

[69] *See* Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), https://tinyurl.com/59ffy57y; Gary Langer, *Confidence in Police Practices Drops to a New Low: POLL*, ABC NEWS (Feb. 3, 2023), https://tinyurl.com/32dunn2p.

[70] *See* Graham et al., *supra*, at 4.

and frequently, less likely—to have contraband.[71] Police are also likelier to use force against Black drivers, "regardless of stop reason, whether the stop involved a search, whether a search found contraband, and whether the encounter resulted in a warning, arrest, or citation."[72]

Lack of proper accountability solidifies public concerns about policing.[73] Remarkably, a majority of police agree that there is an accountability problem: according to a survey of more than 8,000 officers, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable."[74] Between 2005 and 2021, despite thousands of police shootings, just "142 officers have been arrested for murder or manslaughter, [and] only seven have been convicted of murder. An additional 37 were convicted of lesser offenses, and 53 were not convicted."[75] Many others are never even indicted.[76]

"[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship,

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[71] *Id.*

[72] *Id.* at 7.

[73] *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://tinyurl.com/u6rn9hm2.

[74] Rich Morin et al., *Behind the Badge* 40, PEW RSCH. CTR. (2017), https://pewrsr.ch/2z2gGSn.

[75] Rick Rouan, *Fact Check: Police Rarely Prosecuted for On-Duty Shootings*, USA TODAY (June 21, 2021), https://tinyurl.com/59593wcj.

[76] See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), https://nyti.ms/2z0kbZl.

increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness."[77] People who do not trust the police are much less likely to report crimes or cooperate as witnesses,[78] further eroding public safety.[79]

The majority of police officers, when properly trained and supervised, follow their constitutional obligations. These officers will benefit if the legal system reliably holds rogue officers accountable.[80] But under the status quo, "[g]iven the potency of negative experiences, the police cannot rely on a majority of

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[77] Fred O. Smith, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018).

[78] NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 15, 65 (2019).

[79] *See*, *e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 5 (2006) ("Of particular importance is the impact of [people's] experiences [with legal authorities] on views of the legitimacy of legal authorities, because legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities."); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2059 (2017) ("Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood among African Americans to accept law enforcement officers' directives and cooperate with their crime-fighting efforts.") (citations omitted); *accord* U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 80 (Mar. 4, 2015) (saying a "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime"), https://perma.cc/XYQ8-7TB4.

[80] *See Garner*, 471 U.S. at 10–11 (noting even in 1985 that "a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.").

positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated."[81] The moment of threat doctrine wrongly, and counterproductively, shields the minority of officers who discredit the entire vocation and undermine the rule of law.

Ninety-three percent of law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings.[82] Officers also strongly supported more transparency—and accountability.[83] However, constables "have the least accountability of any Texas police department."[84] The Fifth Circuit has held that their acts do not trigger liability under *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), because they are not county policy-makers.[85] Two justices of the Texas Court of Appeals have said that this "neuters" *Monell*.[86] Thirty

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[81] Jack McDevitt, Amy Farrell & Russell Wolff, *Promoting Cooperative Strategies to Reduce Racial Profiling* 21 (2008), https://tinyurl.com/mr3jx4kt.

[82] *See* Morin, *supra*, at 65.

[83] *See id.* at 40, 68.

[84] Eric Dexheimer et al., *Want to Sue a Harris County Constable's Office for Violating Your Rights? You Can't.*, HOUS. CHRON. (Mar. 19, 2024), https://tinyurl.com/5n938yw8 (citation omitted).

[85] *Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985); *but see id.* at 112 (Goldberg, J., dissenting) (writing of a constable: "The bucks stop with him").

[86] *Harris Cnty. v. Coats*, 607 S.W.3d 359, 394 (Tex. Ct. App. 14th Dist. 2020) (Bourliot, J., dissenting from den'l of reconsideration en banc), cited approvingly by *Rios v. State*, No. 14-18-00886-CR, 2021 Tex. App. LEXIS 6212, at *55 n.31 (14th Dist. Aug. 3, 2021) (Hassan, J., dissenting from den'l of en banc relief).

people have died in Harris County constables' custody since 2017, and over 100 cases from a single precinct had to be dismissed in 2016 due to evidence destruction.[87] But civil liability remains out of reach.

In light of these facts, individual accountability is all the more critical. By clarifying that constables who create dangers they then use as justification for killing Texans can be liable, just as they would be at common law, the Court can take a significant step toward restoring public confidence in police.

V. THE MOMENT OF THREAT DOCTRINE IS NOT NEEDED TO FILTER OUT MERITLESS CLAIMS.

The moment of threat doctrine is not necessary to protect reasonable policing decisions, as multiple layers of legal insulation already shield officers from excessive liability. First, one broad study found that nearly 40 percent of officers' motions to dismiss civil rights claims, or for judgment on the pleadings, were granted for reasons other than qualified immunity.[88] Second, police officers have a variety of liability-shielding doctrines available to them, including—for now, at least[89]—the affirmative defense of qualified

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[87] Dexheimer, et al., *supra*.

[88] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 56–57 (2017).

[89] Current and former members of this Court have called for reconsideration of qualified immunity, citing its lack of textual and historical support, as well as the injustices and doctrinal distortions it can cause. *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to

immunity. Even for cases that manage to clear those hurdles, the outcome at trial is far from assured.[90]

Moreover, as this Court recently reaffirmed, the jury trial right is "'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care.'" *SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The jury trial right was "'the glory of the English law,'" "prized by the American colonists." *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES, *379 (8th ed. 1778)). Courts should feel no "heartburn with the notion that [a] dispute can go to trial." *Spiller v. Harris Cnty.*, 113 F.4th 573, 582 (5th Cir. 2024) (Willett, J., concurring); *see also* U.S. CONST. amend. VII. "There, in a solemn United States courtroom," the law "can be vindicated

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subsume."); *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting) (noting that qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment."). *See also Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir. 2023) (Willett, J., concurring) (summarizing recent law review article by Prof. Alex Reinert that shows that the text of § 1983 actually enacted by Congress includes a provision expressly displacing common-law defenses and concluding that "[t]hese are game-changing arguments, particularly in this text-centric judicial era when jurists profess unswerving fidelity to the words Congress chose.").

[90] Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1518 (2016) ("[A]ctors in the civil process—judges and juries—translate [police] violence into justifiable force by concluding that the officer's conduct was reasonable.").

by a jury," rather than "appellate judges playing junior-varsity jury." *Id.*

Finally, even if an officer is ultimately found liable, he is nearly always indemnified. Professor Joanna Schwartz has documented that government employers pay 99.98 percent of all dollars paid out in suits against police for excessive force.[91] The study further documented that, in the data set, no officer "paid more than $25,000, and the median contribution by an officer was $2250."[92]

In sum, eliminating the moment of threat test will better align modern doctrine with common law practice and more justly compensate victims of police misconduct without exposing individual officers to financial ruin.

CONCLUSION

"Human life is too sacred" to let the Fifth Circuit's ahistorical moment of threat test stand.[93] This Court should reverse the judgment below and remand for further consideration.

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[91] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

[92] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1806 (2018).

[93] *Head*, 3 S.W. at 623.

Respectfully submitted,

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