No. 23-1239

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE LOS ANGELES COUNTY POLICE CHIEFS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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The Los Angeles County Police Chiefs' Association respectfully submits this brief *amicus curiae*, pursuant to Supreme Court Rule 37 and the written consent of all parties.[1]

INTERESTS OF THE *AMICUS CURIAE*

The Los Angeles County Police Chiefs' Association ("LACPCA") is a nonprofit mutual benefit corporation consisting of the Police Chief Executives of the 45 independent cities in Los Angeles County. LACPCA focuses on advancing the science and art of police administration and crime prevention in Los Angeles County; coordinating the implementation of law enforcement efforts by local law enforcement leaders; and developing, teaching, and disseminating professional law enforcement practices.

One of LACPCA's missions is to ensure that all 45 independent cities in Los Angeles County provide their peace officers with ongoing training that is thorough, effective, and consistent with the law and best practices. Thus, the members of LACPCA monitor and evaluate case law and legislation through the lens of how they will train officers on new legal developments. LACPCA has a strong interest in this case because this Court's recognition of the "moment of threat" doctrine at issue would greatly support law enforcement in efforts to protect the safety of officers and the general public and in providing clear and effective training.

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1. Petitioners and Respondents have consented to the filing of this brief *amicus curiae*. Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The "moment of threat" doctrine applied by the Fifth Circuit in this case, *see Barnes v. Felix*, 91 F.4th 393, 394 (5th Cir. 2024), serves to protect the safety of peace officers who must make split-second decisions on use of force. Petitioners ask that this Court reject the doctrine in favor of a wholesale application of the "totality of the circumstances" rule that evaluates officer conduct using a broader frame of reference, including the officer's culpability in creating the threat in question. But this Court's rejecting the moment of threat doctrine would defeat sound public policy by causing officers to operate in situations in which they must choose between the potential for ruinous civil liability for committing a Fourth Amendment violation on the one hand and on the other hand acting against an aggressor to protect themselves or members of the public. Under the totality of the circumstances test as envisioned by Petitioner, once an officer has committed conduct culpable under the Fourth Amendment in creating a dangerous situation, the officer enters a legal zone in which any use of force by them—however reasonable, and even urgently necessary—is *a fortiori* unlawful.

Examples of situations an officer could face include an officer mistakenly stopping a motorist when the officer should not have done so. If the motorist suddenly draws a gun on the officer, is the officer prevented from using force to protect themselves? Another example is if an officer attempts to make an arrest in the absence of sufficient cause to do so. Is the officer then subject to whatever threat the subject presents and unable to respond?

In situations where lives are at stake, many would agree that the officer has only one option when confronted with a threat: to act decisively to protect those in danger. But only a moment of hesitation for law enforcement can be enough to decisively impact the situation for the worse. The law should allow officers to act to protect themselves and others when it is reasonable to do so in the instant they need to make a decision. *See infra* Section I.

Dispensing with the moment of threat doctrine in favor of wholesale application of the totality of circumstances rule also constitutes a flawed application of constitutional law. As this Court held in *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017), a use of force that qualifies as legitimate under the Fourth Amendment should not transform into an illegitimate one based only on the existence of a violation earlier in the chain of causation. *Id.* at 422-23. Yet that is what rejecting the moment of threat doctrine would do—it would allow circumstances outside the threat window to de-legitimize an officer's use of force that qualified as legitimate in the instant that decision making had to occur. It would also wrongly allow subjective considerations from outside the threat window, for example features of the situation that might lower the level of fear one would experience, to somehow render wrongful an objectively viable use of force. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *infra* Section II.

Also, the moment of threat doctrine operates in a manner consistent with prevalent forms of officer threat training, which law enforcement professionals have designed to best to protect safety of all concerned when officers conduct their duties in the field. An important form of training is "situation based." As part of it, officers must operate in the narrow circumstances officers face when

confronted with making critical choices. Officers are not expected to evaluate the totality of the circumstances, but only think in the moment. The law should not dissuade them from doing so. *See infra* Section III.

Finally, this Court's recognizing the moment of threat doctrine will not remove important restraints on officer conduct and somehow condone reckless use of force. Existing legal and professional standards apply strenuous safeguards to prevent officer misconduct, and have undergone significant enhancement in recent years. Municipal procedures allow for discipline, including termination, of officers who engage in improper use of force, and civil rights liability standards can render municipalities liable in some circumstances should they, for example, continue to retain officers with demonstrated lack of proficiency or judgment in use of force. In addition, in California in particular, extensive oversight and transparency legislation has passed to facilitate law enforcement agencies' eliminating excessive use of force. This Court's rejecting the well-reasoned moment of threat doctrine is not necessary to curb excessive force and will in fact not do so. *See infra* Section IV.

ARGUMENT

I. THE MOMENT OF THREAT DOCTRINE HELPS PROTECT LIVES OF PEACE OFFICERS AND THE PUBLIC IN THE FACE OF DEADLY THREATS AND RISKS TO THEIR PHYSCIAL SAFETY.

In *Barnes v. Felix*, 91 F.4th 393 (5th Cir. 2024), the Fifth Circuit held that the district court had properly granted summary judgment in favor of Officer Robert

Felix in a 42 U.S.C. section 1983 action against him for the shooting death of Ashtian Barnes. *Id.* at 394. Felix had stopped Barnes for toll violations when Barnes turned his vehicle back on, at which point Officer Felix jumped onto the door sill of the vehicle, shouted, and pointed his gun at Barnes; during this time, the car started to move rapidly to enter freeway traffic. *Id.* at 395. Within two seconds, the officer then shot Barnes killing him. *Id.* In affirming summary judgment, the Fifth Circuit applied the "moment of threat" doctrine, in which the reasonableness of the officer's conduct for purposes of determining a Fourth Amendment violation is viewed within the circumstances immediately leading up to the use of force. *Id.* at 397-98.

Judge Higginbotham's concurring opinion describes that several other circuits have recognized the doctrine: "[t]he Fifth Circuit's approach to the reasonableness analysis is joined by the Second, Fourth, and Eighth Circuits." *Barnes*, 91 F.4th at 400 (Higginbotham, J., concurring). But other circuits take a different approach emphasizing the totality of the circumstances. *Id.* at 400 n.13. Judge Higginbotham criticizes the doctrine, calling for this Court to reject it and take up this case for review in order to do so. *Id.* at 398-401.

But urgent practical considerations support the moment of the threat doctrine, not only to protect officers' lives in emergency situations, but also to allow them better to protect members of the public and perform more effective policing.

As this Court has previously explained, it is important that officers have the ability to "reasonably [ ] anticipate

when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). Similarly, effective law enforcement training informs officers of the potential risks and consequences of their mistakes. While the methods for use of force training continue to evolve, the law is clear that an officer may be held personally liable for using excessive force. *See*, *e.g.*, *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 73 (1st Cir. 2016). This means personal financial responsibility for causing someone harm.

This Court's recognizing the moment of threat doctrine, and in doing so, applying it to law enforcement nationwide, would bring well-needed clarity for law enforcement officers in carrying out their duties. In circuits like the Ninth Circuit that do not recognize the doctrine, law enforcement agencies in conducting training face the perplexing task of trying to explain to their officers that if a situation calls for force against a civilian, and officers use the appropriate level of force, the officers nevertheless may still suffer liability to that person for damages if the officers made a mistake leading up to the situation, i.e., culpably placed themselves in a situation calling for such use of force. Moreover, the officers cannot expect the amount of damages to be proportional to the scope of their mistake.

In terms of the deterrent purposes of allowing civil liability for officer Fourth Amendment violations, it is superfluous and redundant to apply the totality of circumstances rule to generate liability when the moment of threat doctrine would preclude it. There are already rules in place to protect citizens against warrantless searches and excessive force in violation of the Fourth

Amendment. The exclusionary rule, for example, serves to deter such violations. *See*, *e.g.*, *Hector v. Watt*, 235 F.3d 154, 159 (3d Cir. 2000) ("[T]he point of the exclusionary rule is to deter violations of the Fourth Amendment. . . ."). Personal civil liability under 42 U.S.C. section 1983 also serves a clear deterrent purpose. *See Miranda-Rivera*, 813 F.3d at 73 (discussing personal liability for excessive uses of force). Potential municipal liability under 42 U.S.C. section 1983 under the principles of *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), also deters such violations.

Indeed, public safety agencies already train their officers on the importance of making traffic stops effectively and in a way that maintains officer safety while preventing or de-escalating conflict. The agencies already also train their officers on the consequences of failing to abide by particular standards in conducting these activities. But failing to recognize the moment of threat doctrine—and instead allowing officer personal financial liability for unforeseen consequences of their tactical decisions—will not prevent the type of harm that occurred in this case. Should an agency in training tell officers that, if faced with life-threatening circumstances, they should either (1) not use reasonable force, or (2) stop and consider whether they may have technically violated the Fourth Amendment a short period of time before? From the perspective of law enforcement agencies, reflexively applying a totality of circumstances doctrine, without taking account of reasonableness and legitimacy in the moment of threat, is simply not workable. This is particularly true in high stress, and potentially life-changing moments in which law enforcement officers must focus on the situation as it unfolds.

As a practical and public policy matter, rejecting the moment of threat doctrine could also have the negative effect of privileging those who would intentionally place an officer in danger. Without the doctrine, an aggressor could more readily hold the officer liable for a constitutional violation and recover damages against them individually, even though the aggressor acted unlawfully to create a threat. For example, a uniformed officer could enter a residence in violation of the Fourth Amendment and experience an attack from the resident in the resident's effort to avoid capture. This could cause the officer to respond with force but, under the totality of the circumstances test supported by the Ninth Circuit and other circuits, the resident could still have a cause of action against the very officer the resident sought to harm. This outcome would frustrate effective policing, lower law enforcement morale, and lower the public's expectation that law enforcement can protect them.

II. REJECTING THE MOMENT OF THREAT DOCTRINE WOULD BE INCONSISTENT WITH THIS COURT'S HOLDING IN *COUNTY OF LOS ANGELES V. MENDEZ*, WHICH REJECTED THE PROVOCATION RULE—A SIMILAR DOCTRINE UNDER WHICH A PRIOR FOURTH AMENDMENT VIOLATION TRANSFORMED A LEGITIMATE USE OF FORCE INTO AN ILLEGITIMATE ONE.

The moment of threat doctrine has doctrinal support from this Court's landmark decision in *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017). In that case, this Court rejected the Ninth Circuit's "provocation rule" by holding that one Fourth Amendment violation

that contributes to a use of force cannot transform a later legitimate use of force into a Fourth Amendment violation as well. *Id*. at 422. The "provocation rule," as this Court described it, provided that "an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation." *Id.* at 425-26 (quoting the case's petition for writ of certiorari). The Ninth Circuit had applied the rule to find that officers' Fourth Amendment violation in conducting a warrantless entry of a shack in which two individuals resided rendered the officers' legitimate use of force moments later into one that violated the Fourth Amendment. *Id*. at 426. This Court rejected the doctrine and its application in the case. It emphasized prominently in the introduction to its opinion that: "A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id*. at 423.

The moment of threat doctrine applied in this case aligns exactly with this holding of *Mendez*. An officer's Fourth Amendment violation or other culpable conduct in placing themselves in a situation that turns out to present danger should not transform a use of force that is legitimate in the moment into a violation of the Fourth Amendment. In this case, Officer Felix's conduct in placing himself on the vehicle driven by Barnes as it began to move should not—under the reasoning of *Mendez*—transform his subsequent use of force to protect himself automatically into a Fourth Amendment violation. Instead, evaluating the use of force in the moment tracks the *Mendez* holding. Regardless of whether an officer engages in culpable conduct in putting themselves in a situation in which use

of force is necessary, the use of force is evaluated only in that window of time after a threat occurs.

The moment of threat doctrine also has support in this Court's authority on the general standards governing use of force. Those standards provide that officer "fear" alone does not suffice to support use of force. But the corollary also holds: facts outside the moment of threat serving to quell fear should not deprive use of force of its legitimacy when objective facts in the moment support it. This Court has described that, to evaluate the government's interest in using force, one must assess "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The second factor regarding the safety of officers or others is considered the most important. *See Smith v. City of Hemet*, 394 F.3d 689, 702 (9th Cir. 2005). Courts have described that threat to a person's safety must appear from objective factors; "[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001).

The moment of threat doctrine screens out fear-quelling facts from the split-second objective decision making that needs to occur—these could be, for example, the safe reputation of the neighborhood, the subjective or social characteristics of the suspect, the suspect's cooperativeness during the interaction up to the point of threat, and other similar factors. In doing so, it corresponds to this Court's emphasis in *Graham*

on objective criteria, and on safety as the most important factor in assessing reasonableness. If the doctrine applies, neither the officer, nor the trier of fact, will experience distraction from subjective and ultimately irrelevant facts that are external to the dispositive moment of threat.

Critics of the moment of threat doctrine have concerns that victims of improper force will lack a remedy when culpable officer conduct outside the moment of threat does lead to harm but will go unpunished—and without any relief available to the victim for the violation. But plaintiffs will still have a source of relief under state negligence principles, to the extent that the sovereign immunity laws of the jurisdiction allow it. As described above in Section II, they could also have claims under 42 U.S.C. section 1983 against the law enforcement agency itself under principles of *Monell* liability. The plaintiff would need to show, for example, that a policy or custom of the agency led to the Fourth Amendment violation and the harm they suffered. *See Monell*, 436 U.S. at 691. Thus, the moment of threat will not deprive those harmed from any source of relief under the law.

III. APPLYING THE TOTALITY OF THE CIRCUMSTANCES RULE TO OVERRIDE THE MOMENT OF THREAT DOCTRINE IS COUNTERPRODUCTIVE TO CURRENT TRAINING EFFORTS.

In recent years, law enforcement agencies, task forces, and various organizations throughout the country have been analyzing how best to deliver policing services in a way that reduces the number of police-involved shootings and use of force incidents and increases public trust.

The emerging answer for some time has been "scenario-based" training. *See*, *e.g.*, Guiding Principles on Use of Force, Police Executive Research Forum (March 2016) ("Guiding Principles"), at 64 (http://www.policeforum.org/assets/guidingprinciples1.pdf). In fact, a bill has been pending in Congress to require such training as a way to reform policing nationwide. This is S.4847 "Law Enforcement Scenario-Based Training for Safety and De-Escalation Act of 2022." (https://www.congress.gov/bill/117th-congress/senate-bill/4847/text)

According to the Police Executive Research Forum ("PERF"),

> [a]gencies should provide use-of-force training that utilizes realistic and challenging scenarios that officers are likely to encounter in the field. Scenarios should be based on real-life situations and utilize encounters that officers in the agency have recently faced. Scenarios should go beyond the traditional "shoot-don't shoot" decision-making, and instead provide for a variety of possible outcomes, including some in which communication, de-escalation, and use of less-lethal options are most appropriate. Scenario-based training focused on decision-making should be integrated with officers' regular requalification on their firearms and less-lethal equipment.

Guiding Principles, supra, at 64. Scenario-based training requires officers to remain mentally present, constantly assessing the current threat level and how to respond. For example, under the Critical Decision-Making model

proposed by PERF, officers should be asking themselves the following questions:

- Do I need to take immediate action?
- What is the threat/risk, if any?
- What more information do I need?
- What could go wrong, and how serious would the harm be?
- Am I trained and equipped to handle this situation by myself ?
- Does this situation require a supervisory response to provide additional planning and coordination?
- Do I need additional police resources (e.g., other less-lethal weaponry, specialized equipment, other units, officers specially trained in mental health issues)?
- Is this a situation for the police to handle alone, or should other agencies/resources be involved?

Guiding Principles, supra, at 82.

For police officers to use their scenario-based training skills successfully in the field, they must avoid distractions and stay in the moment. The moment of threat doctrine is tailored to this circumstance and aligns with scenario-

based officer training. By contrast, Courts declining to follow the doctrine, and instead emphasizing the totality of the circumstances including related potential Fourth Amendment violations, apply a rule that simply does not encourage officers to stay in the moment. Rather, it encourages officers who are faced with life-or-death decisions to think back on every tactical decision *leading up to* that moment. This is because even if an officer assesses their current situation correctly and determines, for example, that firing their weapon is reasonable, legal, and necessary, they nevertheless still know that if they shoot, they could in turn suffer personal liability in the millions of dollars for a previous tactical error. Instead of officers focusing their attention on suspects, the situation, and the best possible solution, the officer will be distracted and second-guessing past decisions.

In addition, refusing to recognize the moment of threat doctrine would encourage officers to attempt to minimize liability by avoiding dangerous situations in the first place, and thereby in turn discourage proactive law enforcement. Large damage awards against individuals can lead to "overdeterrence," and

> [t]he risk of overdeterrence is especially serious in the police context, even if damages are not set too high. Police officers ordinarily get no tangible benefit from the marginal "good" decision. Thus, if they are made to pay for bad ones, they can simply choose to minimize searches and arrests, or at least to avoid them in all but clear cases. This is a real problem, both because police have a great deal of discretionary authority, and because they often exercise that

> authority (and gather their information) on the street, where it is very hard to monitor them. All of which makes it easy for officers, all too often, to "drive on by"—to choose not to search or arrest at all. This means that overdeterrence probably exists even if damages are assessed accurately; a bias toward overvaluation will only aggravate the problem.

William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 903-04 (1991). Thus, instead of encouraging better policing, refusing to recognize the moment of threat doctrine will encourage less policing, or distracted policing.

IV. EXISTING STANDARDS, AND RECENT REFORMS IN LAW ENFORCEMENT, ALREADY HELP PREVENT EXCESSIVE USE OF FORCE

Critics of the moment of threat doctrine may also express concerns that this Court's applying the doctrine will allow individual officers unrestrained use of force and will thus increase excessive force incidents nationwide. As described above, however, the doctrine aligns with existing use of force authority and also law enforcement training methods designed to enhance decision making in the instant, and in fact would reduce excessive force incidents. But even aside from this, the law and standards government officer conduct already serve amply to curb excessive force.

First, law enforcement agencies can and must discipline peace officers for improper force if it occurs. Memoranda of Understanding authorize termination

and other discipline of officers for just cause. Although, as government entities, law enforcement agencies must comply with due process standards in disciplining officers, officers who commit misconduct have no constitutional right to keep their job if those procedural standards are met. *See*, *e.g.*, *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 215 (1975). Also, law enforcement agencies can have liability for federal civil rights violations if their customs and policies have a sufficient causal nexus to officers remaining in positions to use excessive force when those officers have sufficiently demonstrated a lack of ability to restrain themselves from harming the public. *See Monell*, 436 U.S. at 691; *see*, *e.g.*, *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1016, 1027-29 (9th Cir. 2015) (potential *Monell* liability exists based in part on failure to investigate or discipline officers for incidents of excessive force).

Reforms to policing in the last several years have greatly augmented protections against police officer misconduct. For example, in response to recent increased public demands for accountability in law enforcement, the California Legislature has passed laws that fundamentally alter the practices for employment, investigation, discipline, and certification of peace officers. Senate Bill 2 ("SB 2") passed in 2022 converted the Commission on Peace Officer Standards and Training ("POST") from an agency that developed training for law enforcement agencies to a licensing agency with the mission to regulate, including the power to decertify (i.e., de-license) peace officers from working in the profession ever again, when they engage in serious misconduct. Importantly, POST heavily relies on the administrative Internal Affairs investigations that employing agencies are required to

conduct in fulfilling POST's new role of regulating the certification of law enforcement officers.

Further, in California, two new transparency statutes, Senate Bill 1421 ("SB 1421") (2019) and Senate Bill 16 ("SB 16") (2021) made certain records relating to eight categories of officer misconduct that were previously confidential to now constitute matters that must timely be disclosed in response to requests. Cal. Penal Code § 832.7(b)(1)(A)(iii)-(iv), (B)-(E). Matters that must now be disclosed include any record relating to the report, investigation, or findings of "(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer," "(ii) An incident involving the use of force against a person by a peace officer or custodial officer that resulted in death or in great bodily injury," "(iii) A sustained finding involving a complaint that alleges unreasonable or excessive force," and "(iv) A sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive." *Id.*, § 832.7(b)(1)(A).

Police do not engage in use of force with impunity just because there is no Fourth Amendment violation found so as to generate 42 U.S.C. section 1983 liability. Rather, there exist many other sources of relief, punishment, deterrence, and correction better tailored to support effective policing and the physical safety of officers and the public.

CONCLUSION

For the foregoing reasons, LACPCA respectfully requests that this Court affirm the decision of the Court of Appeals and recognize the moment of threat doctrine. The doctrine rests on sound legal principles and provides significant practical benefits for law enforcement and the public.

Respectfully submitted,

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