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 RESPONDENT ROBERTO FELIX, JR.

JUDITH RAMSEY SALDANA
THOMPSON, COE, COUSINS & IRONS, LLP
4400 Post Oak Parkway
Suite 1000
Houston, Texas 77027
(713) 403-8210

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLOUD
PETER S. JORGENSEN
ERIN M. SIELAFF
HALLIE SAUNDERS
BRETT V. RIES
GARRETT M. WEN*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

* Admitted only in Illinois; practice supervised by D.C. Bar members.

QUESTION PRESENTED

Whether the court of appeals correctly held that respondent's use of force was reasonable at the moment that it occurred.

TABLE OF CONTENTS

Page

STATEMENT 5

A. Factual History.....5

B. Procedural History.....12

SUMMARY OF ARGUMENT 14

ARGUMENT.....17

I. The Court of Appeals Properly Focused on Sergeant Felix's Actions at the Moment of Force.....17

A. *Graham* Requires Reasonableness to be Evaluated at the Moment Force Is Used 18

B. The Moment-of-Threat Doctrine Comports with This Court's Precedents.....19

C. Common Law Supports the Moment-of-Threat Doctrine 24

D. Petitioner's Policy Concerns Are Meritless 28

E. Sergeant Felix's Use of Force Was Reasonable at the Moment 35

II. An "Officer-Created-Danger" Rule Would Upend Fourth Amendment Law.....37

A. Petitioner's Rule Contravenes Settled Precedents.....38

B. Petitioner's Rule Undermines Public Safety 44

III. Sergeant Felix's Use of Force Was Reasonable Even Under Petitioner's Approach.....48

CONCLUSION 51

TABLE OF AUTHORITIES

Page

Cases:

Aguirre v. City of San Antonio,
995 F.3d 395 (5th Cir. 2021) 20
Alexander v. City of San Francisco,
29 F.3d 1355 (9th Cir. 1994) 47
Amador v. Vasquez, 961 F.3d 721 (5th Cir. 2020) 13
Ambler v. Nissen, 116 F.4th 351 (5th Cir. 2024) 28
Baker v. Coburn, 68 F.4th 240 (5th Cir. 2023) 21, 23
Banks v. Hawkins, 999 F.3d 521 (8th Cir. 2021) 28
Barnes v. Felix,
2022 WL 5239297 (S.D. Tex. Sept. 29, 2022) 13, 27
Barrett v. United States,
64 F.2d 148 (D.C. Cir. 1933) 26
Bazan ex rel. Bazan v. Hidalgo County,
246 F.3d 481 (5th Cir. 2001) 20
Bellows v. Shannon, 2 Hill 86 (N.Y. Sup. Ct. 1841) 27
Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002) 41
Bodine v. Warwick, 72 F.3d 393 (3d Cir. 1995) 29-30
Boyle v. Azzari, 107 F.4th 298 (4th Cir. 2024) 28
Brosseau v. Haugen, 543 U.S. 194 (2004) 49
Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 48
California v. Rooney, 483 U.S. 307 (1987) 37
Carnaby v. City of Houston,
636 F.3d 183 (5th Cir. 2011) 21-22
Cass v. City of Abilene,
814 F.3d 721 (5th Cir. 2016) 29
Chappell v. City of Cleveland,
585 F.3d 901 (6th Cir. 2009) 29

Page

Cases—continued:

City of San Francisco v. Sheehan,
575 U.S. 600 (2015) 22, 50
County of Sacramento v. Lewis,
523 U.S. 833 (1998) 45
Cole v. Carson, 935 F.3d 444 (5th Cir. 2019) 20-21
County of Los Angeles v. Mendez,
581 U.S. 420 (2017) 3, 16, 29, 40-44, 49
Crane v. City of Arlington,
50 F.4th 453 (5th Cir. 2022) 19, 21, 23
Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) 33
Elliott v. Leavitt, 99 F.3d 640 (4th Cir. 1996) 22
Espinosa v. City of San Francisco,
598 F.3d 528 (9th Cir. 2010) 41
Est. of Biegert v. Molitor,
968 F.3d 693 (7th Cir. 2020) 22, 24, 26, 33, 43, 50
Florida v. Powell, 559 U.S. 50 (2010) 42
Fogarty v. Gallegos,
523 F.3d 1147 (10th Cir. 2008) 43
Fraire v. City of Arlington,
957 F.2d 1268 (5th Cir. 1992) 13
Graham v. Connor,
490 U.S. 386 (1989) ..2-4, 16-19, 21-24, 36, 38, 41, 44, 47
Harmon v. City of Arlington,
16 F.4th 1159 (5th Cir. 2021) 20, 23, 35, 47
Hayes v. County of San Diego,
57 Cal. 4th 622 (2013) 31
Head v. Martin, 85 Ky. 480 (1887) 24, 27
Hernandez v. Parker,
508 P.3d 947 (N.M. Ct. App. 2022) 31
Holmes v. State, 5 Ga. App. 166 (1908) 27

Page

Cases—continued:

Huaman ex rel. J.M. v. Tinsley,
2017 WL 4365155 (D. Conn. Sept. 28, 2017) 29
Hundley v. District of Columbia,
494 F.3d 1097 (D.C. Cir. 2007) 25-26
Hung Lam v. City of San Jose,
869 F.3d 1077 (9th Cir. 2017) 43
Hunter v. Bryant, 502 U.S. 224 (2001) 47
Jiron v. City of Lakewood,
392 F.3d 410 (10th Cir. 2004) 42
Johnson v. City of Philadelphia,
837 F.3d 343 (3d Cir. 2016) 26
Jones v. State, 2023 Ark. 189 (2023) 36
Kentucky v. King, 563 U.S. 452 (2011) 31
Kisela v. Hughes, 584 U.S. 100 (2018) 18
Knight ex rel. Kerr v. Miami-Dade County,
856 F.3d 795 (11th Cir. 2017) 22
Laney v. United States,
294 F. 412 (D.C. Cir. 1923) 48
LeFever v. Castellanos,
2021 WL 392696 (D. Neb. Feb. 4, 2021) 29
Livermore ex rel. Rohm v. Lubelan,
476 F.3d 397 (6th Cir. 2007) 29
McReynolds v. Schmidli,
4 F.4th 648 (8th Cir. 2021) 28
McVae v. Perez, 120 F.4th 487 (5th Cir. 2024) 23
Moran v. Greco,
2024 WL 1597624 (2d Cir. Apr. 12, 2024) 28
Napier v. Town of Windham,
187 F.3d 177 (1st Cir. 1999) 22
Nieves v. Bartlett, 587 U.S. 391 (2019) 44
People v. Silva, 987 P.2d 909 (Colo. App. 1999) 34

Page

Cases—continued:

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) 45
Plumhoff v. Rickard,
572 U.S. 765 (2014) 3, 16, 35, 36, 38-40, 49-50
Quinn v. Zerkle, 111 F.4th 281 (4th Cir. 2024) 28
Roberson v. State, 53 Ark. 516 (1890) 27
Romero v. City of Grapevine,
888 F.3d 170 (5th Cir. 2018) 19-20
S.R. Nehad v. Browder,
929 F.3d 1125 (9th Cir. 2019) 37, 43
Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996) 22
Saucier v. Katz, 533 U.S. 194 (2001) 2, 18-19, 23, 33
Scott v. Harris,
550 U.S. 372 (2007) 16, 24, 36, 38-40, 45-46, 49, 50
Sok Kong v. City of Burnsville,
960 F.3d 985 (8th Cir. 2020) 22
Spiller v. Harris County,
113 F.4th 573 (5th Cir. 2024) 28
Starr v. United States, 153 U.S. 614 (1894) 24
Sykes v. United States, 564 U.S. 1 (2011) 37
Tennessee v. Garner,
471 U.S. 1 (1985) 18, 22, 24, 27, 35, 44, 49
Thomas v. City of Columbus,
854 F.3d 361 (6th Cir. 2017) 22, 29
Thomas v. State, 317 Ga. 700 (2023) 36
Torres v. Madrid, 592 U.S. 306 (2021) 19
United States v. Hensley, 469 U.S. 221 (1985) 25
Vega-Colon v. Eulizier,
2024 WL 3320433 (2d Cir. July 8, 2024) 28
West v. Atkins, 487 U.S. 42 (1988) 32

Page

Cases—continued:

Wexler v. Hawkins,
2024 WL 3251726 (E.D. Pa. June 21, 2024)..... 31
Whren v. United States, 517 U.S. 806 (1996).....42-43
Wilkie v. State,
242 P. 1057 (Okla. Crim. App. 1926)..... 34
Wilson v. Arkansas, 514 U.S. 927 (1995).....30-31
Winkler v. City of Phoenix,
849 F. App'x 664 (9th Cir. 2021) 43

Constitution and Statute:

U.S. Const. amend. IV
.....3-4, 12, 14, 18-19, 21-22, 24, 29-31, 38, 40-44, 47, 50
42 U.S.C. § 1983 .....3, 12, 29, 32

Other Authorities:

4/28/2016 Shooting of Ashtian Barnes by Officer Felix on Beltway 8 in Houston, Texas,
YouTube (May 6, 2024),
https://youtu.be/9gbM_22fUbY 6, 35
9-1-1 Statistics, Nat'l Emergency Number Ass'n,
https://tinyurl.com/5cezv6rr..... 33
K. Ferzan, *Provocateurs*,
7 Crim. L. & Philos. 597 (2013)..... 34
Matthew Hale, *Historia Placitorum Coronae*
(1736) 24
Houston Police Dep't, https://tinyurl.com/jx5nff6u
(last visited Nov. 5, 2024)..... 11
Bill Hutchinson, *Amber Guyger Convicted of Murder in Wrong-Apartment Killing of Innocent Man*, ABC News (Oct. 1, 2019),
https://tinyurl.com/2z8zxpdt 34

Page

Other Authorities—continued:

Jury Instructions, *United States v. Hankison*, 2024 WL 4667120 (W.D. Ky. Oct. 30, 2024) 29
Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 Geo. Wash. L. Rev. 1362 (2021) 42
Dylan Lovan, *Jury Convicts Former Kentucky Officer of Using Excessive Force on Breonna Taylor During Deadly Raid*, AP (Nov. 2, 2024), https://tinyurl.com/rcn54cjk 28
Model Penal Code Commentaries (Am. L. Inst. 1985) 25
David Muir, *Cleveland Police Officer Who Killed Tamir Rice Fired After Rule Violations*, ABC News (May 30, 2017), https://tinyurl.com/2p9sy8xw 31
N.Y.C. Police Dep't 2020 Use of Force Report (2020), https://tinyurl.com/38rnva22 32
Restatement (First) of Torts § 65 25
Restatement (Second) of Torts § 448 25
Paul Robinson, 2 Crim. L. Def. § 142 (1984) 25
Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, Brennan Ctr. for Just. (May 21, 2021), https://tinyurl.com/38ner8v9 31
Susannah N. Tapp & Elizabeth Davis, *Contacts Between Police and the Public, 2022*, U.S. Dep't of Just. (Oct. 4, 2024), https://tinyurl.com/3nsbepdk 33

Page

Other Authorities—continued:

Tex. Dep't of Transp., Fatal Crashes and Fatalities by County and Road Type (2016), https://tinyurl.com/26wab239 5
Transcript of Oral Argument, *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017) (No. 16-369) 41
U.S. Brief, *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017) (No. 16-369) 4, 23, 38, 40-42, 45-47
U.S. Brief, *Chavez v. Martinez*, 538 U.S. 760 (2003) (No. 01-1444) 45

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 RESPONDENT ROBERTO FELIX, JR.

Each day, hundreds of thousands of police officers across the country report for duty. For some officers, it may be the last time. Simply doing their jobs requires police to confront innumerable threats to their personal safety and the safety of the public. Officers are usually able to resolve those fraught situations peaceably. But in some cases, the only way to end the threat is through the use of force—sometimes, deadly force.

Both this Court's precedents and the common law have long acknowledged and accounted for this tragic reality. The reasonableness of a use of force is determined

from the perspective of the officer on the scene. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). The Court has also explained that the assessment of reasonableness must be made "at the moment," *id.*—that is, "at the moment force was employed," *Saucier v. Katz*, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring) (citation omitted), *abrogated on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

Under that established standard, this case is straightforward. Respondent Roberto Felix, a twenty-year veteran officer from Houston, Texas, ordered Ashtian Barnes to step out of his vehicle during a routine traffic stop. Instead of complying, Barnes fled, driving off with Felix hanging onto the side of the car. And Barnes continued his flight despite Felix's orders to stop and the obvious danger of death faced by Felix because of Barnes's conduct. At the moment he used force, Felix reasonably feared for his life.

Rather than engage with the life-and-death circumstances confronting Sergeant Felix, petitioner caricatures the decision below as resting on a "special rule" that requires courts to ignore everything that came before the use of force. That is not the Fifth Circuit's (or any court's) test, nor is it ours. What petitioner shorthands as the "moment-of-threat" doctrine is just an application of *Graham* to cases involving life-or-death threats to officers. Courts in such cases consistently acknowledge that prior events may inform the perspective of the reasonable officer and his assessment of the danger he faced. But they also acknowledge that, under *Graham*, the assessment of what the officer knew, the seriousness of the threat faced, and the reasonableness of his actions occurs at the relevant point in time: at the moment force is used.

Similarly, moment-of-threat cases recognize that *Graham*'s totality-of-the-circumstances test does not mandate consideration of irrelevant circumstances. If a suspect is pointing a gun in an officer's face, it does not matter whether the underlying offense was armed robbery or jaywalking. Nor does it matter that if the officer had been more observant, he might have seen the gun earlier and been able to disarm the suspect without using deadly force. An officer's failure to be perfectly diligent at some earlier point in time is legally irrelevant. It does not eviscerate his right of self-defense at the moment when he faces a life-or-death threat.

Petitioner would have the Court displace respect for officers' split-second judgments with a vastly different standard. In her view, if officers do something at an earlier point in time that could be said to have created the need for force, they lose the right to defend themselves. The Court has previously rejected such officer-created-danger arguments as "fundamental[ly] flaw[ed]," *County of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017), and "irreconcilable with" precedent, *Plumhoff v. Rickard*, 572 U.S. 765, 776 n.3 (2014).

If anything, petitioner's version of "officer-created-danger" liability is even worse than in *Mendez*. The Ninth Circuit in *Mendez* held that a prior constitutional violation stripped officers of their right to self-defense; petitioner would premise liability on allegations of poor planning, suboptimal tactics, or, in this case, a literal misstep. Section 1983 trials would flourish as judges and juries review officers' actions "with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. That kind of second-guessing would be troubling enough as a rule of state tort law. The Fourth Amendment clearly does not mandate such a test.

Since *Graham*, the United States has consistently stood with officers and against the unwarranted expansion of their Fourth Amendment liability. Sadly, that streak is over. Before, the United States condemned a test that "expands the time period and the range of police action relevant to assessing an officer's liability for the use of force" as "legally wrong," U.S. Br. 19, *Mendez*, 581 U.S. 420 (No. 16-369); now it embraces one. Before, the United States rejected "a standardless inquiry into … an officer's earlier conduct," *id.* at 23; now it advocates one. And where before it cautioned against "remov[ing] the focus from the officers' justification at the time they used force," *id.*, the United States now asks the Court to adopt a rule that would "convert[] members of the judicial branch of government into tactical managers of the police," *id.* (citation omitted).

The Court should retain its long-established focus on the threat facing the officer at the moment force was used, and reiterate that earlier mistakes do not strip officers of the right to self-defense. But even under petitioner's "officer-created-danger" rule, the judgment should be affirmed. That Barnes was pulled over for a minor toll infraction has no bearing on the life-or-death stakes that ultimately confronted Felix that afternoon. Moreover, Felix's decision to step onto the car's door sill was not negligent, let alone unreasonable. It was fully justified, both by his right to defend himself against Barnes's aggression and his authority as an officer to cease Barnes's flight. Whatever the standard, Sergeant Felix's split-second decision did not constitutionally disable him from responding with deadly force to the threat he faced.

STATEMENT

A. Factual History

1. Respondent Roberto Felix, Jr. is a Deputy Constable for Precinct 5 of the Harris County Constable's Office. J.A.17-18. Precinct 5 covers the western half of Houston, home to roads with the most traffic fatalities in Texas. *See* Tex. Dep't of Transp., Fatal Crashes and Fatalities by County and Road Type (2016), https://tinyurl.com/26wab239.

Felix has served for over twenty years and attained the rank of Sergeant in 2021. J.A.20. During his service, Sergeant Felix has enforced traffic laws, investigated accidents, aided people experiencing mental-health crises, and tracked down fugitives in special operations. J.A.111, 166. By 2016, he had completed almost 1,700 hours of training on topics including "Traffic," "Patrol Rifle," and "Use of Force." D. Ct. Dkt. 18, Ex. B at 77-85.

2. On April 28, 2016, at approximately 2:40 PM, Sergeant Felix received an alert about "a prohibited vehicle" driving on the Sam Houston Tollway. Pet.App.18a. Minutes later, he located the vehicle among four lanes of fast-moving traffic. J.A.6. Felix immediately alerted dispatch to his location and "initiated [a] traffic stop." J.A.6; Pet.App.18a. "The driver, Ashtian Barnes, pulled over to the left shoulder of the Tollway…." Pet.App.18a. Felix parked his car behind Barnes's. Pet.App.18a.

Following protocol, Felix introduced himself, explained why he stopped Barnes, and asked Barnes for his license and proof of insurance. Pet.App.18a; J.A.7; D. Ct. Dkt. 18, Ex. B at 116. Barnes replied that the car he was driving was a rental. Pet.App.18a. Barnes then "grabbed a handful of papers" from the passenger side and began "flipping through them" without "actually looking at

them." J.A.7; *accord* J.A.175, 180. Barnes also reached "toward a red plastic cup" on "the passenger floorboard." J.A.7. Felix asked Barnes to "'stop digging around' at least three times." Pet.App.26a. Smelling marijuana, Felix also asked "if there is anything in the vehicle he should know about." Pet.App.18a.

Barnes then "turned off the vehicle," "plac[ed] his keys near the gear shift," and told Felix that his driver's license "might" be "in the trunk." Pet.App.3a; J.A.8. Barnes proceeded to pop open the trunk, telling Felix to "get it if [he] wanted to." J.A.8. In Felix's experience, most drivers do not keep their licenses in the trunk, and Barnes's reaction resembled "deceptive behavior [by] an individual to try to gain [the officer's] focus away from what's actually going on inside the vehicle." J.A.58. Growing concerned, Felix ordered Barnes to "step out of the vehicle." Pet.App.26a.

Barnes did not comply. "Barnes open[ed] the driver's-side door," Pet.App.26a, but "started reaching down" by his seat, J.A. 66, 168.[1] Worried for his own "safety," Felix placed his right hand on his pistol. J.A.59, 168.

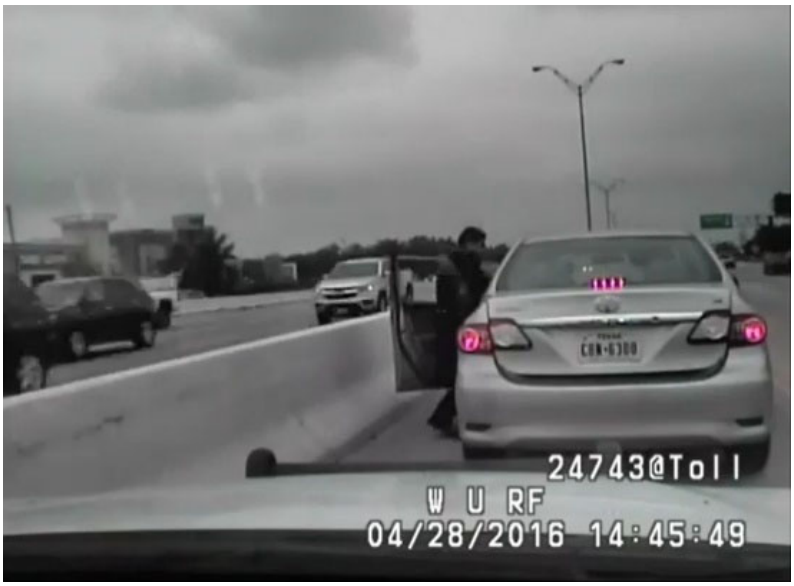
Suddenly, Barnes grabbed his keys and turned on the ignition. Pet.App.27a; J.A.175. Felix's dash cam[2] captured what happened next:

---

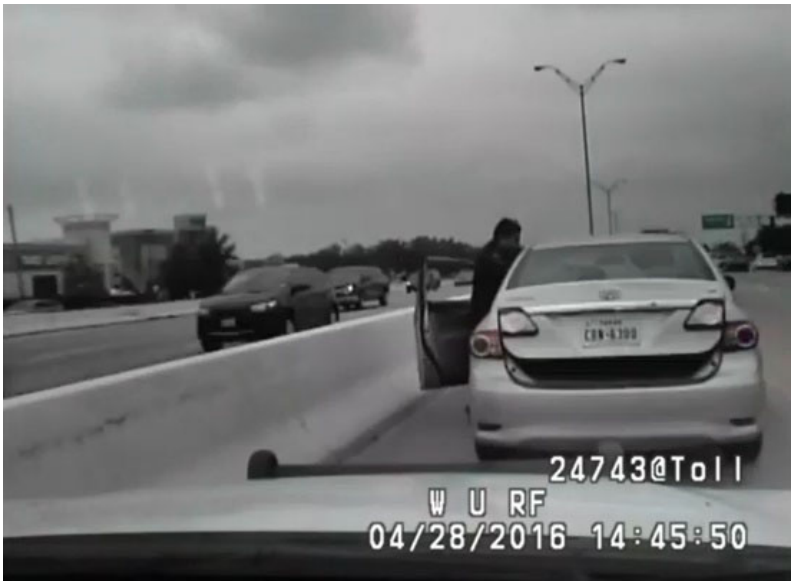
[1] The dash-cam video suggests that Felix opened the door for Barnes after Barnes unlocked it from the inside. *See infra* p.6 n.2 at 14:25:40.

[2] The dash-cam video is in evidence. *See* J.A.13; D. Ct. Dkt. 19. A portion can be viewed at https://youtu.be/9gbM_22fUbY.

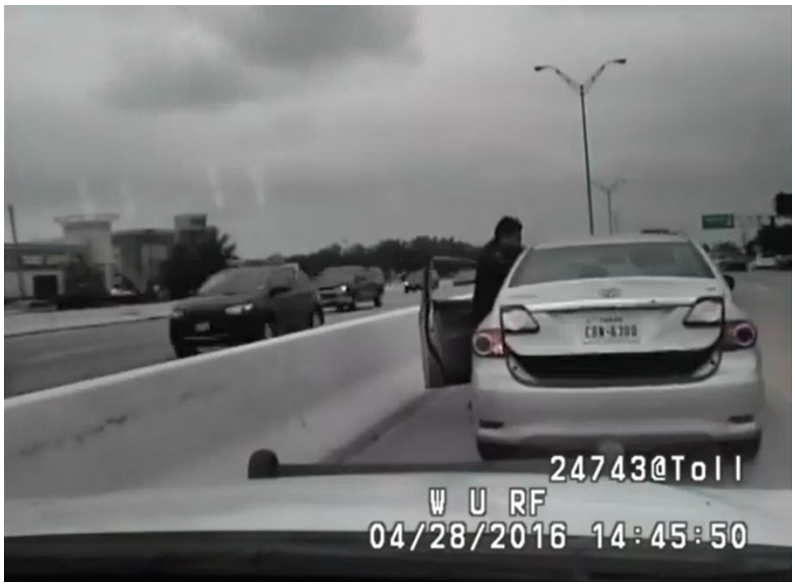
14:45:49: Felix "reached in[to the car] with [his] left hand to try to keep [Barnes] from putting the car in gear and driving off and possibly causing another situation." J.A.168.



14:45:50: Barnes accelerated the car, just as the left half of Felix's body was "partially in the vehicle." J.A.175, 181. As soon as the car "started to go forward," the car door began "sw[inging] back" toward Felix. J.A.9, 88-89; D. Ct. Dkt. 18, Ex. 5 at 20. Because Felix was standing near the top of the "V" created by the car door and the car, he immediately "felt the driver door closing on [him]." J.A.175.

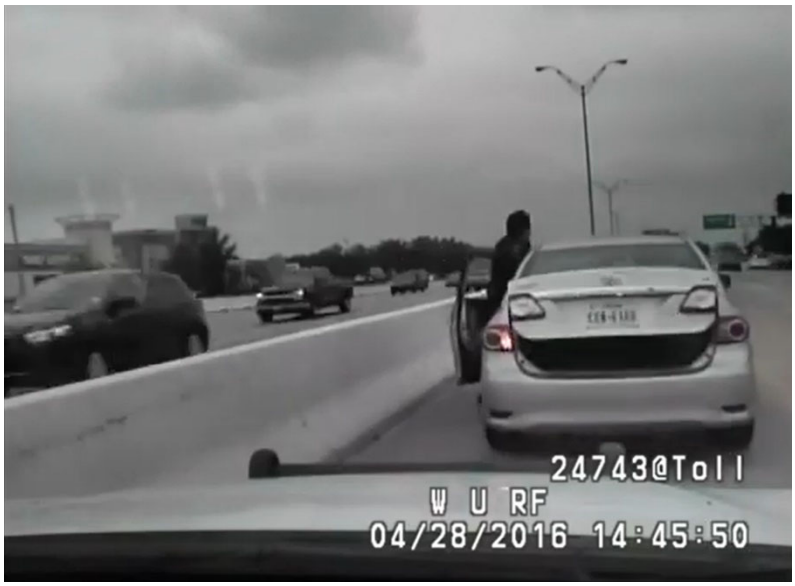


14:45:50: Felix "quickly jumped onto the door seal [sic] and held on[to]" the windshield with his left arm. J.A.175-76. As Felix later explained, he believed he could not stay still or step back because half of his "body still was within the vehicle" such that if he kept "both feet on the ground, the door could have pinned [him] and then dr[agged]" him along with the moving car. J.A.89, 170. He also worried that Barnes "could easily put somebody else's life in danger." J.A.172.[3]



[3] The United States questions whether Sergeant Felix jumped onto the door sill "shortly before or shortly after the car started accelerating." U.S. Br. 3. But the parties agree that Felix jumped onto the car *after* Barnes accelerated. *See, e.g.*, Pet. Br. 34 ("[Felix] jumped onto a moving vehicle….").

14:45:50: As Barnes continued accelerating, the car door impacted Felix. At this point, Felix's "left arm and upper torso" were "out of the [moving] vehicle" and being "trap[ped]" by the door, his "right hand" was "inside the vehicle with [his] duty weapon drawn," and he "was unable to see anything inside." J.A.3, 9, 176.



14:45:51: Felix yelled "Don't fucking move" twice. Pet.App.19a. Barnes kept accelerating. Pet.App.27a; J.A.176.

14:45:52: Felix discharged his pistol. Pet.App.27a. As he later explained, at the moment he first used force Felix "[f]ear[ed] that [he] would either get thrown from the vehicle or crushed by the retaining wall." J.A.176. But that shot had no effect; Barnes continued accelerating. J.A.176. So Felix discharged his pistol a second time. Pet.App.19a. Barnes's vehicle began to slow down and come to a halt. Pet.App.19a. From the time Barnes began to flee to when his car stopped, five seconds had elapsed.

A dispatch supervisor at the Harris County Toll Road Authority witnessed the incident through a surveillance camera. J.A.1-3. As the incident "unfold[ed] before [her] eyes," the supervisor "start[ed] freaking out" because she "believed that the driver of the sedan was going to kill Deputy Felix by running over him." J.A.3. She reported seeing Felix being "pinned between the door and the sedan," "trying to hold on," and unable to "key up or ask for help on the radio." J.A.3.

Following the shooting, Felix immediately radioed for medical assistance. J.A.10, 176. Barnes died at the scene. Pet.App.19a; D. Ct. Dkt. 15, Ex. 5 at 28.

3. The Homicide Division of the Houston Police Department—which investigates all fatal shootings in Houston—conducted an independent investigation of the shooting. Pet.App.4a; Houston Police Dep't, https://tinyurl.com/jx5nff6u (last visited Nov. 5, 2024). The Department forwarded a report summarizing the incident to the Harris County District Attorney's Office, which presented that report to a grand jury. Pet.App.4a. The grand

jury returned a "no bill," finding "no probable cause for an indictment." Pet.App.4a.

The Precinct 5 Constable's Office also conducted an Internal Affairs Investigation, which found that Felix did not violate its Standard Operating Procedures. Pet.App.4a.

B. Procedural History

1. Barnes's mother Janice Hughes Barnes (petitioner) sued Felix in state court under 42 U.S.C. § 1983, alleging that Felix violated Barnes's Fourth Amendment right against excessive force. *See* Compl. ¶¶ 35-42. Her complaint also asserted claims against Harris County under both section 1983 (via *Monell* liability) and the Texas Tort Claims Act. *See* Compl. ¶¶ 46-74. Felix and Harris County removed the case to the Southern District of Texas. Pet.App.5a.

Following discovery, the district court granted Felix's motion for summary judgment on the Fourth Amendment claim, finding that his use of force was "reasonable" and "not excessive." Pet.App.30a (citation omitted). The court "focus[ed]" its analysis on "the act that led [Felix] to discharge his weapon." Pet.App.25a (citation omitted). That act, the court reasoned, occurred during "the moment" when Felix was "still hanging onto the moving vehicle," or "the two seconds before Felix fired his first shot." Pet.App.29a. In that moment, Felix "reasonably believed his life was in imminent danger of death or great bodily injury," which justified his use of force. Pet.App.29a (citation omitted).

The district court rejected petitioner's argument that "any danger perceived by Felix was 'created solely by [Felix] himself.'" Pet.App.29a. The court emphasized that

"officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." Pet.App.25a (quoting *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020)). Therefore, the court explained, judges should not consider "what had transpired up until the shooting itself." Pet.App.29a (quoting *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992)). Nor should they examine "the act that led the officer to discharge his weapon" with "the 20/20 vision of hindsight." Pet.App.25a (quoting *Amador*, 961 F.3d at 728 (5th Cir. 2020)).

Because the district court found no constitutional violation, the court did not reach the qualified-immunity question. Pet.App.30a-31a. For the same reason, the court dismissed petitioner's *Monell* claims against Harris County. Pet.App.31a. The court also held petitioner had waived her Texas Tort Claims Act claim against Harris County. *See* Pet.App.20a n.1.

Petitioner later filed a motion for clarification, arguing that even if Felix's decision to use deadly force was reasonable, his conduct "prior to his pulling of the trigger"—specifically, his decision to "brandish his gun"—was "separately and independently unconstitutional." Pls.' Opposed Mot. for Clarification at 1. The court rejected that argument, emphasizing that Felix "did not draw his weapon until Barnes turned his vehicle back on despite Felix's order to exit the vehicle," and that "[p]laintiffs do not offer any non-inimical explanation for Barnes's conduct." *Barnes v. Felix*, 2022 WL 5239297, at *4 (S.D. Tex. Sept. 29, 2022).

2. The Fifth Circuit affirmed, holding that "there is no genuine dispute of material fact as to constitutional injury." Pet.App.7a.

The Fifth Circuit agreed with the district court's finding that Felix "reasonably believe[d] his life was in imminent danger" when he was "still hanging onto the moving vehicle and believed it would run him over." Pet.App.8a (citation omitted). The court further explained that the "focus" of its Fourth Amendment inquiry was "on the act that led [Felix] to discharge his weapon," and that "[a]ny of [Felix's] actions leading up to the shooting are not relevant." Pet.App.8a (citation omitted).

Judge Higginbotham (who also authored the panel's opinion) concurred. Pet.App.10a-16a. He acknowledged that Felix acted "reasonabl[y]" at the "'precise moment' at which [Felix] decided to use deadly force against Barnes." Pet.App.10a. But Judge Higginbotham thought the case did not "enjoy[] full review of the totality of the circumstances" because the panel did not consider "Felix's role in escalating the encounter"—specifically, Felix's decision to step onto the door sill of Barnes's car. Pet.App.15a-16a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that Sergeant Felix's decision to use force was reasonable at the moment it was made.

A. The Fourth Amendment prohibits unreasonable seizures, not unreasonable police conduct writ large. This Court's excessive-force cases accordingly examine only the reasonableness of the seizure—the use of force—and they do so from the perspective of a reasonable officer at the moment that force is used.

B. Petitioner spends much of her brief attacking a strawman. What petitioner terms the "moment-of-threat" doctrine does not require courts to ignore relevant information simply because it preceded the use of force. Instead, the moment-of-threat doctrine stands for two far

more modest propositions: (1) An officer's use of force can be reasonable notwithstanding earlier ill-advised conduct; and (2) in cases involving officer self-defense, the critical facts and circumstances are the nature of the threat the officer confronted and how he responded to that threat.

The Fifth Circuit repeatedly acknowledges that what an officer knew before using force can inform his perception of the danger he faced. But the Fifth Circuit—like this Court and the majority of other circuits—also recognizes that the force can be reasonable *even if* officers make some mistakes. Moment-of-threat cases effectuate the Court's repeated instruction that judges and juries should not second-guess decisions made by officers under tense, rapidly evolving circumstances. When a suspect puts innocent civilians or officers in harm's way, officers do not have the luxury of mentally replaying every millisecond of every interaction leading up to the threat. The officer must act, and he must do so decisively.

C. The moment-of-threat doctrine aligns with the common law. Like the moment-of-threat doctrine, the common law is emphatic that officers who face violent resistance to their lawful authority have no duty to retreat. And like the moment-of-threat doctrine, the common law recognizes officers' right to self-defense, even in cases where officers were negligent earlier in the execution of their duties.

D. Concluding that imperfect officers are constitutionally able to defend themselves does not foreclose other forms of liability. State law and internal police discipline constrain the scope of officers' actions in ways our Constitution cannot and should not. Petitioner's other policy complaints fail for similar reasons.

E. The Fifth Circuit correctly held that Felix's use of force was reasonable. Barnes had ignored multiple orders and driven off onto a busy highway with Felix clinging to the car. Thus, at the moment Felix used force, he reasonably believed that Barnes's flight posed an imminent risk to Felix's own life, and possibly to the lives of others. Felix had the right to respond with deadly force to end those twin threats.

II. This Court should reject petitioner's alternative "officer-created-danger" theory.

A. Petitioner's test flouts precedent. *Graham* directs courts to respect officers' split-second judgments and to focus only on whether the officer's use of force was justified at the moment. Petitioner seeks the opposite. *Scott* and *Plumhoff* rejected arguments that overly aggressive police tactics render seizures unconstitutional. Petitioner's theory depends on such faulty arguments. And *Mendez* unanimously overturned a rule that would render a reasonable use of force unreasonable based on earlier unconstitutional acts. Petitioner would do the Ninth Circuit one better, premising liability on mere negligence or bad tactics. But if an earlier *unconstitutional* act cannot render a later, reasonable use of deadly force unconstitutional, a merely *ill-advised* one plainly cannot, either.

B. Petitioner's rule would severely undermine public safety. In petitioner's world, if officers make any misstep over the course of an encounter, they may lose the right to defend themselves—even in the face of deadly threats. That result would undermine officers' ability to perform their duties; encourage criminals to resist officers; invite judicial parsing of routine policing decisions; and restrict the right to self-defense.

III. Even under petitioner's "officer-created-danger" theory, this Court should affirm. The nature of the initial traffic stop makes no difference here; it does not alter the fact that, when Felix used force, Barnes posed an imminent threat to Felix's safety and the safety of others. Felix's split-second decision to step onto Barnes's car does not alter the analysis. Felix had the right to defend himself against Barnes's use of force—his accelerating the vehicle while Felix's body was inside it—by stepping onto the car. Felix was not obligated to risk being dragged by Barnes or rammed into the highway's concrete barrier. Similarly, Felix had the right to pursue Barnes during Barnes's flight. Barnes never desisted from his flight, and once Barnes's continued flight jeopardized Felix and the public at large, force was clearly justified.

ARGUMENT

I. The Court of Appeals Properly Focused on Sergeant Felix's Actions at the Moment of Force

For over thirty years, this Court has analyzed excessive-force claims by applying a reasonableness standard "at the moment" force was used. *Graham*, 490 U.S. at 396. The Fifth Circuit properly followed that well-worn path in finding Sergeant Felix's use of force reasonable because, at the moment Felix used force, Barnes's conduct posed a threat of serious physical harm to Felix and the public.

Petitioner's contrary argument attacks a strawman. What petitioner calls the "moment-of-threat doctrine" is not some novel rule that requires courts to blind themselves to everything before the use of force. It instead reflects two sensible propositions about how *Graham* works in cases where officers use force in self-defense: (1) An officer's use of force can be reasonable even if the officer previously made some mistakes (which, to be clear, was

not the case here, *infra* pp.36-37, 50); and (2) the critical facts and circumstances when assessing reasonableness are the nature of the threat the officer confronted and how he responded to that threat. Precedent, the common law, and common sense support both conclusions.

A. *Graham* Requires Reasonableness to be Evaluated at the Moment Force Is Used

The ultimate question in a Fourth Amendment excessive-force case is whether the officer's application of force was reasonable. *Graham*, 490 U.S. at 396; *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). *Graham* mandates a "standard of reasonableness *at the moment*." 490 U.S. at 396 (emphasis added). *Graham* also makes clear that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight … even if it may later seem unnecessary in the peace of a judge's chambers." *Id.* (citation omitted).

This Court has repeatedly affirmed *Graham*'s direction to focus on the officer's actions "at the moment" of the seizure. *Id.* In *Saucier*, the Court collected cases demonstrating that "[e]xcessive force claims … are evaluated for objective reasonableness based upon the information the officers had *when the conduct occurred*." 533 U.S. at 206-07 (emphasis added). Concurring, Justice Ginsburg explained that "[t]he proper perspective in judging an excessive force claim … is that of 'a reasonable officer on the scene' and '*at the moment' force was employed*." *Id.* at 210 (Ginsburg, J., concurring) (emphasis added) (quoting *Graham*, 490 U.S. at 396). In the qualified-immunity context, this Court has similarly focused on the officer's conduct "at the time of the shooting." *Kisela v. Hughes*, 584 U.S. 100, 101 (2018).

The Court's repeated emphasis on the threat confronting officers at the moment force is used was not "stray language." Pet. Br. 44. It flows from the Fourth Amendment's text, which prohibits only "unreasonable searches and seizures." U.S. Const. amend. IV. An officer who deprives a person of life or liberty by using force effectuates a "seizure" only at the moment he employs that force. *See Torres v. Madrid*, 592 U.S. 306, 325 (2021).

The Court's "at-the-moment" focus also reflects the "temporal perspective of the inquiry" that *Graham* mandates. *Saucier*, 533 U.S. at 206. Whether a suspect poses an "*immediate* threat to the safety of the officers or others" or "whether he is *actively* resisting arrest or attempting to evade arrest by flight" are necessarily assessed at the moment force is used. *See Graham*, 490 U.S. at 396 (emphasis added).

B. The Moment-of-Threat Doctrine Comports with This Court's Precedents

The Fifth Circuit's moment-of-threat cases apply the preceding principles rather than depart from them.

1. The Fifth Circuit's "moment-of-threat" caselaw does not contravene *Graham* by requiring courts to ignore everything that occurred before the moment force was used. That fiction permeates petitioner's brief and Judge Higginbotham's solo concurrence. In truth, the Fifth Circuit *embraces* the proposition that courts "must consider all of the circumstances leading up to [the moment deadly force is used], because they inform the reasonableness of [the officer's] decisionmaking." *Romero v. City of Grapevine*, 888 F.3d 170, 177 (5th Cir. 2018) (citation omitted). Those events "demand attention," *Crane v. City of Arlington*, 50 F.4th 453, 463-65 (5th Cir. 2022) (cited at Cert. Pet. 21), because they can "set the stage for what follow[s],"

Bazan ex rel. Bazan v. Hidalgo County, 246 F.3d 481, 493 (5th Cir. 2001).

Nor does the Fifth Circuit improperly "narrow[] 'the reasonableness analysis' 'to the precise millisecond at which an officer deploys deadly force,' excluding everything else from the court's purview." Pet. Br. 18 (citing Pet.App.12a (Higginbotham, J., concurring)); U.S. Br. 7. To the contrary, the Fifth Circuit routinely accounts for pre-seizure events that bear on the reasonableness of the officer's decision to use force, including:

- the "speed with which an officer resorts to force," *Harmon v. City of Arlington*, 16 F.4th 1159, 1165 (5th Cir. 2021) (cited at Pet. Br. 34);
- whether the suspect was involved in a "suspected crime," *Romero*, 888 F.3d at 178;
- whether the suspect "was resisting, struggling, or at all uncooperative," *Aguirre v. City of San Antonio*, 995 F.3d 395, 411 (5th Cir. 2021); and
- whether officers "had the time and opportunity to give a warning" before using lethal force but did not, *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc).

Petitioner (at 36) relies on Judge Duncan's dissent in *Cole* to argue that the moment-of-threat doctrine ignores "pre-encounter facts." *See id.* at 479 (Duncan, J., dissenting). But the en banc majority held only that it was "disputed whether any of the events [Judge Duncan] recounted were known to [the officers] when they fired on" the suspect. *Id.* at 456. And the majority found that these disputes over pre-shooting facts precluded summary judgment. *Id.* at 457. *Cole* reflects a context-dependent analysis, not a context-blind one.

Moreover, contrary to petitioner's (at 14) suggestion, culpability can be considered in the Fifth Circuit. The suspect's culpability is inherent in the *Graham* factors, including whether he has committed a crime, whether he "poses an immediate threat," and whether he is actively fleeing or attempting to evade arrest. 490 U.S. at 396. The Fifth Circuit has accordingly held that if an individual has not committed a crime, is not posing a threat, and is not fleeing (and thus not culpable), those factors will go in his favor. *See, e.g.*, *Baker v. Coburn*, 68 F.4th 240, 247-48 (5th Cir. 2023) (officer not entitled to summary judgment because "immediate threat" factor favored plaintiff); *Crane*, 50 F.4th at 466 ("[W]ith all three of the *Graham* factors favoring [the plaintiff], [the plaintiff] prevails."). The court's analysis of these factors is far from "merely performative." *Contra* Pet.App.15a.

What the Fifth Circuit *does* exclude from this holistic inquiry at the moment of the threat is whether the officer's alleged negligence at earlier stages "created the need for deadly force." *Crane*, 50 F.4th at 466. It does so because the issue in a Fourth Amendment excessive-force case "is not whether [the officer] created the need for deadly force," but "whether there was a reasonable need for deadly force." *Id.*; *see Cole*, 935 F.3d at 483 (Duncan, J., dissenting) (moment-of-threat doctrine rejects "the notion that officers' negligence *before* a confrontation determines whether they properly used deadly force *during* the confrontation").

The moment-of-threat doctrine thus stands for the commonsense proposition that "[t]he use of deadly force may be proper regardless of an officer's negligence if, at the moment of the shooting, he was trying to prevent serious injury or death." *Carnaby v. City of Houston*, 636

F.3d 183, 188 (5th Cir. 2011). Petitioner wrongly characterizes that view as an extreme outlier. In fact, the majority of circuits to consider the question have adopted *respondent's* (and the Fifth Circuit's) position, rejecting the argument that "officers' creation of a dangerous situation constitute[s] an independent violation of [a suspect's] constitutional rights." *Est. of Biegert v. Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (Barrett, J.).[4]

The circuits' majority position tracks *Graham* and its progeny. Those cases make clear that plaintiffs "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." *City of San Francisco v. Sheehan*, 575 U.S. 600, 615 (2015) (citation omitted). Similarly, "[n]othing in the Fourth Amendment bar[s officers] from protecting themselves," even when "hindsight" reveals that "the officers may have made 'some mistakes.'" *Id.* at 612-13 (citation omitted).

2. The moment-of-threat doctrine is also consistent with the directive that reasonableness "at the moment" force is used, *Graham*, 490 U.S. at 396, is ultimately based on the "totality of the circumstances," *Garner*, 471 U.S. at 8-9.

---

[4] *Accord Napier v. Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Elliott v. Leavitt*, 99 F.3d 640, 643-44 (4th Cir. 1996); *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017); *Sok Kong v. City of Burnsville*, 960 F.3d 985, 993-94 (8th Cir. 2020); *Knight ex rel. Kerr v. Miami-Dade County*, 856 F.3d 795, 813 (11th Cir. 2017). As explained below, *infra* p.43, only the Ninth and Tenth Circuits have adopted petitioner's theory that an officer's earlier actions can disable his right to self-defense.

The totality-of-the-circumstances framework is not a license to consider any and all facts. The inquiry is tethered to "the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. The reasonable officer's perspective necessarily includes "the information the officers had when the conduct occurred." *Saucier*, 533 U.S. at 207. But as the United States has previously explained, "consideration of the facts and circumstances leading up to a use of force in evaluating the reasonableness of that action is different from … blaming police for the need to use force at all." U.S. *Mendez* Br. 25-26.

In rejecting a "blame-the-officer" approach, moment-of-threat cases do not create any "special rule" different from *Graham*. *Contra* Pet. Br. 2. The cases simply recognize that, under *Graham*, "[t]he threat-of-harm factor typically predominates the analysis when deadly force has been deployed." *Harmon*, 16 F.4th at 1163[5]; *accord* U.S. Br. 13.

Moreover, even under a totality-of-the-circumstances analysis, courts must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. Moment-of-threat cases recognize that it is only by focusing on the threat facing the officer at the moment he uses force that courts can exercise proper "deference to the judgment of reasonable officers on the scene." *Saucier*, 533 U.S. at 205.

---

[5] *See also Baker*, 68 F.4th at 247-48 ("[W]hether there is an immediate threat to safety[] is generally the most important factor...."); *Crane*, 50 F.4th at 463 (same); *McVae v. Perez*, 120 F.4th 487, 492 (5th Cir. 2024) (same).

In short, an analysis that "focus[es] on the danger posed by the person to whom the force was applied," *Biegert*, 968 F.3d at 699, still requires courts to "'slosh' 'through the fact-bound morass of "reasonableness,"'" Pet. Br. 18 (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)), and conduct a "balancing of competing interests," *Garner*, 471 U.S. at 8 (citation omitted). But it conducts that balancing at the constitutionally relevant point in time—"at the moment" the seizure occurred, *Graham*, 490 U.S. at 396—and through the lens of the constitutionally relevant actor—the officer who used force.

C. Common Law Supports the Moment-of-Threat Doctrine

1. The moment-of-threat doctrine is also rooted in common-law rules of self-defense that inform the original meaning of the Fourth Amendment.

a. Like the moment-of-threat doctrine, the common law has long recognized that when a suspect uses force against the officer in the course of his flight, the officer may respond with necessary defensive force. And as with the moment-of-threat doctrine, the officer can defend himself regardless of the severity of the initial offense. "An officer, in arresting or preventing an escape for a misdemeanor, may oppose force to force, and sufficient to overcome it, even to the taking of life." *Head v. Martin*, 85 Ky. 480, 483, 485 (1887); *accord Starr v. United States*, 153 U.S. 614, 620-21 (1894) ("[I]f the party making the resistance [to a lawful arrest] is unavoidably killed in the struggle, the homicide is justifiable."). The self-defense justification extends even when officers could have retreated during the pursuit to avoid the use of force. *See* Matthew Hale, *Historia Placitorum Coronae* 481 (1736); *see also Starr*, 153 U.S. at 620-21.

b. Like the moment-of-threat doctrine, the common law also holds that an officer need not stand down from a lawful arrest even if the need for force is foreseeable. *See* Restatement (First) of Torts § 65(2)(c), (3)(b). Contrary to petitioner's assertions (at 14), governments have a strong interest in effecting arrests. And that interest is implicated even when—perhaps especially when—an arrest is resisted with force. *See United States v. Hensley*, 469 U.S. 221, 229 (1985).

Modern criminal law continues to recognize that "one who is justified in making an arrest is not obliged to desist because resistance is encountered. He may not only stand his ground but may also press forward to achieve his object, meeting force with force, and if he believes that deadly force is necessary to protect himself, he may employ such force." Model Penal Code Commentaries § 3.07(c), at 111 (Am. L. Inst. 1985); *see also* Paul Robinson, 2 Crim. L. Def. § 142 (1984).

c. Finally, like the moment-of-threat doctrine, the common law rejects the notion that an officer's earlier negligence disabled him from defending himself or others. The common law recognized that a suspect's use of force constitutes an intervening act that breaks the causal chain between the officer's potentially negligent execution of the arrest and the harm to the suspect from the officer in response to the resistance. *See* Restatement (Second) of Torts § 448. That is so because "[a]s a matter of law, it is not ordinarily reasonable to foresee that a citizen will react to a police stop by attacking the detaining officer, thereby triggering a situation that requires the officer to use deadly force in self-defense." *Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007) (Kavanaugh, J.).

Thus, in *Hundley*, the D.C. Circuit held that even if the officer's initial step—ordering the man out of the car—was negligent, the suspect's lunge toward the officer was a superseding act that justified the officer's use of force. *Id.* at 1104. The Seventh Circuit reached the same result in *Biegert*, holding that "[e]ven if the defendants' actions exacerbated the danger, [the arrestee's] actions were an intervening cause of the deadly force." 968 F.3d at 698. The Third Circuit has similarly held that "a sudden, unexpected attack that instantly forced [an] officer into a defensive fight for his life" was a "rupture in the chain of events." *Johnson v. City of Philadelphia*, 837 F.3d 343, 352 (3d Cir. 2016).

Although there was no negligence here, *infra* pp.36-37, 50, these decisions show that petitioner's appeal (at 38) for the Court to apply "ordinary ideas of causation" hurts, not helps, her case.

2. Petitioner (at 29-33) argues that the common law required evaluating circumstances before the moment of force. But, as explained above, pre-force circumstances are not categorically off the table under the moment-of-threat doctrine. As with the common law, earlier facts can be considered to the extent they inform a reasonable officer's perception of the threat and the need for force. *See, e.g.*, *Barrett v. United States*, 64 F.2d 148, 149 (D.C. Cir. 1933).

In any event, petitioner's common-law argument erroneously blurs the lines between two distinct concepts: (1) a citizen's right to use force to resist an unlawful arrest; and (2) an officer's use of force while pursuing a fleeing suspect. The first concept is irrelevant here, and the second supports respondent.

a. **Unlawful arrest**. Many of petitioner's cited cases (at 31-32) turn on the common-law right of citizens to resist *unlawful* arrests. In such cases, "the officer would go beyond the limit of the law, and employ force when and of a character forbidden by it." *Head*, 85 Ky. at 486. The officer can therefore be held liable for the resulting harm because the officer was the trespasser. *See, e.g.*, *Holmes v. State*, 5 Ga. App. 166, 169 (1908); *Roberson v. State*, 53 Ark. 516, 518 (1890).

That principle has no application here. Felix's initial traffic stop was lawful, and petitioner does not argue otherwise. Nor is there any "non-inimical explanation" for Barnes's flight. *Barnes*, 2022 WL 5239297, at *4. And this is not a case where Felix failed to identify himself after approaching Barnes. *See, e.g.*, *Bellows v. Shannon*, 2 Hill 86, 90 (N.Y. Sup. Ct. 1841).

Petitioner instead seeks to litigate the prudence of Felix's decision to step onto the sideboard of the car. But under the common law of unlawful arrest, the relevant question is not what Felix *should* have done during the course of a lawful arrest; it is, instead, whether he *could* have initiated the arrest in the first instance. The answer to that question—the dispositive question—is an unequivocal yes. Again, petitioner does not argue otherwise.

b. **Fleeing felon**. Petitioner (at 30-33) relies on common-law cases addressing the limitations on force when officers chase a fleeing felon. As petitioner notes, at common law, officers could use deadly force to arrest a suspect only if the suspect had, in fact, committed a felony. *See Garner*, 471 U.S. at 13-14. But this is not a fleeing felon case—it is a self-defense case. And as explained above, *supra* p.24, the common law permitted officers to use deadly force even against fleeing misdemeanants where,

as here, the arrestee's actions put the officer in harm's way.

Had Barnes simply failed to pull over and driven away from Felix without endangering him or any innocent bystanders, petitioner's comparison to fleeing-felon cases may have been apt. But that is not what happened. Felix used force in response to the threat to his life and the lives of others posed by Barnes's action during the stop. *Infra* pp.35-36. The special constraints imposed by the common law on using deadly force solely to arrest a felon do not apply here.

D. Petitioner's Policy Concerns Are Meritless

1. Focusing on the threat facing officers when force is used does not immunize officers from excessive-force liability. Examples from circuits that apply the moment-of-threat doctrine abound.[6] To take just one: A jury recently found an officer guilty of violating the civil rights of Breonna Taylor, an innocent woman shot in her Louisville home during a botched police raid. *See* Dylan Lovan, *Jury Convicts Former Kentucky Officer of Using Excessive Force on Breonna Taylor During Deadly Raid*, AP (Nov. 2, 2024), https://tinyurl.com/rcn54cjk. Consistent with Sixth Circuit precedent, the court's instructions required the jury to "consider all of the facts and circumstances as they would be viewed by an ordinary and reasonable officer on the scene *at the moment that force was*

---

[6] *See*, *e.g.*, *Vega-Colon v. Eulizier*, 2024 WL 3320433, at *4 (2d Cir. July 8, 2024); *Moran v. Greco*, 2024 WL 1597624, at *3 (2d Cir. Apr. 12, 2024); *Quinn v. Zerkle*, 111 F.4th 281, 297 (4th Cir. 2024); *Boyle v. Azzari*, 107 F.4th 298, 302-03 (4th Cir. 2024); *Ambler v. Nissen*, 116 F.4th 351, 357-61 (5th Cir. 2024); *Spiller v. Harris County*, 113 F.4th 573, 577 (5th Cir. 2024); *McReynolds v. Schmidli*, 4 F.4th 648, 653-54 (8th Cir. 2021); *Banks v. Hawkins*, 999 F.3d 521, 525-28 (8th Cir. 2021).

used." Jury Instructions, *United States v. Hankison*, 2024 WL 4667120 (W.D. Ky. Oct. 30, 2024) (emphasis added).[7] The instructions further explained that "proof that a defendant violated policy or acted contrary to training … *is not relevant* to your determination that the defendant violated a victim's constitutional rights." *Id.* (emphasis added).

Likewise, if officers commit a separate Fourth Amendment violation before the use of force, that is fair game for a Section 1983 suit—but only as a separate violation. That prior violation can be an unlawful entry, as in *Mendez*, or a "false arrest," *LeFever v. Castellanos*, 2021 WL 392696, at *8 (D. Neb. Feb. 4, 2021). Or the plaintiff could sue over a use of force at an *earlier* point in time, such as when the individual "had committed no crime and posed no threat." *Huaman ex rel. J.M. v. Tinsley*, 2017 WL 4365155, at *13 (D. Conn. Sept. 28, 2017); *see Cass v. City of Abilene*, 814 F.3d 721, 732 (5th Cir. 2016).

Consider this case. Petitioner could have litigated a claim that Felix "committed a predicate Fourth Amendment violation when he stepped onto Barnes's vehicle," but she objects to pursuing that path. Pet. Br. 48. Instead, petitioner (*id.*) proposes that all instances of seizure should be viewed as part of one "core constitutional claim" and not separate inquiries. But analyzing separate Fourth Amendment claims separately is not playing "dress up." Pet. Br. 18. It is how the Fourth Amendment works. *See Mendez*, 581 U.S. at 427-28; *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (Alito, J.) (explaining

---

[7] *Accord Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 407 (6th Cir. 2007) (Courts must "disregard [pre-shooting] events and … focus on the 'split-second judgments' made immediately before the officer used allegedly excessive force."); *Thomas*, 854 F.3d at 365; *Chappell v. City of Cleveland*, 585 F.3d 901, 914 (6th Cir. 2009).

that "illegal entry and unlawful force claims must be kept separate"). *Id.*[8]

2. Prioritizing the moment force is used does not "raise[] impossible line drawing questions." Pet. Br. 36-37; *accord* U.S. Br. 21-22. That criticism rests on petitioner's misguided assertion (at 37) that courts must "explain[] when pre-seizure events start and what conduct prior to that chosen moment should be excluded." (citation omitted). The moment-of-force doctrine does not require courts to parse the encounter so finely. Instead, courts evaluate "whether the officers or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force." Pet.App.7a-8a. That is the same straightforward analysis this Court's precedents demand.

3. Nor does focusing on the moment of force make excessive-force law a Fourth Amendment outlier. *Contra* U.S. Br. 12-13. The reasonableness of a search similarly depends on whether officers adhered to the "traditional protections against unreasonable searches … afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In knock-and-announce cases, the Court considers only whether the officers satisfied the common-law rule at the moment of entry—or, if not, whether there was a corresponding justification. *Id.* at 934-35. The Court does not consider whether the officers' actions surrounding their entry were prudent and measured. And even in that context, the

---

[8] Petitioner (at 49 n.9) suggests that the Court "at least remand and direct the lower courts to consider" an "independent Fourth Amendment claim based on Officer Felix jumping onto Barnes's car." But petitioner waived that theory of liability by failing to raise it before the Fifth Circuit. *See* Pet. Ct. App. Br. 22-56.

Court recognized the importance of "countervailing law enforcement interests," including the need to respond to "threat[s] of physical violence." *Id.* at 934, 936.

The police-created-exigency rule also turns on whether the officers breached a duty by "engaging or threatening to engage in conduct that violates the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 462 (2011). The Court in *King* considered only whether the police "gain[ed] entry to premises by means of an actual or threatened violation of the Fourth Amendment." *Id.* at 469.

4. Other forms of liability keep officers in check.

States can choose to make officers' tort liability "broader than federal Fourth Amendment law" in excessive force cases, including by considering the officer's "tactical conduct and decisions preceding the use of deadly force." *Hayes v. County of San Diego*, 57 Cal. 4th 622, 639 (2013) (interpreting California negligence law); *see, e.g.*, *Hernandez v. Parker*, 508 P.3d 947, 954 (N.M. Ct. App. 2022) (negligence); *Wexler v. Hawkins*, 3251726, at *14-15 (E.D. Pa. June 21, 2024) (assault and battery), *appeal docketed*, No. 24-2320 (3d Cir. 2024). Petitioner included such a tort claim in her complaint but waived it by not pursuing it below. Pet.App.29a.

In addition, many states have recently "changed their [police] use of force standards," "clarifying that deadly force is justified only as a last resort after exhausting all nonviolent options." Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, Brennan Ctr. for Just. (May 21, 2021), https://tinyurl.com/38ner8v9 (collecting statutes).

Finally, officers are often disciplined pursuant to local policy. *See, e.g.*, David Muir, *Cleveland Police Officer Who*

Killed Tamir Rice Fired After Rule Violations, ABC News (May 30, 2017), https://tinyurl.com/2p9sy8xw. These policies "hold[] [officers] to a higher level of restraint" than Section 1983, such as by "plac[ing] a priority, whenever possible, on de-escalation." N.Y.C. Police Dep't, 2020 Use of Force Report 8 (2020), https://tinyurl.com/38rnva22.

5. Petitioner's hypotheticals do not show that adhering to a moment-of-force rule would "produce[] deeply unjust results." Pet. Br. 33. They show that petitioner misunderstands the moment-of-threat doctrine and common-law causation principles.

a. Take petitioner's repeated hypothetical (at 14, 28, 33), in which an officer "jump[s] in front of" a "moving vehicle" for "no good reason."

To begin, petitioner simply assumes that the driver in her hypothetical would have a cause of action under Section 1983. But Section 1983 requires that a defendant "exercise[] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (citation omitted). An officer who jumps in front of a car "for no good reason" may not even be exercising state authority. No "moment-of-threat" decision petitioner cites applies the doctrine where officers are not even engaged in legitimate law enforcement activities to begin with.

But even assuming the officer exercises authority under color of law, the moment-of-threat doctrine would not shield him from liability. As relevant here, the moment-of-threat doctrine is a self-defense doctrine that applies when a person protects himself against violent aggression. In petitioner's hypothetical, there was no aggression at all,

except by the officer. Although the car poses an immediate danger to the officer, the officer's decision to shoot after jumping in front of the car would constitute an unreasonable seizure. This is because "the information the officer[] had when the conduct occurred," *Saucier*, 533 U.S. at 207, would include that the driver had posed no threat to the public, committed no crime, and was not resisting arrest.

Moment-of-threat cases immunizing officers who "acted so far outside the bounds of reasonable behavior that the deadly force was almost entirely a result of [their] actions" are not just "rare," U.S. Br. 7 (quoting *Biegert*, 968 F.3d at 698)—they are non-existent. Neither petitioner nor the government identifies a moment-of-threat decision that rejects liability under the circumstances of petitioner's hypothetical.[9] That silence is significant. Each year, 240 million emergency calls are placed nationwide, and officers interact with 49.2 million U.S. residents. 9-1-1 Statistics, Nat'l Emergency Number Ass'n, https://tinyurl.com/5cezv6rr; Susannah N. Tapp & Elizabeth Davis, *Contacts Between Police and the Public, 2022*, U.S. Dep't of Just. (Oct. 4, 2024), https://tinyurl.com/3nsbepdk. Yet petitioner and her amici could not find a single jump-in-front-of-the-car-style case in which the officer escaped liability. That is strong evidence that petitioner is crying wolf.

---

[9] Petitioner (at 34) characterizes *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993), as holding that it was "irrelevant" that the officer ran in front of a car with his gun drawn and failed to identify himself. In fact, the officer repeatedly identified himself, and he only fired after being "struck by the vehicle" that had "sped forward towards him" after ignoring the officer's cries of "Police Officer, stop!" and "Police Officer, turn the vehicle off!" *Id.* at 776. The real facts of *Drewitt* bear no resemblance to petitioner's hypothetical.

b. Causation principles supply the same sensible answer to petitioner's hypothetical. "Under the common law, a defendant could not avail himself of the defense of self-defense if the necessity for such defense was brought on by a deliberate act of the defendant, such as being the initial aggressor or acting with the purpose of provoking the victim into attacking." *People v. Silva*, 987 P.2d 909, 914 (Colo. App. 1999) (citation omitted); *see also Wilkie v. State*, 242 P. 1057, 1059 (Okla. Crim. App. 1926) (cannot claim self-defense when defendant engaged in conduct "'reasonably calculated' to lead to an affray or deadly conflict"). Thus, when an officer's unlawful act proximately causes the need for his use of force, he loses his self-defense justification because he "start[ed] the fight … without initiating aggression." K. Ferzan, *Provocateurs*, 7 Crim. L. & Philos. 597, 615 (2013); *see, e.g.*, Bill Hutchinson, *Amber Guyger Convicted of Murder in Wrong-Apartment Killing of Innocent Man*, ABC News (Oct. 1, 2019), https://tinyurl.com/2z8zxpdt.

The moment-of-threat doctrine does not apply when the officer is the unlawful aggressor. For example, an officer who commits a violent felony is the aggressor and has no right to act in self-defense when his victim fights back. He faces a choice either to desist or to incur additional legal liability by "defending" himself against his victim. In such circumstances, courts should not ask whether the officer faced a threat of death or serious bodily injury at the moment he used deadly force because it is the victim's force—not the officer's—which is lawful. A court would commit error if it used the moment-of-threat doctrine to justify the force of an unlawfully aggressing officer. But those are not the circumstances in which the moment-of-threat doctrine has been applied, and, as we next explain, they are not the circumstances of this case.

E. Sergeant Felix's Use of Force Was Reasonable at the Moment

The decision below properly "focus[ed] the inquiry … on the act that led the officer to discharge his weapon," Pet.App.8a (citation omitted)—specifically, Barnes's decision to flee while Felix was on the car, and Felix's consequent reasonable belief that "his life was in imminent danger," Pet.App.6a.

1. The "crucial question" is whether Felix "acted reasonably in the particular circumstances that [he] faced." *Plumhoff*, 572 U.S. at 779. Those circumstances were grave. When Felix stopped Barnes, Barnes resisted the stop with force by rapidly accelerating while Felix was partially inside the vehicle. At the moment Felix fired his pistol, "Barnes posed a threat of serious harm to Felix." Pet.App.30a. Barnes "refused to follow [Felix's] commands to stop the vehicle from moving while the deputy's left foot was partially standing on the door sill of the vehicle." Pet.App.29a. As a result, when Felix made the decision to use force, he was "still hanging onto the moving vehicle and believed it would run him over." Pet.App.8a. "Common sense confirms that falling off a moving car onto" a highway "can result in serious physical injuries." *Harmon*, 16 F.4th at 1164. At the moment Felix used force, he "reasonably believe[d] his life was in imminent danger." Pet.App.8a. That obvious "threat of serious physical harm" justified Felix's use of force. *Garner*, 471 U.S. at 11.

Moreover, when Felix fired his pistol, Barnes also posed a "grave public safety risk" to other drivers. *Plumhoff*, 572 U.S. at 776. The dash-cam video shows dozens of cars traversing the toll road—exceeding 65 miles per hour—during the encounter. *See* Dash-Cam Video, *supra* p.6 n.2. Fleeing vehicles regularly collide with others on

the road, killing innocent drivers and passengers. *See, e.g.*, *Jones v. State*, 2023 Ark. 189, at 2 (2023); *Thomas v. State*, 317 Ga. 700, 701 (2023). This Court has consistently recognized the "paramount governmental interest in ensuring public safety" as a basis for officers' use of deadly force, *Scott*, 550 U.S. at 383; *accord Plumhoff*, 572 U.S. at 776, and that interest further supports Felix's use of force here.

Petitioner virtually ignores the risks of Barnes's flight, going so far as to claim (at 3-4) that "Barnes had posed no 'immediate threat' to Officer Felix when [Felix] initiated the seizure." If driving off with an officer on the side of your car does not pose an immediate threat to that officer, it is hard to see what would. Petitioner's version of events also cannot be squared with the dash-cam footage, which the district court correctly found resolved "all lingering genuine disputes of material fact" in *Felix's* favor. Pet.App.5a.

2. Petitioner (at 10, 25) and the United States (at 22-23) seize on the panel's statement that "[a]ny of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit." Pet.App.8a. But read in context, that statement does not depart from the *Graham* standard. In the Fifth Circuit, the only "action" that petitioner argued created the need for force was Felix's decision to "jump[] onto the moving car." Pet. Br. 25 (emphasis omitted). Petitioner contends that decision disabled Felix's right of self-defense. There are two problems with this argument.

First, Felix's jump onto the car was not a violation of any legal duty or right, let alone a violation of Barnes's rights. To the contrary, the Court has held that "[f]light from a law enforcement officer *invites, even demands*, pursuit," and officers "may deem themselves dutybound

to escalate their response to ensure" apprehension. *Sykes v. United States*, 564 U.S. 1, 9, 10 (2011) (emphasis added), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). Second, the jump was a separate act from the (allegedly unconstitutional) seizure that occurred when Felix discharged his firearm. The panel did not err by holding that Felix's legally irrelevant "action[] leading up to the shooting" was indeed irrelevant.

In any event, this Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (citation omitted). To the extent petitioner's complaint is that the panel's articulation of the rule, read in isolation, might literally foreclose consideration of anything any officer ever did before using force, that is not a basis for overturning the court's clearly correct judgment.

II. An "Officer-Created-Danger" Rule Would Upend Fourth Amendment Law

Petitioner and the United States would replace this Court's consistent focus on reasonableness at the moment force is used with a freewheeling "evaluat[ion of] the officer's actions leading up to the use of force." Pet. Br. (i); *see* U.S. Br. 11. That approach would require courts to ask if the "danger perceived by [the officer] was created solely by himself." Pet.App.29. To answer that question, courts would assess, for example, whether officers used "poor law-enforcement tactics," U.S. Br. 20, or exhibited "poor judgment or lack of preparedness," Cert. Pet. 17 (quoting *S.R. Nehad v. Browder*, 929 F.3d 1125, 1135 (9th Cir. 2019)). Only the Ninth and Tenth Circuits have adopted this "officer-created-danger" rule. This Court should stop it from spreading further.

A. Petitioner's Rule Contravenes Settled Precedents

1. ***Graham***. Liability premised on whether the threat officers faced was "self-created" (Pet. Br. 47) "is directly contrary to *Graham*, which teaches that whether a police use of force is constitutional depends on whether the officer's decision is objectively reasonable at the moment the officer used the force." U.S. *Mendez* Br. 17 (citing *Graham*, 490 U.S. at 396-97). As the United States has explained previously, "[i]f the use of force is justified at that moment (say, because a suspect is threatening the officer with a gun), then the officer did not use excessive force and the shooting does not violate the Fourth Amendment." *Id.* at 17-18.

By "expand[ing] the time period and the range of police action relevant to assessing an officer's liability for the use of force," the officer-created-danger rule "focuses on the wrong point in time." *Id.* at 18-19. And in so doing, it "places officers in an untenable position." *Id.* at 19. "At the moment that an officer is deciding whether to use force, particularly deadly force," the officer should be "focused on the immediate threat he is facing, not an earlier point in time." *Id.*

Graham rejects putting an officer in that position root and branch. It recognizes that officers must be free to make "split-second judgments" in the moment, under "tense, uncertain, and rapidly evolving" circumstances. *Graham*, 490 U.S. at 396-97. That assurance would be meaningless if an officer's every decision—like Felix's decision to step onto Barnes's car—becomes fodder for a jury trial.

2. ***Scott*** **and** ***Plumhoff***. Car-chase cases further illuminate the errors of petitioner's "officer-created-danger" rule.

a. In *Scott*, a suspect led police officers on a ten-mile, high-speed chase across double-yellow lines and through red lights. 550 U.S. at 375, 379. "Numerous police cars [were] forced to engage" in "hazardous maneuvers just to keep up." *Id.* at 379-80. But the Court asked only whether an officer's actions were reasonable when he "ramm[ed] the motorist's car from behind"—*i.e.*, at the moment the officer used force. *Id.* at 374; *accord id.* at 381.

The Court followed the same approach in *Plumhoff*. The high-speed chase there lasted over five minutes, with six police cruisers pursuing the suspect as he "swerv[ed] through traffic." 572 U.S. at 769, 777. Yet as in *Scott*, this Court assessed the officers' actions only "at the moment when the shots were fired." *Id.* at 777.

Even more significantly, *Plumhoff* rejected exactly the same officer-created-danger theory petitioner now advances. The district court there found liability on the theory that "the danger presented by a high-speed chase cannot justify the use of deadly force because that danger *was caused by the officers' decision to continue the chase*." *Id.* at 776 n.3 (emphasis added). But this Court unanimously deemed that reasoning "irreconcilable with" *Scott*, *id.*, reiterating that the only relevant questions were whether the suspect "posed a grave public safety risk" and whether "the police acted reasonably in using deadly force to end that risk," *id.* at 777. These holdings are so obviously inconsistent with petitioner's position that she simply ignores them.

b. Petitioner (at 22) and the United States (at 11-12) contend that *Scott* and *Plumhoff* scrutinized the officers' pre-seizure conduct. There is no merit to that revisionist account.

It is true that the Court in *Scott* recounted pre-shooting facts. But that was in the context of determining what the officer knew at the moment he decided to use deadly force. The suspect's preceding conduct informs "the threat … that [the officer is] trying to eliminate." *Scott*, 550 U.S. at 383. But the Court did not consider whether the *officer's* pre-seizure actions complied with the Fourth Amendment.

It is also true *Scott* considered the "relative culpability" of the suspect and bystanders. Pet. Br. 21 (citing *Scott*, 550 U.S. at 384). That fact does not support petitioner's position, either. The Court held the *fleeing suspect* was culpable because the suspect, like Barnes, "intentionally placed himself and the public in danger" by engaging in the flight that ultimately forced the officer to use deadly force. *Scott*, 550 U.S. at 384. *Scott*'s emphasis on culpability supports respondent, not petitioner.

Plumhoff is of a piece with *Scott*. As the United States previously recognized, while it is true that "*Plumhoff* examined uses of force that were not preceded by constitutional violations, the relevant point is that this Court declined to call into constitutional question a reasonable use of force because of actions that the police had taken that led up to the use of force." U.S. *Mendez* Br. 21.

3. ***Mendez***. Although *Mendez* did not explicitly resolve today's question presented, 581 U.S. at 429 n.*, its logic makes the answer to that question clear. Petitioner's "officer-created-danger" theory is even more problematic than the "provocation rule" this Court unanimously rejected in *Mendez*.

a. The "provocation rule" held officers liable if they "intentionally or recklessly provoked a violent response,"

id. at 426-27 (citation omitted), or if they "created [the] situation" that "required the officers to use force," *Espinosa v. City of San Francisco*, 598 F.3d 528, 539 (9th Cir. 2010). Under that rule, it was not enough that "the officer's use of force was reasonable and therefore constitutional at the moment it occurred." U.S. *Mendez* Br. 12. Rather than "stop there," the Ninth Circuit would "look back in time" to see if something the officers did prior to the use of force could "serve as the foundation of the plaintiff's excessive force claim." *Mendez*, 581 U.S. at 428. "[T]he theory [was] basically that [an officer] shouldn't have gotten himself into the situation, so he couldn't constitutionally shoot his way out of it." *Billington v. Smith*, 292 F.3d 1177, 1185-86 (9th Cir. 2002).

Petitioner's "officer-created-danger" rule is cut from the same cloth. Like in *Mendez*, the effect of petitioner's position is that "an officer's otherwise reasonable (and lawful) defensive use of force" can be rendered "unreasonable as a matter of law" by earlier events. 581 U.S. at 425-26. Like in *Mendez*, petitioner seeks to expand *Graham*'s totality-of-the-circumstances inquiry beyond the use of force to include missteps made before the use of force. And like in *Mendez*, petitioner's position has the "anomalous" effect of "imposing liability for what is arguably a violation of best police practices" but not a violation of the Fourth Amendment. Tr. of Oral Arg. 32, *Mendez* (No. 16-369) (Alito, J.). *Mendez* explains that this Court has repeatedly declined to adopt such an "unwarranted and illogical expansion of *Graham*." 581 U.S. at 430. The Court should do the same here.

If anything, petitioner's approach is *worse* than the provocation rule rejected in *Mendez*. Flawed as it was, the Ninth Circuit's rule at least had the virtue of requiring that the officer's prior actions constitute "a distinct

Fourth Amendment violation such as an unreasonable entry." *Id.* at 428. Petitioner's "provocation-lite" version would jettison even that modest limitation. Petitioner's rule thus "has all of the problems of the Ninth Circuit's doctrine, with the added problem that it imposes Fourth Amendment liability without any constitutional violation at all." U.S. *Mendez* Br. 24 n.2 (criticizing *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004), which held that a police shooting can be unreasonable if the "reckless or deliberate [police] conduct during the seizure unreasonably created the need to use such force").

Indeed, the academic literature petitioner relies on calls *Mendez*'s provocation rule "*too restrictive* in limiting the kinds of pre-seizure conduct that could be considered." Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 Geo. Wash. L. Rev. 1362, 1405 (2021) (emphasis added) (cited at Cert. Pet. 25-26). Petitioner's amici similarly urge courts to "account[] for an officer's training, department policies, and tactical decisions." L. Enf't Officers Br. 9; *accord* Nat'l Urb. League Br. 14.

States might choose to adopt such a sweeping rule for their tort laws. *See supra* p.31. Petitioner asks the Court to enshrine it in the Constitution. For example, she asserts (at 40-42) that the Fourth Amendment should "reinforce" local training and policies by making a violation of best practices from "Los Angeles" to "Minneapolis" to "Miami" a potential basis for excessive-force liability. But the whole point of state and local regulations is to afford—and experiment with—"more protecti[on]" than what the Constitution commands. *Florida v. Powell*, 559 U.S. 50, 71 n.6 (2010). Best "practices," "even if they could be practicably assessed by a judge, vary from place to place and from time to time." *Whren v. United States*, 517 U.S. 806,

815 (1996). For this reason, "[p]olicies and procedures do not shed light on the reasonableness of an officer's behavior." *Biegert*, 968 F.3d at 699. Courts should "give no weight to these arguments," *id.*—not, as petitioner would have it, make them controlling.

b. Petitioner (at 47) claims to disavow a *Mendez*-like rule in which an officer's earlier mistake renders a later use of force unreasonable. But the petition urges this Court to follow cases adopting that very test. Petitioner (at Cert. Pet. 18) cited with approval a Tenth Circuit case "consider[ing] whether an officer's own 'reckless or deliberate conduct' in connection with the arrest contributed to the need to use the force employed." *Fogarty v. Gallegos*, 523 F.3d 1147, 1159-60 (10th Cir. 2008). Likewise, petitioner (at Cert. Pet. 16) touted a Ninth Circuit case explaining that "[r]easonable triers of fact can … conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably." *Nehad*, 929 F.3d at 1135. And in another of petitioner's preferred cases (at Cert. Pet. 16-17), the Ninth Circuit held the district court correctly refused to instruct the jury "that Fourth Amendment liability cannot be premised solely on an officer's 'bad tactics.'" *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017). The Ninth Circuit has clung to that wayward conclusion even after *Mendez*. *See Winkler v. City of Phoenix*, 849 F. App'x 664, 666-67 (9th Cir. 2021).

Petitioner expunges these cases from her opening brief, but she cannot hide the "officer-created-danger" rule's origins—or its deleterious effects.

c. Petitioner repeatedly characterizes *Mendez* as "reaffirming that an officer should bear liability 'for the foreseeable consequences' of his earlier unreasonable actions." Pet. Br. 13 (quoting *Mendez*, 581 U.S. at 430-31);

see also id. at 23, 28, 47. Nothing in *Mendez* endorses petitioner's broad foreseeability argument. *Mendez* observed that the "provocation rule" "may be motivated by" notions of foreseeability. 581 U.S. at 430. But then the Court went on, explaining that there "is no need to distort the excessive force inquiry in order to accomplish this objective." *Id.* Instead, plaintiffs can hold officers accountable by seeking damages for *other Fourth Amendment violations*. *Id.* at 430-31. Here, by contrast, petitioner seeks to impose liability for excessive force based on Felix's decision to step onto the vehicle—a separate (though still reasonable) Fourth Amendment seizure distinct from Felix's use of deadly force.

Petitioner also misconstrues other language in *Mendez*, stating: "There should be 'no need to dress up' 'an excessive force claim' … in the guise of some other 'Fourth Amendment claim.'" Pet. Br. 48 (quoting *Mendez*, 581 U.S. at 431). But *Mendez* actually says the inverse: "[T]here is no need to dress up every Fourth Amendment claim as an excessive force claim." 581 U.S. at 431. That is what petitioner attempts to do here.

B. Petitioner's Rule Undermines Public Safety

1. **Law-enforcement efficacy**. Petitioner's approach would "severely hamper effective law enforcement." *Garner*, 471 U.S. at 19. Policework places officers in "tense, uncertain, and rapidly evolving" circumstances. *Graham*, 490 U.S. at 396-97. Officers "conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions." *Nieves v. Bartlett*, 587 U.S. 391, 403 (2019). As this Court has recognized time and again, officers must be able to "go about their work without undue apprehension of being sued." *Id.* But petitioner's rule does just the opposite. Officers who face the choice to use force will know that a jury may scrutinize their every

move, using the benefit of 20/20 hindsight to search for any hint of unreasonableness. That is a recipe for chilling officers and ensuring that they err on the side of "do[ing] nothing" when the situation demands the use of reasonable force. *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994).

Here again, the United States used to get it right. It previously recognized that premising liability on earlier mistakes would exacerbate "the fear of personal liability," which "could lead an officer to forgo use of force and allow a suspect's threat to officers or the public to persist." U.S. *Mendez* Br. 22 (citing *Scott*, 550 U.S. at 385). This Court should reject a rule that places officers "in the untenable position of having to consider, often in a matter of seconds, whether to risk … incurring personal liability in order to neutralize the volatile situation confronting them." U.S. Br. 25, *Chavez v. Martinez*, 538 U.S. 760 (2003) (No. 01-1444).

And what if the officer chooses to do something, but his decision is mistaken? If the officer subsequently finds himself facing the barrel of a gun, is the only way for the officer to escape excessive-force liability to stand down and hope a bullet does not come out? That cannot be the law, but it is the clear upshot of petitioner's position.

2. **Perverse incentives**. Petitioner's rule encourages suspects to resist officers and use violence: A suspect who has a chance to flee should take it, because the officer will be under a duty to stand down to avoid imprudently escalating the encounter. There is a "real danger in announcing a rule" that encourages suspects to defy lawful police orders. *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998) (Kennedy, J., concurring). But petitioner encourages the Court to do exactly that.

Petitioner cites *Scott* for the proposition that alleged reckless behavior by an officer should not make that officer's use of force "*more* reasonable" because "[t]he Constitution assuredly does not impose [an] invitation to impunity-earned-by-recklessness." Pet. Br. 34 (quoting *Scott*, 550 U.S. at 385-86). But the Court in *Scott* made this statement in reference to the recklessness of *fleeing suspects*, not police officers. Rather than saying that negligent or reckless police behavior before the use of force renders the use of force unreasonable, the Court said that *suspects* cannot use negligent or reckless behavior to flee officers. *Scott*, 550 U.S. at 385-86. Officers, by contrast, are not "requir[ed] to allow fleeing suspects to get away." *Id.* at 385. Yet petitioner encourages a rule incentivizing flight and disabling pursuit by placing the blame on Felix's decision to hop onto the vehicle, rather than on Barnes's decision to flee.

3. **Micromanaging law enforcement**. Petitioner wants to empower judges and juries to determine, for example, if officers who used deadly force were negligent in speaking too harshly or failing to carry or use nonlethal weapons. The United States correctly explained in *Mendez* why such an "open-ended and ill-defined" approach is untenable:

> [It] invites courts to look past established rules identifying certain conduct as reasonable (and thus lawful under the Fourth Amendment) and to engage instead in a standardless inquiry into whether an officer's earlier conduct might nevertheless be viewed as unreasonable in a more general way. And by expanding the inquiry from the moment the police used force to the entire inter-

> action between the police and the suspect, [it] invite[s] close scrutiny of split-second police judgments based on prior events and actions.

U.S. *Mendez* Br. 23. Simply put, by "remov[ing] the focus from the officers' justification at the time they used force," petitioner's approach "converts members of the judicial branch of government into tactical managers of the police." *Id.* (quoting *Alexander v. City of San Francisco*, 29 F.3d 1355, 1377 (9th Cir. 1994) (Trott, J., concurring in part and dissenting in part)).

4. **Weakening qualified immunity**. Petitioner (at 40) asserts that qualified immunity affords officers "added protection," so Fourth Amendment law should stay "lenient." But there is no reason to define the Constitution through the lens of an implied statutory defense.

If anything, petitioner's rule would *weaken* qualified immunity. Qualified immunity "exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (2001) (citation omitted). But petitioner advocates precisely the "sort of Monday morning quarterbacking" that "qualified immunity precedent forbids." *Harmon*, 16 F.4th at 1165. To apply petitioner's rule, judges and juries would have to flyspeck "split-second judgments" made by officers under the most stressful circumstances imaginable. *Graham*, 490 U.S. at 396-97.

5. **Impairing self-defense**. Finally, endorsing petitioner's rule would severely restrict civil liberties for officers and ordinary citizens alike. Petitioner's rule would force officers to cower in the face of threats, and similarly would allow violent criminals to restrict officers' law-enforcement activities merely by threatening violence.

Taken to its logical limit, that approach could deprive *anyone* of the right to self-defense if they even arguably put themselves in a dangerous situation. A robbery victim walking down a dark street alone at night? Should have known better. A Phillies fan wearing his favorite jersey around Manhattan? Had it coming. By encouraging courts to scrutinize whether a law-abiding citizen did "everything in his power to prevent [the] necessity" of using force in self-defense, petitioner would let criminals restrict an individual's civil liberty merely by threatening violence. *Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923); *see id.* (Black man's "conduct" in entering public street "deprive[d] him of any right to invoke the plea of self-defense" against white mob).

III. Sergeant Felix's Use of Force Was Reasonable Even Under Petitioner's Approach

Even if the Court adopts petitioner's officer-created-danger test, it should affirm the judgment below. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006) (affirming after "[a]ppl[ying]" a new standard "to the facts of th[e] case").

Petitioner points to two considerations she views as rendering Sergeant Felix's use of force unreasonable: the nature of the underlying offense, and the decision to step onto the car's running board. Neither changes the analysis.

1. Petitioner (at 14, 25, 27, 31, 34) repeatedly asserts that "the offense that prompted Officer Felix to seize Barnes" was "driving a vehicle with outstanding toll violations." But Felix did not use force solely to effectuate an arrest based on the outstanding tolls. He used force because Barnes's decision to flee *endangered Felix's life*,

and potentially the lives of others. Barnes's "flight itself … posed the threat of 'serious physical harm.'" *Scott*, 550 U.S. at 382 n.9 (quoting *Garner*, 471 U.S. at 11). That is not, as petitioner (at 30-31) suggests, a "trivial misdemeanor."

Regardless, petitioner is wrong that the underlying crime's status as a misdemeanor or nonviolent necessarily means officers should not use force. To the contrary, this Court has upheld the use of deadly force to prevent harm to officers or the public even when the underlying offenses were minor. *See Scott*, 550 U.S. at 374 (speeding); *Plumhoff*, 572 U.S. at 768 (burned-out headlight); *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004) (theft and outstanding warrant for drug offenses). And in *Mendez*, where the reasonableness of the officers' use of deadly force was undisputed, Mendez had not committed any crime at all. 581 U.S. at 424-25.

The Court's approach makes eminent sense. Violent criminals sometimes get pulled over for minor infractions. And violent criminals often react to police with violence. If Barnes had responded to the command to step out of the car by leveling the gun later found in his glove compartment, it would (or at least should) be undisputed that Felix's use of force in response would be justified. And that would be true notwithstanding the toll violation. That the real danger came from Barnes's car rather than a gun does not change the need for self-defense.

2. Felix's decision to step onto the running board of the car does not deprive him of self-defense, either. In no way was Felix negligent. And Barnes, not Felix, was the aggressor. Barnes used force first by starting to drive away while Felix was inside the car door and half of Felix's body was inside the vehicle. *See* J.A.175, 181; *supra* pp.8-9. Felix only stepped onto the running board in response

to that initial use of force. *See* J.A.169, 175-76; *supra* p.10. The danger Felix faced therefore was not "created solely by himself." Pet.App.29. Similarly, Felix's placement of his foot on the car did not violate any legal right of Barnes, "who intentionally placed himself" in danger by engaging in the flight "that ultimately produced" Felix's need to defend his life by using force. *Scott*, 550 U.S. at 384.

Nor was Felix required to try jumping down (from a moving car, on a busy highway) before using force. Even assuming such a stuntman maneuver was feasible—an argument petitioner has never advanced—officers "may resort to deadly force 'even if a less deadly alternative is available to the officers.'" *Biegert*, 968 F.3d at 700 (citation omitted). And "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Plumhoff*, 572 U.S. at 777.

Petitioner may disagree with Felix's tactical decision to step onto the car. But she "cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" *Sheehan*, 575 U.S. at 615 (citation omitted).

* * * * *

It is tragic that what began as a routine traffic stop ended with Ashtian Barnes's death. But Barnes did not die because of unpaid tolls. He died because, in the course of fleeing from a police officer executing a lawful stop, he put that officer and the public in danger. Barnes repeatedly refused Felix's commands and ignored Felix's call to stop the vehicle, even though Felix was standing on it while Barnes accelerated. A reasonable officer in Felix's shoes could have concluded that Barnes was intent on continuing his flight and that, if he were allowed to do so, he

would kill or seriously injure Felix and pose a threat to others on the road. At the moment he used force, Sergeant Felix made a split-second judgment—based on years of experience and training—to act rather than risk harm to himself and the public. The Constitution affords him that choice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JUDITH RAMSEY SALDANA
THOMPSON, COE, COUSINS & IRONS, LLP
4400 Post Oak Parkway
Suite 1000
Houston, Texas 77027
(713) 403-8210

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLOUD
PETER S. JORGENSEN
ERIN M. SIELAFF
HALLIE SAUNDERS
BRETT V. RIES
GARRETT M. WEN*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Counsel for Respondent Roberto Felix, Jr.

DECEMBER 13, 2024

* Admitted only in Illinois; practice supervised by D.C. Bar members.