No. 23-1239

In the Supreme Court of the United States

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

Petitioner,

v.

ROBERTO FELIX, JR., *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. is a non-partisan nonprofit dedicated to robust enforcement of the Fourth Amendment and related due-process rights. Restore the Fourth oversees a series of local chapters whose membership includes lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files *amicus curiae* briefs in major cases about Fourth Amendment or due-process rights. *E.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Culley v. Marshall*, 601 U.S. 377 (2024) (No. 22-285); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Torres v. Madrid*, 592 U.S. 306 (2021) (No. 19-292).

Restore the Fourth is interested in *Barnes* because "[n]eglecting more traditional approaches" in this case "may mean failing to vindicate the full protections of the Fourth Amendment." *Carpenter v. United States*, 585 U.S. 296, 405 (2018) (Gorsuch, J., dissenting). At issue here is which of two tests should control Fourth Amendment claims of excessive force. Neither test, however, guarantees consideration of whether a police officer's need to use force was self-created—a factor long recognized by the common law to negate efforts to justify or excuse a use of force as self-defense, particularly when such force is lethal. Restore the Fourth submits this traditional approach should be privileged under whatever test the Court ultimately settles upon to resolve this case.

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[1] No counsel for a party wrote this amicus brief in whole or in part; nor has any person or any entity, other than Restore the Fourth and its counsel, contributed money intended to fund the preparation or submission of this amicus brief.

SUMMARY OF THE ARGUMENT

Petitioner's case is not about a choice between a 'right' test and 'wrong' test for excessive-force claims. Regardless of which test the Court may adopt here—either the moment-of-threat test or the totality-of-the circumstances test—courts may manipulate either test to ignore the crucial factor on which Petitioner's case turns at bottom: whether police officers brought upon themselves the need to use lethal force.

Common law principles dating back to the founding era confirm that persons, including officers, could not justify force under a necessity they created through their own fault. This was a well-established limitation on claims of self-defense, particularly for lethal force. The modern trend of wrong-house raids then demonstrates the continuing importance of the common law's concern for police-created necessity. Numerous recent cases show police raids on innocent homes leading to unnecessary police violence, often due to failures to properly investigate, to announce officer presence, or to give proper commands.

The Court may thus wish to consider a third option: the Tenth Circuit's approach to excessive-force cases, which explicitly requires courts to review both the immediate threat that officers faced when they used force and whether an officer's own reckless conduct created the need for force. This approach affirms the Fourth Amendment's dual commitment to protecting persons who posed no immediate threat to officers *and* persons who posed a threat only due to reckless officer conduct. In both cases, police uses of force epitomize an 'unreasonable' seizure.

ARGUMENT

I. In excessive-force cases, both the totality-of-the-circumstances test and the moment-of-threat test risk obscuring the extent to which the police brought upon themselves the need to use force in a given case.

The Fourth Amendment safeguards "against unreasonable searches and seizures." This protection forbids "excessive force in the course of making an arrest, investigatory stop, or other 'seizure.'" *Graham v. Connor*, 490 U.S. 386, 389 (1989); *see id.* at 395–96 ("[T]he Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct."). "[W]hether an officer has used excessive force requires careful attention to the facts and circumstances of each particular case . . . ." *Kisela v. Hughes*, 584 U.S. 100, 103 (2018) (cleaned up).

Courts have articulated two different tests to explain what facts and circumstances do (and do not) matter in deciding excessive-force cases. The totality-of-the-circumstances test provides that courts should generally "examine the actions of the government officials leading up to the seizure." *St. Hilaire v. City of Laconia*, 71 F.3d 20, 25–26 (1st Cir. 1995). The moment-of-threat test, on the other hand, provides that courts may "scrutinize only the seizure itself, not the events leading to the seizure." *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). So in the case of a shooting, the court "focus[es] solely on whether the officer . . . was acting in self-defense at the moment of the shooting." *St. Hilaire,* 71 F.3d at 26–27.

In this case, the moment-of-threat test defeated Petitioner Janice Hughes Barnes's excessive-force claim. *See Barnes v. Felix*, 91 F.4th 393, 398 (5th Cir. 2024). Police officer Roberto Felix, Jr. shot and killed Petitioner's son Ashtian during a traffic stop over toll violations. *See id.* at 395. The district court held that Felix acted reasonably because at the moment of the shooting—all of two seconds—Ashtian's vehicle was moving toward Felix and risked running Felix over. *Id.* at 396–97. The court further held that "Officer Felix's actions prior to the moment of threat . . . had 'no bearing' on the officer's ultimate use of force." *Id.* The court thus disregarded the fact that a second before the shooting, Officer Felix needlessly "jumped onto the [car's] door sill," bringing upon himself the danger that led him to shoot Ashtian. *Id.*

The Fifth Circuit affirmed. *See id.* at 397–98. Judge Higginbotham wrote separately to explain how Fifth Circuit precedent tied his hands by limiting the "reasonableness analysis of the Fourth Amendment to the precise millisecond at which an officer deploys deadly force." *Id.* at 399. Judge Higginbotham goes on to explain the "blinding" nature of this focus, obscuring "the officer's role in bringing about the 'threat' precipitating the use of deadly force." *Id.* at 398. This leads Judge Higginbotham to conclude: "the moment-of-threat [test] . . . . lessens the Fourth Amendment's protection of the American public, devalues human life, and 'frustrates . . . judicial determination of guilt and punishment.'" *Id.*

Petitioner's merits brief echoes this criticism, declaring: "Judge Higginbotham is right, the moment of the threat doctrine is profoundly wrong, and this

Court should reject it." Pet'r Br. 3. In Petitioner's view, "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." Pet'r Br. 13. Otherwise, plaintiffs asserting excessive-force claims face a "deeply unjust" reality: a permanent thumb on the scale in the police's favor, even when "any danger perceived by [the officer] was created solely by himself, and not . . . [the plaintiff's] actions." Pet'r Br. 28. Petitioner stresses that the "Fourth Amendment's standard of reasonableness" is not meant to work as "a one-way ratchet." *Id.*

Based on this unequivocal criticism, one would expect that excessive-force plaintiffs virtually never succeed in the Second, Fourth, Fifth, and Eighth Circuits—four courts of appeals that expressly follow the moment-of-threat test. *See Barnes*, 91 F.4th at 398, 400 & n.13 (Higginbotham, J., concurring). Yet, in the last year alone (from 2023 to 2024), one finds repeated examples of excessive-force plaintiffs who have prevailed in these circuits—including cases that involve fast-moving circumstances and deadly force.[2] These wins take the form of decisions: (1) affirming a district court's denial of an officer's effort to defeat a claim of excessive force; or (2) reversing a district court's grant of relief to officers in this context.

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[2] *See, e.g., Partridge v. City of Benton*, 70 F. 4th 489, 491–93 (8th Cir. 2023); *Baker v. Coburn,* 68 F.4th 240, 247–51 (5th Cir. 2023); *Franklin v. City of Charlotte,* 64 F.4th 519, 530–34 (4th Cir. 2023); *see also, e.g., Vega-Colon v. Eulizier*, No. 23-1211, 2024 U.S. App. LEXIS 16548 (2d Cir. July 8, 2024); *Lewis v. Inocencio*, No. 23-20098, 2024 U.S. App. LEXIS 1416 (5th Cir. Jan. 22, 2024); *Bygum v. City of Montgomery*, No. 21-2130, 2023 U.S. App. LEXIS 4507 (4th Cir. Feb. 24, 2023).

Consider *Vega-Colon v. Eulizier*, No. 23-1211, 2024 U.S. App. LEXIS 16548 (2d Cir. July 8, 2024)—a case like *Barnes* involving an officer who killed a driver during a traffic stop arising from a minor traffic violation (misuse of license plates). As Officer Eulizier "stood near the front" of Anthony Vega-Cruz's car, the car "started moving forward." *Id.* at *5. Eulizier fired two shots, killing Vega-Cruz. *Id.* The Second Circuit determined "a reasonable jury could find" that Eulizier used excessive force given sufficient evidence in the record demonstrating at the moment of the shooting, Vega-Cruz's car "was moving away from Eulizier at a low rate of speed posing no threat." *Id.* at *14. The Second Circuit also noted the existence of factual disputes for a jury over whether Eulizier "intentionally stepped in front" of the car or "could have stepped out of the way." *Id.* at *6–7. So the Second Circuit affirmed the district court's denial of relief to Eulizier, explaining Eulizier could not obtain summary judgment simply because "he was in close proximity to the vehicle and fired within seconds of it moving forward." *Id.* at *14.

What is going on here? How are excessive-force plaintiffs winning under the moment-of-threat test when the test's "only" function (per the test's critics) is "excluding evidence that helps the plaintiff show the force [used] was excessive?" *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999); *see Barnes*, 91 F.4th at 398 (Higginbotham, J., concurring) (the moment-of-threat test "ignor[es] relevant facts"). Petitioner's answer to this puzzle is: "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." Pet'r Br. 14.

To support this assertion, Petitioner cites *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021)—a case in which the Eighth Circuit affirmed a district court's denial of relief to an officer who a jury could have found shot an unarmed homeowner without warning a second after the homeowner opened the door to the officer. *See id.* at 526 ("Vanessa Banks testified that Hawkins fired . . . the moment Johnny Banks opened the door . . . ."). So, to win her case, Petitioner asks the Court to conclude (expressly or tacitly) that a myriad of other excessive-force plaintiffs should have been denied relief in their cases. *See* Pet'r Br. 36 ("A broader analysis of the totality of the circumstances . . . may have vindicated the officer's actions.").

Amicus respectfully disagrees, leading Amicus to support neither party.[3] Petitioner reduces her case to a choice between a 'right' test and a 'wrong' test. Such analysis oversimplifies the way in which both the moment-of-threat test and the totality-of-the-circumstances test have worked in practice over the years across hundreds of excessive-force cases. This body of law reveals two problematic assumptions in Petitioner's unequivocal advocacy of the totality-of-the-circumstances test as the only standard capable of vindicating the Fourth Amendment's protection of persons against police use of excessive force.

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[3] At the certiorari stage, Restore the Fourth joined a Due Process Institute amici brief in support of Petitioner. This brief urged review and reversal so "future plaintiffs in Petitioner's position have access to the courts." DPI Cert.-Stage Amici Br. 24. Upon further consideration at the merits stage, Restore the Fourth still believes that review and reversal are merited—but not because one excessive-force test is better than the other, as Petitioner argues (and Respondents will likely argue).

First, it is unclear that the moment-of-threat test requires a categorical disregard of the ways that an officer's pre-seizure conduct may have spurred a needless (and thereby excessive) use of force. As the Second Circuit puts it: "[t]he reasonableness inquiry depends . . . upon **the officer's knowledge of circumstances immediately prior to** and at the moment that he made the split-second decision to [fire]." *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (bold added). Consistent with this principle, the Second Circuit affirmed a magistrate judge's award of $475,000 in damages to an excessive-force plaintiff given the shooting officer's "repeated testimony that he believed [the plaintiff] was unarmed by the time of the second gunshot." *Thomas v. Wellenreuther*, No. 21-1400, 2022 U.S. App. LEXIS 9209, at *5 (2d Cir. Apr. 6, 2022) (certain capitalization omitted).

Courts applying the moment-of-threat test have also observed that while the test "focus[es] on the seizure itself," the test still allows courts and juries to draw "reasonable inferences from evidence about events surrounding and leading up to the seizure." *Gardner v. Buerger*, 82 F.3d 248, 253 (8th Cir. 1996). In *Gardner*, Charles Gardner "cordially invited" the police to enter his home and an angry confrontation followed. *See id.* at 250–51. The police then shot an unarmed Gardner "in the back of the head." *Id.* The Eighth Circuit reversed a grant of relief to the police even though Gardner's widow (the plaintiff) "never introduced testimony describing the moment Mr. Gardner was shot." *Id.* at 253. The court pronounced that a jury could still properly infer excessive force from "uncontradicted testimony that an unarmed man was shot in the back of the head." *Id.*

With this in mind, there are times when the moment-of-threat test proves to be more protective of persons against excessive force than the totality-of-the circumstances test. A good example is *Franklin v. City of Charlotte*, 64 F.4th 519 (4th Cir. 2023). "[F]orty-three seconds elapsed between Officer Kerl's arrival on the scene and when [Kerl] fatally shot [Danquirs] Franklin." *Id.* at 527. Reversing a grant of relief to Officer Kerl, the Fourth Circuit held that a reasonable jury could find that Kerl used excessive force. *Id.* at 530–34. At the moment of the shooting, Officer Kerl brought the need to shoot upon herself by yelling "inconsistent instruction[s]" at Franklin, causing Franklin to hesitate. *Id.* at 533. The Fourth Circuit rejected Kerl's effort to downplay her role insofar as Kerl asked the court to "look beyond the seconds before she pulled the trigger and consider Franklin's general unresponsiveness." *Id.; see Lytle v. Bexar Cty., Tex.,* 560 F.3d 404, 413 (5th Cir. 2009) ("[A]n exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.").

Second, it is unclear that the totality-of-the-circumstances test requires courts to consider the ways that an officer's pre-seizure conduct may have spurred an excessive use of force. Some courts have said this outright, declaring that application of the totality-of-the circumstances test means determining "whether the force used to effect [a given] seizure was reasonable in the totality of the circumstances, **not whether it was reasonable for the police to create the circumstances**." *Carter v. Buscher,* 973 F.2d 1328, 1333 (7th Cir. 1992) (bold added); *see also St. Hilaire*, 183 F.3d at 26 (noting this reality).

The totality-of-the-circumstances test may also function in practice to conceal—rather than clarify—a use of force that the police brought on themselves. In *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021), the panel dissent urges consideration of a host of pre-seizure circumstances to bury the fact that an officer brought upon himself the need to use force by failing to identify himself or giving any warning before he fired (something he did a second after the excessive-force plaintiff opened the door). *Id.* at 531 (Stras, J., dissenting). Among the pre-seizure circumstances that the panel dissent invokes are the facts that the officer was responding to a "domestic disturbance" and he "saw a truck parked in the driveway with its hazard lights flashing." *Id.* But as the panel majority replies, the central fact of *Banks* still remains that the police shot an unarmed man in his home without warning at a point in time when the situation "was no longer volatile"—and that is "not enough to justify the use of deadly force. *Id*. at 527 (majority op.).

In the end, neither the moment-of-threat test nor the totality-of-the-circumstances test guarantees judicial consideration of the key fact of Petitioner's case: that Officer Felix unnecessarily jumped onto a moving car, creating the necessity to shoot Ashtian Barnes. Courts may manipulate either test to ignore facts demonstrating self-necessitated police uses of force, making a non-starter of Petitioner's advocacy of one test over the other. To solve the problem that *Barnes* raises, one must remember the governing force of a more ancient, fundamental body of law: "the statutes and common law of the founding era . . . that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

II. At common law, persons could not justify force under a necessity that they brought upon themselves by their own fault.

"Originally, the word 'unreasonable' in the Fourth Amendment likely meant 'against reason'—as in "against the reason of the common law." *Carpenter v. United States*, 585 U.S. 296, 355 (2018) (Thomas, J., dissenting). "At the founding, searches and seizures were regulated by a robust body of common-law rules." *See id.* at 355–56. This robust body of common-law rules included extensive discussion of when homicide was (and was not) "justifiable."[4]

The common law recognized that "in some cases homicide is justifiable . . . either for the advancement of public justice, which without such indemnification would never be carried on with proper vigor; or, in such instances where [homicide] is committed for the prevention of some atrocious crime, which cannot otherwise [be] avoided."[5] The common law also held that "in all these cases, there must be an apparent necessity on the officer's side; *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold."[6] **"[W]ithout such absolute necessity**," an officer's use of lethal force was "not justifiable."[7]

The common law thus made 'necessity' a central part of evaluating the propriety of an officer's use of

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[4] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 179 (ch. 14) (1769), https://tinyurl.com/34kh2e62.

[5] *Id.*

[6] *Id.* at 180.

[7] *Id.* (bold added).

force. The common law further strived to prevent abuses of this rule. According to William Hawkins, "[i]t must be owing to some *unavoidable necessity*, to which the person who kills another must be reduced **without any manner of fault in himself**."[8] Hawkins went on: "[n]either shall a man **in any case justify the killing [of] another** by a pretense of necessity, unless he were himself **wholly without fault in bringing that necessity upon himself**."[9] So whenever "a person who kills another . . . [took] occasion, from the appearance of necessity, to execute his own private revenge, he [was] guilty of murder."[10] Or put another way: "a private person and, *a fortiori*, an officer of justice, who happens unavoidably to kill another in endeavoring to defend himself . . . may justify the fact [of homicide], inasmuch as **he only does his duty in aid of the public justice**."[11]

Sir Matthew Hale concurred. Hale observed that "ministers of justice" had "a more special protection in the execution of their [royal] office than private persons."[12] But Hale also stressed that this special protection had its limits: "if the prisoner makes no resistance . . . yet the officer . . . strikes the prisoner, whereof he dies, this is murder, for here was no assault first made by the prisoner, and so it cannot be [self-defense] in the officer."[13] This led Hale to

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8 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 168 (1795) (bold added), https://tinyurl.com/ykzzrpvv.

9 *Id.* at 172 (bold added).

10 *Id.* at 168

11 *Id*. at 173 (bold added).

12 1 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 481 (1778), https://tinyurl.com/2s3a7pkx

13 *Id*.

conclude: "[h]e that first assaulted hath done the first wrong and **[having] brought upon himself this necessity** . . . **shall not have advantage of his own wrong** to gain the favorable interpretation of the law that *that* necessity, which he brought upon himself should, by way of interpretation be accounted . . . to save himself from [legal guilt] . . . ."[14]

In emphasizing that persons (including officers) "cannot urge in justification of [a] killing, a necessity produced by his own unlawful or wrongful act," the common law gave force to the general maxim that "[n]o man shall take advantage of his own wrong."[15] The common law also developed a host of rules to deter police-created necessities to use lethal force. One example is the knock-and-announce rule: "[an officer] ought to signify the cause of his coming, and to make request to open doors . . . for the law **without a default in the [home]owner** abhors the . . . breaking of any house (which is for the habitation and safety of man) . . . ." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (bold added) (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)). By first knocking and announcing their presence, an officer might avoid the need to use force, "for perhaps [the homeowner] did not know of the [warrant], of which, if he had notice . . . he would obey it." *Id.*

Another example is the common-law recognition of an "arrest without touching through a submission to a show of authority." *Torres v. Madrid*, 592 U.S. 306, 314 (2021). This rule made it possible for officers

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14 HALE, *supra* note 12, at 482 (bold added).

15 L.B. HORRIGAN, SELECT AMERICAN CASES ON THE LAW OF SELF-DEFENSE 220, 226 (1874), https://tinyurl.com/mp5ywu9t.

to make arrests without bringing upon themselves the need to use force, as "no manual touching of the body or actual force [was] necessary to constitute an arrest, if the [arrestee submitted]."[16] The rule upheld that officers were "not obliged to use violence or menace" when they executed arrests, instead having "a right to abstain from any unnecessary force." *Josselyn v. McAllister*, 25 Mich. 45, 48 (1872).

The common law's concern for killings caused by self-created necessities played a notable role shortly before the American Revolution. In 1769, James Otis defended Michael Corbet and several other sailors charged with murdering British officer Lieutenant Henry Panton.[17] Panton came aboard Corbet's ship "with some sailors," at which point Panton "asked for the vessel's papers" and "commenced a search" for uncustomed goods.[18] When the search failed to reveal any contraband, Panton began an unlawful search for sailors that he could impress into British military service.[19] Corbet objected. Panton then discharged "a pistol right in the face of Corbet," badly wounding Corbet's lip.[20] Corbet responded by driving a harpoon "with all his force" into Panton, killing him.[21]

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16 1 THOMAS WATERMAN, A TREATISE ON THE LAW OF TRESPASS IN THE TWOFOLD ASPECT OF THE WRONG AND THE REMEDY 312 (New York: Baker, Voorhis & Co. 1875).

17 MASS. HISTORICAL SOCIETY, *Rex v. Corbet–1769–Editorial Note*, https://tinyurl.com/3xuh3kc9 (last visited Nov. 24, 2024).

18 *Id.*

19 *See* 2 WORKS OF JOHN ADAMS 532 (C. Adams ed. 1850) (President John Adams's notes of John Otis's argument during the Corbet trial), https://tinyurl.com/yd2zxnbn.

20 2 WORKS OF JOHN ADAMS, *supra* note 19, at 532.

21 *See* MASS. HISTORICAL SOCIETY, *supra* note 17.

Otis defended Corbet's actions by arguing that the entire incident was one of Panton's own creation: "[Lieutenant Panton's] blood must lie at his own door."[22] Otis explained: "[i]f Mr. Panton came as a custom-house officer . . . to search the ship for uncustomed goods, he had a fair opportunity to do it."[23] "[Panton] asked and was told that the hatchways were open; he ordered the lazaretto open, and it was done, and after this, instead of searching for uncustomed goods, he proceed[ed] directly to search for seamen."[24] Otis maintained "all that Lieutenant Panton did on board the vessel was tortious and illegal . . . . [H]e was a trespasser in going down below, but especially in firing a pistol."[25] "What could Corbet expect? Should he stand still and be shot[?]" The court ultimately acquitted Corbet.[26]

American courts assimilated these common-law precepts. *See, e.g.*, *Rippy v. State*, 39 Tenn. 217, 219–20 (1858); *Vaiden v. Com.*, 53 Va. 717, 729–30 (1855). As one court put it: "[s]uppose I see a man in the act of shooting me, and to save myself, I rush upon him . . . ? Would his shooting me be considered an act of self-defense? . . . True, his shooting me might, at the moment, be necessary; but it is a necessity of his own creation, and cannot avail him as a defense." *Roach v. State*, 34 Ga. 78, 85 (1864). This observation then proves quite prescient given the modern phenomenon of wrong-house raids that involve just this sequence of events playing out in homes nationwide.

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22 2 WORKS OF JOHN ADAMS, *supra* note 19, at 528.

23 *Id.* at 532.

24 *Id.*

25 *Id.* at 529.

26 *See* MASS. HISTORICAL SOCIETY, *supra* note 17.

III. The modern trend of wrong-house raids evinces why courts must consider police-created necessity in excessive-force cases.

Forty minutes after midnight on March 13, 2020, three officers burst into Breonna Taylor's home in Louisville, Ky.[27] Three minutes later, officers shot Breonna six times, killing her.[28] Breonna was a 26-year-old emergency-room technician and this was her "first night off after a few consecutive days with 12-hour shifts."[29] Startled out of bed when the police arrived, Breonna and her boyfriend Kenneth Walker yelled to ask who was there.[30] Receiving no answer and fearing for their lives, Kenneth "grabbed a gun he legally owned and fired."[31] When the dust settled, no evidence linked Breonna's home to narcotics or to an ex-boyfriend of Breonna's who the police arrested the same morning over ten miles away.[32] Meanwhile, Breonna "bled to death in her hallway."[33]

The police raided the "wrong house": something that happens when police search the wrong address or when police search the right address but without fair justification.[34] And Breonna Taylor's case is no

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27 Tessa Duvall, *Breonna Taylor Shooting: A Minute-by-Minute Timeline*, LOUISVILLE (KY.) COURIER JOURNAL, Sept. 23, 2020, https://tinyurl.com/4znmpsj2.

28 *Id.*

29 *Id.*

30 *Id.*

31 Theresa Waldrop, *Breonna Taylor Killing*, CNN, Aug. 4, 2022, https://tinyurl.com/mptvxpzc.

32 *See* Duvall, *supra* note 27.

33 Waldrop, *supra* note 31.

34 *See* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 611 (2022).

outlier.[35] In recent years, police have raided dozens of wrong houses, often with severe results:

- **Courtney Price (2024)**: "An Ohio toddler was sent to the hospital with burns and was struggling to breathe after police raided what may have been the wrong address and used flash-bang devices, according to the boy's mother who shared doorbell [camera] footage that contradicts the police account."[36]

- **Kelly Angell (2023)**: "[D]ozens of [Pittsburgh] SWAT officers . . . surrounded Kelly Angell's home. Inside were Angell's spouse and five daughters, one of whom is autistic . . . . 'I kept hearing them say 1102 Paulson Avenue, and I immediately said there is a mistake, you have the wrong address,' Angell said."[37]

- **Ruby Johnson (2022):** "[Denver] officers smashed the door to [Johnson's] garage . . . , broke apart a ceiling panel, damaged a

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[35] Police commit wrong-house raids so often that Professor Laurent Sacharoff has examined how a common-law reading of the Fourth Amendment's oath-or-affirmation requirement for search warrants might help to prevent such raids in the future. *See* Sacharoff, *supra* note 34, at 611–19, 678–86.

[36] Marlene Lenthang, *'It's the Wrong House': Audio of Ohio Police Raid That Left a Baby Injured Raises New Questions*, NBC NEWS, Jan. 16, 2024, https://tinyurl.com/bdemr5m4; *see also* Caitlin O'Kane, *New Bodycam Footage from Ohio Police Raid Shows Officers Using Flash-Bang [Grenade]*, CBS NEWS, Jan. 17, 2024, https://tinyurl.com/5n76y8ex.

[37] Talia Kirkland, *After Mistaken SWAT Raid, Pittsburgh Police Make Policy Changes to Protect Homeowners*, WPXI-TV, May 15, 2024, https://tinyurl.com/2sbe36j4.

collectible doll and left the house in shambles. The officers found nothing. Johnson had nothing to do with . . . stolen goods . . . ."[38]

- **Adela Carrasco (2021):** "[Joliet, Ill.] officers barged into the bedrooms of [Adela] Carrasco's grandchildren, who ranged in age from 12 to their early twenties, and pointed guns at them while shouting obscenities. There was only one problem: [t]he search warrant for [Elian] Raya listed his address as 226 South Comstock. Carrasco lived at 228 South Comstock."[39]

- **Renee Dunigan (2021)**: "[When Michigan state] troopers broke down the door . . . . Dunigan, her daughter and grandchildren ages 14, 10 and 3 were inside . . . . [A]ll five of them complied and tried to ask what was going on. . . . [P]olice left the residence and admitted they were at the wrong house."[40]

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[38] Shelly Bradbury, *Jury Awards $3.76 Million to Denver Woman Over SWAT Raid of Her Montbello Home*, DENVER POST, Mar. 4, 2024, https:// tinyurl.com/yt2fpv3f; *see also* Holly Yan, et al., *Denver Police Raided the Wrong House After Officers Relied on a Phone Tracking App*, CNN, Mar. 8, 2024, https://tinyurl.com/we8ntuzw ("Denver police relied solely on Apple's 'Find My" app and stormed the wrong home.").

[39] C.J. Ciaramella, *Illinois Family Files Lawsuit After Police Execute Wrong-Door Raid & Allegedly Detain Them for 6 Hours*, REASON, Nov. 3, 2019, https://tinyurl.com/8h96ubw9*; see also* Anthony Ponce, *Ring Video Shows Suburban Police Forcefully Enter Wrong Home in Joliet: Complaint*, FOX 32 (Chi.), Nov. 2, 2023, https://tinyurl.com/munz2m97.

[40] Ann Pierret, *Flint Family Says Police Barged Into Their Home Improperly*, ABC-12 NEWS (Flint), June 8, 2021, https://tinyurl.com/3amwct2v.

- **Diamonds Ford (2020)**: "[Ford] never heard the [Jacksonville, Fla.] SWAT officers identify themselves . . . and thought she was firing at an intruder, as evidenced by the fact that Ford called 911 . . . . [She] awoke to . . . [a] bedroom window being broken [by officers]."[41]

- **Anonymous Family (2020)**: "[Nashville] officers, with guns drawn, breach[ed] the door of [an innocent family's] home at 6:05 a.m. . . . . [Police] Chief John Drake said he's deeply disturbed by the body footage of the raid and believes the officers took shortcuts, saying the [officers'] information was 'stale.'"[42]

- **Anjanette Young (2019)**: "[Young] sobbed and told [Chicago] officers that they were at the wrong home. . . . [O]fficers realized about a minute after they entered . . . that the target was not present and was not associated with Young's address . . . [but Young] remained handcuffed for about 17 minutes."[43]

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41 *Calls Mount to Drop Charges Against Black Woman Who Shot Officer During Raid on Her Home*, CBS NEWS, Feb. 10, 2021, https://tinyurl.com/3nwxva72; *see also* Diamonds Ford & Maurice Chammah, *I 'Stood My Ground'—But It Was the Police Raiding My House*, THE MARSHALL PROJECT, Dec. 8, 2023, https://tinyurl.com/n6u7tkrp (first-hand account).

42 Kaylin Jorge, *3 Nashville Police Officers Decommissioned After Raiding Wrong Home*, FOX-17 (Nash.), Aug. 19, 2020, https://tinyurl.com/ye6j4y75; *see also* Peter Martinez, *Nashville Police Chief 'Greatly Disturbed' After Cops Raid Wrong Home*, CBS NEWS, Aug. 19, 2020, https://tinyurl.com/mruhmuhx.

43 Minyvonne Burke, *Black Woman Handcuffed Naked in Raid at Wrong Home Set to Get $2.9 Million from Chicago*, NBC NEWS, Dec. 14, 2021, https://tinyurl.com/5ff4mr4e.

- **Dennis Tuttle (2019):** "A jury found [Houston police officer] Gerald Goines guilty of two counts of murder in the . . . deaths of Dennis Tuttle, 59, and his 58-year-old wife Rhogena Nicholas. The couple, along with their dog, were fatally shot after officers burst into their home using a 'no-knock' warrant . . . ."[44]

- **Spencer Renck (2018):** "[DEA agents] crept up to a house in Cleveland, Tennessee, before dawn . . . [and] burst inside. . . . [T]hey opened the basement door and found a man with a gun. They tackled him and told him he was under arrest, wanted for murder. . . . [I]t was the wrong house and the wrong man."[45]

- **Sharnia Phillips (2017):** "[Chicago police] raid[ed] the wrong home . . . while searching for gang members and guns, forcing an innocent woman out into the cold . . . . [P]olice were searching for the grandchildren of [Phillips'] former tenant, who had not lived at the home in at least six months."[46]

- **Michael & Stacie Hutchison (2016):** "[The Hutchisons] reached a $5,000 settlement with

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44 *Former Houston Officer Found Guilty of Murder in Deaths of Couple During Drug Raid*, ASSOCIATED PRESS (VIA NBC NEWS), Sept. 25, 2024, https://tinyurl.com/4chta8ua.

45 Gianluca Mezzofiore & Amanda Watts, *A Tennessee Man Is Tackled by a SWAT Team in a Raid—But It's the Wrong House*, CNN, May 25, 2018, https://tinyurl.com/595ydkhk.

46 Todd Feurer, *Victim of Botched Chicago Police Raid in 2017 to Get $300,000 Settlement*, CBS NEWS, Oct. 2, 2023, https://tinyurl.com/yezuy35y.

> the [Kentucky] city of Bowling Green after police erroneously served a search warrant on their home. . . . [The] Hutchison[s] were forced to the floor of their home and handcuffed after police breached the front door . . . ."[47]

- **Marianne Dianzand (2015)**: "[Worcester, Mass. police] handcuffed Dianzand while she was naked in front of her two daughters, ages seven and 18 months. Dianzand was frisked by a female officer and left naked for over ten minutes while officers determined if they were in the correct apartment."[48]

- **Jason Westcott (2014):** "Acting on false information from an unreliable informant, [Tampa, Fla.] cops broke into Westcott's house while he and his boyfriend were sleeping. Minutes later, Westcott was dead, his body riddled with shotgun and pistol bullets."[49]

And that's just the beginning. CBS News in Chicago reports that after receiving their "first tip" in 2018 about Chicago police "wrongly raiding a family's home," the story soon became "bigger than

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47 *Bowling Green Couple Reaches Settlement After City Searches Wrong Home*, WKMS (MURRAY STATE), Apr. 17, 2017, https://tinyurl.com/m8dt3afj.

48 Garrett Quinn, *Worcester SWAT Team Raids Wrong House, Terrifies Family*, BOSTON MAGAZINE, Aug. 24, 2015, https://tinyurl.com/2zeffukh.

49 Justin Garcia, *Deadly Tampa Police Raid Results in Settlement, SWAT Policy Changes,* TAMPA BAY TIMES, July 26, 2023, https://tinyurl.com/2hexj58a.

just one case."[50] The news station uncovered "more than a dozen incidents—with doors broken, homes ransacked and innocent families left traumatized."[51] Such discoveries bear out Justice Robert Jackson's sage observation that "there are many unlawful searches of homes . . . of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Careful examination of these wrong-house raids, in turn, reveals a troubling common denominator: police creating situations leading to a wrongful use of force that was entirely preventable. Like the Texas SWAT commander who "[did] not even check the number of [a] house before instructing the SWAT team to execute [a search] warrant." *Jimerson v. Lewis*, 94 F.4th 423, 431 (5th Cir. 2024) (Dennis, J., dissenting).[52] Or the Tennessee officers who—by the police chief's own admission—"did not exercise due diligence in confirming that the . . . subject of [a] search" even lived at a wrongly-raided apartment.[53] *See, e.g., Penate v. Sullivan*, 73 F.4th 10, 22 (1st Cir. 2023) ("[T]he police did not investigate who lived at the apartment, and . . . having failed to do so . . . used a SWAT team to force the door and enter without knocking and with guns drawn.").

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[50] Dave Savini, Samah Assad, *et al.*, *[Un]warranted: A CBS 2 News Documentary*, CBS NEWS (Chi.), Oct. 6, 2019, https://tinyurl.com/bdfvtm22.

[51] *Id.*

[52] The *Jimerson* plaintiffs have filed a certiorari petition with the Court. *See Jimerson v. Lewis*, No. 24-473 (U.S.).

[53] Jorge, *supra* note 42 (quoting police chief John Drake).

Or take the case of the Mendez family. Chicago police burst into the Mendez home, aiming guns at 9-year-old Peter Mendez, his little brother Jack, and their parents.[54] In "body camera footage," officers can be "heard whispering that they were in the wrong apartment, but that didn't stop them from searching the home and Peter's school backpack."[55]

Here's how Chicago police obtained the warrant for the raid. Officer Joe Cappello "made a drug arrest the day before and flipped that suspect into becoming a confidential informant called a John Doe."[56] "The John Doe then gave Cappello the name and an address . . . of a so-called major drug dealer. But Cappello never investigated to see if John Doe's tip was even true or if the address was correct."[57]

Then there are wrong-house raids where the police make force necessary through outright lies. Breonna Taylor might be alive today had police not fabricated much of the evidence spurring their raid.[58] While there is no easy fix for this problem, ensuring that police-created necessity must be accounted for in excessive-force cases is a good place to start.

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[54] Lauren Petty, *Family Sues CPD, Says Cops Raided Wrong Home & Traumatized Kids*, NBC-5, Aug. 15, 2018, https://tinyurl.com/4cperbst.

[55] *Chicago Police Raided the Wrong Homes With Guns Drawn*, WCBI, Oct. 29, 2019, https://tinyurl.com/32d44xze.

[56] *Chicago Police Officers Reveal Major Missteps as They're Questioned on Video for Lawsuit About Raiding Wrong Home*, CBS NEWS (Chi.), Oct. 3, 2019, https://tinyurl.com/53rvp8y6.

[57] *Id.*

[58] *See* Nichols Bogel-Burroughs, et al., *Breonna Taylor Raid Puts Focus on Officers Who Lie for Search Warrants*, N.Y. TIMES, Aug. 6, 2022, https://tinyurl.com/3knw99n8.

IV. Whatever test the Court adopts to resolve *Barnes,* the Court should make clear that in excessive-force cases, courts must give due regard to whether the force used was a necessity of the police's own making.

Petitioner asks the Court to hold that courts "should determine the reasonableness of [an officer's] seizure based on the totality of the circumstances." Pet'r Br.19. But even if the Court does this, nothing prevents the Fifth Circuit on remand from declaring the 'totality of the circumstances' does not include police-created necessity. In *Marlborough v. Stelly*, 814 F. App'x 798 (5th Cir. 2020), the Fifth Circuit does effectively this in declaring "the law of the Fifth Circuit . . . reject[s] the idea that a police officer uses excessive force simply because he has manufactured the [very] circumstances that gave rise to the fatal shooting." *Id.* at 803 (punctuation omitted).

Nothing likewise prevents the Fifth Circuit from applying the totality-of-the-circumstances test in this case (or any other) by overweighting facts related to "the moment of the threat" and underweighting facts showing "[the police's] own reckless conduct created the need to use deadly force." *Id.* And so, for all the work that Petitioner has done to prove the totality-of-the-circumstances test is the 'right' test, adoption of this test by the Court may leave Petitioner no better off. And other excessive-force plaintiffs may be left worse off to the extent they would have benefited from the moment-of-threat test's clarifying focus in laying bare wrongful uses of force against unarmed or non-threatening persons. *E.g., Cole v. Richards*, 959 F.3d 1127, 1130–31, 1133 (8th Cir. 2020).

What excessive-force plaintiffs really need—and what the Fourth Amendment's common-law roots direct—is a holding that courts both can and must consider whether a challenged use of police force was a necessity of the police's own making. Tenth Circuit law exemplifies this approach. The Tenth Circuit has held that excessive force "depends **both** on whether the officers were in danger at **the precise moment that they used force** and on whether [the officers'] own reckless or deliberate conduct during the seizure **unreasonably created the need to use such force**." *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997) (bold added); *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1213–15 (10th Cir. 2019) (reaffirming *Allen*'s approach to excessive-force cases).

The Tenth Circuit's two-step approach does justice by excessive-force victims like the victim in *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021) who at the 'moment of threat' was unarmed and who the police shot without any warning a second after the victim opened his front door. *See id.* at 526–27. And this two-step approach does justice by an excessive-force victim like the victim in *Estate of Ceballos v. Husk*, 919 F.3d 1204 (10th Cir. 2019) who police shot and killed based on a necessity of their own creation: "approach[ing] [the victim] quickly, screaming at [the victim] . . . and refusing to give ground as [the victim] approached the officers." *Id.* at 1216.

If common-law history and the prevalence of wrong-house raids are insufficient to justify adoption of an approach like the Tenth Circuit's, a final reason is that the Fourth Amendment was never meant to be a safe haven for "unconstitutional . . . method[s]

of law enforcement so reckless and so fraught with danger" as to "discredit . . . law enforcement" itself. *McDonald v. United States*, 335 U.S. 451, 461 (1948) (Jackson, J., concurring). And experience teaches the many reckless ways that police may create the need to use force, leading to severe injury or death:

- **Failure to investigate.** *See, e.g., Penate*, 73 F.4th at 22 ("[T]he police did not investigate who lived at the apartment . . . .").

- **Failure to knock or announce presence**. *See Hudson v. Michigan,* 335 U.S. 586, 594 (2006) ("An unannounced [police] entry [into a home] may provoke violence in supposed self-defense by the surprised resident."); *see also, e.g., Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996) (police used excessive force when they made an unannounced home entry).

- **Failure to give coherent commands**. *See, Franklin*, 64 F.4th at 525 ("[When] abstruse commands require the suspect to divine their meaning, the law cannot be so forgiving.").

- **Failure to give time to comply.** *See, e.g.*, *Banks*, 999 F.3d at 527 ("Hawkins fired . . . instinctively, without a warning or . . . a 'split-second' pause to assess the situation.").

- **Failure to move out of harm's way.** *See, e.g., Estate of Stark v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (officer acted unreasonably when he jumped in front of a speeding cab, which led the police to shoot the driver).

In determining what the Fourth Amendment demands, it is always worth remembering that "the police are the public and the public are the police."[59] By requiring courts to give due regard to how police may bring upon themselves an otherwise preventable use of force, the Court vindicates a common-law rule that governed everyone, officer or not. And therein lies the fundamental distinction "between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17–18 (1948).

CONCLUSION

"[T]he Fourth Amendment preserves personal security with respect to methods of apprehension old and new." *Torres v. Madrid*, 592 U.S. 306, 316–17 (2021). Any excessive-force test that the Court may adopt in *Barnes* should accordingly make clear that the Fourth Amendment preserves personal security against police who create the need to use force.

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[59] *Sir Robert Peel's Nine Principles of Policing*, N.Y. TIMES, Apr. 15, 2014, https://nyti.ms/3uHqCdb (quoting tenets stated in 1829 by the founder of modern municipal policing).