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

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF SERGEANT FELIX

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INTEREST OF AMICI CURIAE

A nation of approximately 335 million people,[1] America depends on the commitment of the nearly 650,000 police and sheriff's patrol officers who "[m]aintain order and protect life and property by enforcing local, tribal, state[,] or federal laws and ordinances."[2] Making less than the median household income in 2023, 136 of these brave men and women never made it home—including "37 [who] died in traffic-related incidents."[3] Just twelve days ago, Officer Jacob Candanoza—just shy of his twenty-ninth birthday and with a wife and young daughter at home—was shot and killed after he stopped a motorist for driving with expired license plates in Terrell, Texas.[4] His senseless death, and the dozens of others this year alone just like it, demonstrate that traffic stops can be anything but routine.

Amici curiae are the States of Texas, Alabama, Arkansas, Georgia, Indiana, Iowa, Louisiana, Mississippi, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, and Virginia, which appear

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[1] *Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/ (last visited Dec. 16, 2024).

[2] *Occupational Employment and Wage Statistics: 33-3051 Police and Sheriff's Patrol Officers*, U.S. BUREAU OF LABOR STATISTICS (May 2023), https://www.bls.gov/oes/2023/may/oes333051.htm#(3) (last visited Dec. 16, 2024).

[3] N'dea Yancey-Bragg, *Fewer Police Officers Died in the Line of Duty in 2023, but 'Scary Number' Were Shot: Study*, USA TODAY (Jan. 11, 2024, 1:09 PM ET), https://perma.cc/6QDW-LQU4; *see also Officer Deaths by Year*, NAT'L L. ENF'T OFFICERS MEM'L FUND (Apr. 29, 2024), https://perma.cc/QMV4-2FFQ (reflecting 2023 to have the fewest officer deaths since 1959).

[4] Peyton Yager, *Community Honors Fallen Terrell Police Officer Jacob Candanoza*, FOX4 KDFW (Dec. 11, 2024, 1:25 PM CST), https://perma.cc/Z7BZ-JYP8.

before this Court both as the employers of tens of thousands of law-enforcement officers and as sovereigns. Petitioner's theory in this case, taken to its logical conclusion, will expose any law-enforcement officer accused of excessive force to life-disrupting litigation if a creative plaintiff's lawyer can so much as allege that the officer in some way contributed to the risk requiring the use of force. As employers who often must foot the bill for lawyers, experts, and ultimately judgments, Amici States have a direct financial interest in whether their employees' choices during exigent circumstances will be subject to second-guessing by those far removed in both time and space from any real danger. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985). Perhaps more fundamentally, as sovereigns, Amici States have an interest in—indeed, an obligation to protect—the safety of their citizens and the orderly functions of their communities, which will be harmed if such excessive liability leads to the "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

STATEMENT

Shortly before 3 p.m. on Thursday, April 28, 2016, Sergeant Roberto Felix, Jr., "initiated [a] traffic stop" on "a prohibited vehicle" traveling southbound on the Sam Houston Tollway, Pet.App.18a; J.A.174, a stretch of road where drivers reguarly exceed the posted speed limt of 65 mph. A twenty-year veteran of the Harris County Constable's Office, Sergeant Felix became suspicious when, rather than provide his license and insurance upon request, the driver—Ashtian Barnes—began "flipping through" a "handful of papers" without "actually looking at them," J.A.7, and insisted the requested

documentation "might" be "in the trunk," Pet.App.3a; J.A.8.

A dashcam video shows the confusion that followed. J.A.13. Barnes initially cooperated by "turn[ing] off the vehicle" and "placing his keys near the gear shift." Pet.App.3a. But he soon began engaging in what Sergeant Felix would later describe as potentially "deceptive behavior," which could have shifted the officer's "focus away from what[] [was] actually going on inside the vehicle," J.A.58-59, as Barnes tried to "access a weapon," J.A.8. During the relatively brief encounter, Barnes ignored multiple instructions from Sergeant Felix to "stop digging around" the passenger compartment, Pet.App.26a; J.A.58, and to "let [Felix] see [Barnes's] hands, J.A.168; *see* J.A.13.

Concerned with his own safety and needing to "maintain visual" as Barnes continued to rifle through materials in the front of the car, J.A.59, 168, Sergeant Felix "opened the driver's side door," and leaned the left side of his body into the vehicle. J.A.8-9. Barnes then "grabbed his keys," "turned on the vehicle," and "put the car in drive," with Sergeant Felix standing between the car frame and the door, which was itself only inches from a concrete barrier dividing opposing lanes of traffic. *See* J.A.8-9; J.A.13.

Feeling the "inertia of the vehicle creating pressure against [his] torso" and concerned that he might be dangerously "pinned" against the vehicle as it started to move into freeway traffic, J.A.9—a concern shared by his dispatch supervisor who watched in horror as events unfolded on surveillance cameras, J.A.3—Sergeant Felix "jumped onto the door sill and held on so [he] wouldn't get run over or dragged," J.A.9. When Barnes accelerated rather than stopping the vehicle as commanded,

J.A.9, Sergeant Felix discharged his service weapon twice, striking Barnes in the chest, J.A.9-10. Barnes died before he could be transported to the hospital. Pet.App.19a; D. Ct. Dkt. 15, Ex. 5 at 14.

Sergeant Felix was cleared of any wrongdoing both by the Constable's Office and by a Harris County Grand Jury. Pet.App.4a. Nevertheless, Barnes's mother initiated this lawsuit seeking to hold both Sergeant Felix and Harris County liable under 42 U.S.C. § 1983, alleging that Sergeant Felix violated Barnes's Fourth Amendment right against excessive force. *See* Compl. ¶¶ 35-42, 46-74.

Recognizing that Sergeant Felix was "forced to make [a] split-second judgment[] in circumstances that [were] tense, uncertain, and rapidly evolving," Pet.App.25a, the district court found that it was not unreasonable for Sergeant Felix to discharge his weapon while "still hanging onto the moving vehicle," Pet.App.29a. The Fifth Circuit agreed. Pet.App.8a. One member of the panel did so begrudgingly, however, asserting that court's prior decisions required the panel to give insufficient weight to "Felix's role in escalating the encounter." Pet.App.15a-16a (Higginbotham, J., concurring in his own opinion).

SUMMARY OF ARGUMENT

I. Contrary to a central thesis of Petitioner's brief, it is undisputed that whether a particular use of force is reasonable depends on "the totality of the circumstances." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation marks omitted). Such an analysis, however, requires a court to "balanc[e] the extent of the intrusion aginst the need for it." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). As a result, courts must consider danger to innocent bystanders, the "relative culpability" of a suspect who is creating the danger against other

bystanders, and whether that threat to innocents is "imminent." *Scott v. Harris*, 550 U.S. 372, 384 (2007). They must also take note of any unique threats, such as those posed to an officer on foot when such a suspect is "set on avoiding capture through vehicular flight." *Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) (per curiam). Crucial here, this calculus inherently changes over time even within a single encounter between a suspect and police. *See City & County of San Francisco v. Sheehan*, 575 U.S. 600, 611-13 (2015).

And contrary to Petitioner's suggestion, courts adopting what Judge Higginbotham dubbed the "moment of threat doctrine"—including the Fifth Circuit below—follow this analsyis. For example, pulling directly from this Court's caselaw, the Fifth Circuit requires that lower courts consider "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Romero v. City of Grapevine*, 888 F.3d 170, 177 (5th Cir. 2018) (quoting *Hogan v. Cunningham*, 722 F.3d 725, 734 (5th Cir. 2013) in turn quoting *Graham*, 490 U.S. at 396). Courts must also "'consider all of the circumstances leading up to'" the moment deadly force is used "because they inform the reasonableness of [the officer's] decisionmaking." *Id.* (quoting *Mendez*, 823 F.3d at 333).

True, the Fifth Circuit's verbiage may occasionally differ from Petitioner's preferred formulation, as well as that of its amici. *E.g.*, U.S.Br.16-17. But the substance is the same: Factors like imminence, flight, and threats to others are all key considerations to determine whether excessive force was used. Because this Court "review[s] judgments of the lower courts, not statements in their

opinions," *Amgen Inc. v. Sanofi*, 598 U.S. 594, 615 (2023), the Court should not fundamentally rewrite how the actions of police officers in exigent circumstances are analyzed based on concerns over loose language.

II. Petitioner's efforts to rewrite the excessive-force doctrine are particularly concerning because they would insert a level of subjectivity and hindsight bias that was once a prominent feature of this Court's qualified-immunity jurisprudence. *Harlow*, 457 U.S. at 815. This Court, however, deliberately "purged" those inquiries, *Mitchell*, 472 U.S. at 517, precisely because they "inherently require[d] resolution by a jury," vitiating the purpose and benefits of the immunity, *Harlow*, 457 U.S. at 816. Petitioner and her amici ask this Court to require by way of the Fourth Amendment what the Court refused to mandate by way of qualified immunity: Specifically, they invite the Court to judge Sergeant Felix's conduct *not* based on what a reasonable officer would have known at the time he discharged his weapon but based on the "historical facts of which the officer is aware." U.S.Br.10. As that bears a remarkable resemblance to the "subjective" element that used to permeate the qualified-immunity inquiry, the Court should decline the request. *See Harlow*, 457 U.S. at 815 (noting that the "subjective element" was assessed based on what an official "knew or reasonably should have known").

III. Even though Petitioner has not phrased her request as an effort to revisit qualified immunity, it would cause the same social harms—and it would do so when state and local police forces are least able to take the hit. Although rarely reported, police forces across this country are in crisis. *See, e.g.*, Exec. Order. No. JML 24-22 (La. Feb. 15, 2024), https://perma.cc/23S2-4BH4

(declaring state of emergency due to police shortage). A decline in public confidence in the police has led to profound problems with recruitment, which—in a dismal spiral—can lead to further declines in public confidence. The Court should be cautious before adopting an overbroad reading of the Fourth Amendment which would wrongly expand police liability, further exacerbating this cycle.

ARGUMENT

I. Petitioner Misunderstands Excessive-Force Jurisprudence.

Sergeant Felix is right (at 14) to criticize Petitioner for "spend[ing] much of her brief attacking a strawman"—albeit one that drew life from Judge Higginbotham's caricature of his own circuit's precedent regarding what he himself dubbed the "moment of threat doctrine." Pet.App.10a.[5] This Court has recognized that when the circumstances in which officers find themselves are "tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 397, "[t]he calculus of reasonableness," must evolve with the moment, *id.* at 396; *Sheehan*, 575 U.S. at 612 (quoting *Heien v. North Carolina*, 574 U.S. 54, 61 (2014)). In such an evolving situation, the reasonableness inquiry necessarily focuses on the moment of the alleged excessive force—as at least seven other circuits have held.[6] Contrary to the suggestion by Petitioner and her

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[5] A Westlaw search across all federal courts of appeals on the date Sergeant Felix's brief was filed for the phrase "moment of threat doctrine" returns only one result: the opinion below. Even "moment of threat" returned only nine opinions.

[6] *See, e.g.*, *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, 642 (4th Cir. 1996); *Thomas v. City of Columbus*, 854 F.3d 361, 356-66 (6th Cir. 2017); *Est. of Biegert by Biegert*

amici, however, recognizing that fact does *not* "categorically preclude any possible consideration of police conduct prior to the moment of a threat." U.S.Br.20; *see also, e.g.*, Pet.24.

A. This Court examines reasonableness "at the moment" force is used.

As this Court has "often said," "the ultimate touchstone of the Fourth Amendment . . . is reasonableness." *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)); *see also, e.g.*, *Lange v. California*, 594 U.S. 295, 301 (2021) (same). Because "[t]o be reasonable is not to be perfect," the "Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" *Heien*, 574 U.S. at 60-61 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)); *see also, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 206 (2001). At all times, courts are expected to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Garner*, 471 U.S. at 8.

1. In examining whether an officer has exceeded the leeway afforded by the Fourth Amendment, courts look to "the totality of the circumstances," *Graham*, 490 U.S. at 396, including "the manner in which a search or seizure is conducted," *Garner*, 471 U.S. at 7-8. And specifically, "[w]ith respect to a claim of excessive force," Petitioner's own primary authority makes clear that "the same standard of reasonableness *at the moment* applies"

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v. Molitor, 968 F.3d 693, 698 (7th Cir. 2020) (Barrett, J.); *Frederick v. Motsinger*, 873 F.3d 641, 645 (8th Cir. 2017) (quoting *County of Los Angeles v. Mendez*, 581 U.S. 420, 429 n* (2017)); *Carr v. Tatangelo*, 338 F.3d 1259, 1270 (11th Cir. 2003).

precisely because "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Graham*, 490 U.S. at 396 (emphasis added) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). This rule prevents a plaintiff, acting with the benefit of hindsight, from "establish[ing] 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.

By necessity, this analysis is time specific because—as Petitioner seems to acknowledge (at 16) and courts have repeatedly recognized—"police officers are often forced to make split second judgments . . . about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396. The Court has similarly warned against "second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (per curiam). Accordingly, under this Court's caselaw, reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

In other words, officers may make mistakes of fact or law without violating the Fourth Amendment so long as those mistakes were objectively reasonable based on the information available to the officer *at the time. See Heien*, 574 U.S. at 66-67. This inquiry "do[es] not examine the subjective understanding of the particular officer involved." *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

2. Although Petitioner seeks (at 44) to dismiss this Court's choice of time referent as "stray language," the

principle that the Fourth Amendment examines the reasonableness of an officer's actions "at the time" of the use of force pervades this Court's caselaw in the excessive-force,[7] unreasonable seizure,[8] and qualified-immunity contexts.[9] *See also* Resp.Br.14 (explaining how the Fourth Amendment does not prohibit "unreasonable police conduct writ large").[10]

This too makes sense. After all, in "the balancing of competing interests," *Garner*, 471 U.S. at 8, few (if any) interests are weightier than that of the lives of innocent officers and bystanders. Because the level of risk changes over time, the Court recognized that the Fourth Amendment's reasonableness standard accounts for "exigent circumstances," involving automobiles including to prevent imminent injury." 547 U.S. at 401-02; *see also, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 179 (2017) (Breyer, J., dissenting). That is, this "Court has held that the search of an automobile can be reasonable without a warrant" "because a 'vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be

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[7] *E.g.*, *Mullenix v. Luna*, 577 U.S. 7, 17 (2015) (per curiam) (citing *Long v. Slaton*, 508 F.3d 576, 581 (11th Cir. 2007), for the proposition that "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect"); *accord Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014).

[8] *E.g.*, *Saucier*, 533 U.S. at 206; *see also, e.g.*, *Navarette v. California*, 572 U.S. 393, 411 (2014) (Scalia, J., dissenting); *Hudson v. Michigan*, 547 U.S. 586, 623 (2006); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

[9] *E.g., Kisela v. Hughes*, 584 U.S. 100, 101 (2018); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

[10] To the extent Petitioner attempts to rely (at 23) on perceived daylight between the unreasonable-search and excessive-force contexts, that argument is foreclosed. *Saucier*, 533 U.S. at 206; *Rodriguez*, 497 U.S. at 188.

sought.'" *Collins v. Virginia*, 584 U.S. 586, 591 (2018) (quoting *Carroll v. United States*, 267 U.S. 132, 153 (1925)).

The Court has expressly declined to hold an officer liable when she uses deadly force out of "fear[] for the other officers on foot who[m she] believed were in the immediate area," and "for the occupied vehicles in [the] path" of a suspect fleeing in a moving vehicle. *Brosseau*, 543 U.S. at 196-97. This makes sense given that the average weight of a passenger vehicle ranges between 2,500 and 6,000 pounds—enough (and then some) to crush a human on foot.[11] The driver of a motor vehicle is thus far from the "unarmed, nondangerous" teenager in *Garner* to which Petitioner compares her deceased son. *Compare* 471 U.S. at 11, *with Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005) (explaining when a motor vehicle is itself a deadly weapon for purposes of the Texas Penal Code); Tex. Penal Code § 22.02(b)(1) (making assault with a deadly weapon a class 1 felony).

That is not to say that the life and safety of the person subject to deadly force is not *also* a vital interest. *See Garner*, 471 U.S. at 9. However, courts must weigh the "relative culpability" of the person creating the danger against other bystanders. *Scott*, 550 U.S. at 384. This too changes over time—both as a matter of fact and as a matter of police perception. After all, seemingly "routine" traffic stops have led to the arrests of dangerous fugitives, including murderers.[12] And Officer Candanoza's

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[11] *See* Dustin Hawley, *Average Weight of a Car*, J.D. POWER (Dec. 11, 2022), https://www.jdpower.com/cars/shopping-guides/average-weight-of-a-car/.

[12] *See* Terri Jo Neff, *Fugitive Murderer Captured After Benson Area DPS Trooper Stops Van for Cracked Windshield*, NEWS-SUN (Nov. 21, 2024), https://perma.cc/Q5MM-NVWY; Nicholas McEntyre, *Fugitive Migrant Woman Wanted for Murder Cries as*

daughter is no less orphaned because her father stopped his murderer's car that night for an expired license plate rather than a *prior* violent felony. *Supra* p.1. It is precisely because traffic stops all too often go wrong all too quickly that police officers must remain vigilant every time they pick up their badge,[13] and why this Court does not "second-guess[]" an officer's on-the-scene judgment. *Ryburn*, 565 U.S. at 477.

B. The Fifth Circuit's rule is consistent with this Court's caselaw.

Properly understood, the Fifth Circuit's refusal to second-guess Sergeant Felix's decision to discharge his service weapon while "still hanging onto the moving vehicle and believe[ing] it would run him over," Pet.App.8a, is an application of this precedent. As the Court explained in *Scott,* the interest analysis that favors an unarmed, non-dangerous suspect fleeing the scene of a misdemeanor does not apply where, as here, a suspect has "intentionally placed himself and the public in danger"—for example, by "unlawfully engaging in [] reckless, high-speed flight" in an automobile while "ignor[ing] [the

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She's Busted During Texas Traffic Stop, NEW YORK POST (May 29, 2024), https://perma.cc/5JRV-DNWR; Daniel Duric, *Massachusetts Trooper's Traffic Stop Leads to Arrest of Wanted MS-13 Fugitive*, NEWPORT DISPATCH (Feb. 26, 2024), https://perma.cc/GY8L-Y7B5; *Atlanta Murder Suspect on the Run for 28 Years Nabbed by Oconee County Deputies*, FOX 5 ATLANTA (Aug. 19, 2022), https://perma.cc/7JLL-GDEU; Natasha Velez, *Cops Catch Fugitive with Same Name as Murder Suspect in Routine Traffic Stop*, NEW YORK POST (Feb. 19, 2015), https://perma.cc/99NG-7GH5.

[13] *See, e.g.*, *More Details Revealed After CPD Officer Killed in Line of Duty During Traffic Stop*, NBC CHICAGO (Nov. 5, 2024), https://perma.cc/RQS9-LVCP; Capi Lynn, *Salem Officer Shooting Shows 'There's No Such Thing as a Routine Traffic Stop'*, STATESMAN JOURNAL (May 23, 2019), https://perma.cc/EX25-9ERA.

officer's] warning to stop." 550 U.S. at 384. In that circumstance, this Court had "little difficulty in concluding it was reasonable" for an officer to use deadly force to end the threat. *Id.* Although admittedly a closer question, the same principle has precluded liability at the *outset* of such a chase even though the primary party at risk is a police officer who could, in theory, have taken other action that might have de-escalated the situation. *Brosseau*, 543 U.S. at 598. The Fifth Circuit has correctly recognized this rule as a general matter and properly applied it here.

1. As a general matter, when "evaluating whether an officer acted reasonably," the Fifth Circuit "consider[s] 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Romero*, 888 F.3d at 177 (quoting *Hogan v. Cunningham*, 722 F.3d 725, 734 (5th Cir. 2013), in turn quoting *Graham*, 490 U.S. at 396). And it has specifically recognized that a "court '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.'" *Id.* at 176 (quoting *Mendez v. Poitevent*, 823 F.3d 326, 333 (5th Cir. 2016)). Looking at the totality of the circumstances, the Fifth Circuit has reiterated that "[t]he use of deadly force violates the Fourth Amendment unless 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Id.* at 176 (quoting *Garner*, 471 U.S. at 11).

True, the Fifth Circuit has held that "the focus" of the excessive-force "inquiry should be on the act that led the officer to discharge his weapon." *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020) (cleaned up). But this

language refers to one of two concepts—neither of which remotely suggests that (notwithstanding its clear holding to the contrary) the Fifth Circuit has "circumscrib[ed] the reasonableness analysis of the Fourth Amendment to the precise millisecond at which an officer deploys deadly force." *Contra* Pet.App.12a (Higginbotham, J., concurring).

First, most often this language is used to describe how the analysis takes the "perspective of a reasonable officer on the scene, rather than judge with the 20/20 vision of hindsight." *Hanks v. Rogers*, 853 F.3d 738, 745-46 (5th Cir. 2017) (cleaned up). For example, the Fifth Circuit has held that deadly force may be reasonable "when a suspect moves out of the officer's line of sight" where "that the officer could reasonably believe the suspect was reaching for a weapon"—even if the suspect turned out to be unarmed. *Argueta v. Jarandi*, 86 F.4th 1084, 1091 (5th Cir. 2023). This version of the moment-of-threat doctrine—if it can be given such a sobriquet—derives its origin directly from *Graham*. 490 U.S. at 396.

Second, the Fifth Circuit has occasionally cited the "Second and Eighth Circuits' view that violations before [a] seizure are irrelevant." *Hover v. Brenner*, No. 99-60462, 2000 WL 1239118, at *2 (5th Cir. 2000) (per curiam) (applying *Salim*, 93 F.3d 86; *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995)); *cf. Lytle v. Bexar County, Tex.*, 560 F.3d 404, 415 (5th Cir. 2009) (applying *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993)). But even those cases "still slosh[ed their] way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383. The court merely found the earlier actions of the police were irrelevant *under the facts of the case*. For example, the facts of *Hover* showed more than one relevant seizure. 2000 WL 1239118, at * 2. Under such circumstances, like those

confronted by this Court in *Sheehan*, these intervening events fundamentally alter both the reasonableness and the proximate-cause analysis. 575 U.S. at 611-12.

2. So too in this case. It was Barnes who created the danger by ignoring Sergeant Felix's instruction to step out of the vehicle, choosing instead to restart a parked car and attempt to drive into a busy freeway while his driver door and trunk were open and a police officer was pinned between the vehicle and driver-side door, mere inches from a concrete barrier. Resp.Br.6-11. Due to Barnes's "unlawfully engaging in the reckless" behavior, *Scott*, 550 U.S. at 384, Sergeant Felix had to make a split-second "choice between two evils," *id.*: jump onto the sill of the car being driven by someone who smelled strongly of marijuana or risk being crushed either by the car itself or the nearby concrete barrier. Resp.Br.6-11. Which of those represented the safest option is debatable. Whether, when it comes to the "balancing of competing interests," Sergeant Felix was entitled to weigh his own safety is not. *Garner*, 471 U.S. at 8, 11.

Because Sergeant Felix had "probable cause to believe that [Barnes] pose[d] a threat of serious physical harm, either to [Felix] or to others," *Garner*, 471 U.S. at 11, it was entirely consistent with this Court's caselaw for the Fifth Circuit to hold that his use of deadly force was reasonable under the Fourth Amendment. For example, in *Scott*, the Court had "little difficulty" in finding that the officer's actions of taking out an automobile that had engaged in a 10-mile, high-speed pursuit because the driver "posed an actual and *imminent* threat to the lives" of innocent bystanders and the officers in pursuit. 550 U.S. at 384. In *Brosseau*, the Court declined to hold an officer liable even at the outset of the pursuit due to a perceived threat to nearby pedestrians. *See* 543 U.S. at

204 (Stevens, J., dissenting) (noting that the driver "had not threatened anyone with a weapon, and [the officer] did not shoot in order to defend herself").

Here, as in this Court's prior cases, choices by Barnes—not Sergeant Felix—to restart the car after having removed the key from the ignition put a police officer in danger, justifying the use of force even if Sergeant Felix could have (theoretically) avoided the danger by taking an alternative course of action.

C. Adopting Petitioner's theory would rewrite how courts across the country analyze the use of force.

1. Although Petitioner seeks to paint the Fifth Circuit's decision as the outlier, it is Petitioner's theory that would alter how courts view the Fourth Amendment across the country. Although they vary somewhat in the way they describe their tests, lower courts have been consistent: Whether an officer's use of force satisfies the Fourth Amendment turns on whether it was "objectively reasonable," *Napier*, 187 F.3d at 188, based on "circumstances that [the officer] faced in the moment he decided to use force," *Thomas*, 854 F.3d at 365. Because the officer is judged by the reasonable officer standard, subjective mistakes in judgment that an officer may make in those pre-force moments do not "render[] the officers' subsequent use of force unreasonable." *Est. of Biegert*, 968 F.3d at 698 (Barrett, J.); *see also, e.g.*, *Carr*, 338 F.3d at 1270; *Frederick*, 873 F.3d at 645-46 (quoting *Mendez*, 581 U.S. at 429).

For example, the First Circuit has clarified that, though it does not subscribe to the idea that a court examines "reasonableness *only* at the moment of the shooting," the mere fact that "the officers were the ones to blame for creating those exigent circumstances" does not

"deprive their later conduct in response to [a threat] of its reasonableness." *Napier*, 187 F.3d at 188 (emphasis added). Put another way, the Fourth Amendment does not convey upon citizens the right to put an officer in mortal danger just because he fails during initial stages of the encounter to scrupulously obey police procedures.

The Fourth and Sixth Circuits have also stated that to "avoid hindsight bias and try to place ourselves in the heat of the moment," a court should consider only "whether the hypothetical reasonable officer in that situation would have had 'probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others.'" *Stanton v. Elliott*, 25 F.4th 227, 233 (4th Cir. 2022) (alteration in original) (quoting *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005), in turn quoting *Garner*, 471 U.S. at 11). As discussed above, because threats change over time, "[t]hat determination must focus on the moment that deadly force was used, not the whole episode." *Id.*; *accord Thomas*, 854 F.3d at 365-66 (finding the use of deadly force to be "objectively reasonable" if "a reasonable officer would perceive a significant threat to his life" in "the moment he decided to use force").

To be sure, following an old Eighth Circuit opinion, the Second Circuit has stated that an officer's "actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force." *Salim*, 93 F.3d at 92. But as Sergeant Felix points out (at 34), "petitioner and her amici could not find a single" case applying this decades-old precedent in the extreme way she posits. Instead, the statement that the evidence in question was "irrelevant" is best understood—as in the Fifth Circuit cases discussed above (at Part II.B)—to refer to the facts and

circumstances *of that case*. In *Salim*, an officer allegedly placed himself in danger by "failing to carry a radio or call for back-up" during the initial stages of a confrontation. 93 F.3d at 92. Such lapses in judgment bear little factual relation, however, to the question of whether an officer "being pummeled by more than five people" reasonably discharged his weapon "when the possibility that [one of his assailants] might gain control of the officer's weapon was imminent." *Id.* at 91-92.

Contemporaneously with this Court's decision in *Sheehan*, the Eighth Circuit has similarly explained that it does examine the entire episode between a suspect and police. But "'the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional.'" *Frederick*, 873 F.3d at 645-46 (quoting *Mendez*, 581 U.S. at 428). The Eleventh Circuit follows a similar rule. *See Carr*, 338 F.3d at 1270; *see also Knight ex rel. Kerr v. Miami-Dade County*, 856 F.3d 795, 813 (11th Cir. 2017).

That is, a close reading of their opinions demonstrate that most circuits actually agree with the Fifth Circuit in this case: Under this Court's caselaw, "[i]f the use of deadly force was objectively reasonable under *Graham*, based on what the officers knew *when the force was applied*, 'it may not be found unreasonable by reference to some separate constitutional violation.'" *Frederick*, 873 F.3d at 645 (emphasis added) (quoting *Mendez*, 581 U.S. at 429 n.*).

2. By contrast, only the Ninth and Tenth Circuits truly follow the rule that Petitioner advocates the Court adopt here: that an otherwise reasonable use of force can somehow become *unreasonable* if the officer in any way contributes to the need for force. *See* Resp.Br.37. Such a

rule, however, inherently invites the very types of Monday morning quarterbacking this Court has forbidden.

Every police interaction—including every traffic stop—creates a number of risks. The police officer may pull someone over for a broken window only to find he has detained a fugitive wanted for murder. *Supra* n.12. A suspect might flee, *e.g.*, *Mullenix*, 577 U.S. at 8, or pull a weapon, *e.g.*, *Yager*, *supra*. If he flees, he might lead officers on a chase "swerving through traffic at high speeds," *Plumhoff*, 572 U.S. at 769, or down crowded city streets.[14] The driver may or may not have a passenger. *E.g.*, *Ombres v. City of Palm Beach Gardens*, 788 F. App'x 665, 666 (11th Cir. 2019) (per curiam).

Each of these scenarios—and countless others—carry its own unique risks. *Which* risk will eventuate (and whether the officer's otherwise reasonable conduct contributed to that risk) is only knowable after the fact. And as the closely related "state-created danger doctrine" demonstrates,[15] determining whether the relevant state actor was sufficiently culpable to impose liability typically turns on whether the relevant official had knowledge "of the substantial risk of serious harm, not of the certainty of that harm." *Kedra v. Schroeter*, 876 F.3d 424, 447 (3d Cir. 2017) (emphasis omitted); *see generally McClendon v. City of Columbia*, 305 F.3d 314, 324-26 (5th Cir. 2002) (per curiam) (en banc) (requiring actual

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[14] *E.g.*, Tara Brolley, *Police Chase Ends with Car Crashing into Building in Downtown Austin*, CBS Austin (Mar. 17, 2023 10:50 AM), https://perma.cc/4UXT-Y7D6.

[15] Although technically separate, plaintiffs often seek to "blend" the two doctrines where the allegation is that an officer has contributed to the risk to which he responded with deadly force. *E.g.*, *Neuberger v. Thompson*, 124 F. App'x 703, 706 (3d Cir. 2005) (discussing *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999), and *Grazier ex rel. White v. City of Philadelphia*, 328 F.3d 120 (3d Cir. 2003)).

knowledge for the doctrine to apply). Neither is permissible under this Court's well-established Fourth Amendment precedent, which Petitioner nowhere asks this Court to revisit.

II. Petitioner's Theory Would Vitiate Qualified Immunity in the Fourth Amendment Context.

Petitioner assures the Court (at 39-40) that her approach "will not prevent officers from defending themselves or the public" because "officers receive the added protection of qualified immunity." However, Petitioner's theory undermines qualified immunity itself, thereby compromising its ability to prevent the "substantial social costs" that arise from "permitting damages suits against government officials." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow*, 457 U.S. at 814).

A. As it exists today, qualified immunity shields officers from suit unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. As this Court has repeatedly emphasized, to be clearly established, the law must be "particularized to the facts of the case," so that the legal question before the officer is "beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam); *see also, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (cleaned up). Courts may "not . . . define clearly established law at a high level of generality," *Sheehan*, 575 U.S. at 613 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011))—particularly "in the Fourth Amendment context, where the Court has recognized that [i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts," *Mullenix*, 577 U.S. at 12; *see also, e.g.*, *Sheehan*, 575 U.S. at 613 (noting

that "qualified immunity is no immunity at all" if defined at that level of generality).

Qualified immunity exists not only to protect officers from "liability for money damages," but also from "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526. "[E]ven such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government." *Id.* (cleaned up). Further, on a personal level, a full and public trial process threatens to wreak social and reputational havoc in an individual officer's life. Such possibilities cause officers to fear "being sued, even when they [are] confident that no judgment [will] be satisfied from their personal resources." John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 51 n.17 (1998). That is why qualified immunity protects officers from the "harassment" and "distraction" of suit. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Thus, as the Court explained in *Wyatt v. Cole*, 504 U.S. 158 (1992), "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions," including by "preserv[ing the government's] ability to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Id.* at 167. Qualified immunity thus "acts to safeguard government, and thereby to protect the public at large." *Id.* at 168.

Although qualified immunity is far from uncontroversial, Congress has pointedly rejected efforts to do away

with it. *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018). This Court too has declined to overrule qualified immunity even when the issue was directly presented. *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting); *accord, e.g.*, *District of Columbia v. Wesby*, 583 U.S. 48 (2018) (applying the doctrine unanimously). After rejecting frontal attacks on qualified immunity, the Court should not now adopt a rule through the backdoor that would accomplish the same functional outcome.

B. Petitioner insists (at 40) that qualified immunity will remain a robust protection under her theory, allowing cases to be "quickly" resolved. It is difficult to see how. This Court has recognized that "*Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Kisela*, 584 U.S. at 105. But that is because, like qualified immunity itself, the inquiry is deliberately and self-consciously objective. This was not always the case: Until *Harlow*, this Court "underst[ood] qualified immunity as an affirmative defense that had both an 'objective' and a 'subjective' aspect." *See Crawford-El v. Britton*, 523 U.S. 574, 603 (1998) (Rehnquist, C.J., dissenting) (tracing this history) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). *Harlow* jettisoned the subjective inquiry because it "inherently requir[ed] resolution by a jury," making it impossible to defeat "insubstantial claims" and imposing costs that were "peculiarly disruptive of effective government." 457 U.S. at 817; *see also Mitchell*, 472 U.S. at 517.

As discussed above, the rule that Petitioner advocates would resurrect the very "sort of Monday morning quarterbacking" and subjective inquiry that "qualified immunity precedent forbids"—albeit under the guise of

a Fourth Amendment analysis rather than directly in the immunity inquiry. *Harmon v. City of Arlington*, 16 F.4th 1159, 1165 (5th Cir. 2021).

To the extent there were any doubt about the implications of Petitioner's arguments, they are eliminated by a close examination of her amici. For example, the United States asks this Court (at 6) to assume that "[a] reasonable officer on the scene is aware of not only the circumstances in the precise moment when force is used, but also historical facts leading up to that moment." At no point does the United States say whether the facts in question stretch back a minute, an hour, a month, a year, or a decade. To the contrary, the United States gives up the game when it extends its rule to "historical facts of which the officer *is* aware." U.S.Br. 10 (emphasis added). This is precisely the type of "subjective component[]" of "which this Court purged qualified immunity doctrine" when it held that "'governmental officials performing discretionary functions, generally are shielded from liability'" based on an objective standard of what "'a reasonable person would have known.'" *Mitchell*, 472 U.S. at 51 (quoting *Harlow*, 457 U.S. at 818).

C. This change in the law would have real costs to the societal aims protected by qualified immunity, resulting in more drawn-out litigation and wasted resources. As this Court has repeatedly emphasized, qualified immunity "is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Mitchell*, 472 U.S. at 526). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526.

As the doctrine currently exists, "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim," and a court need only "determine [] a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell*, 472 U.S. at 528; *see also Saucier*, 533 U.S. at 204. "[S]o long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'" *Sheehan*, 575 U.S. at 616-17 (quoting *Billington v. Smith*, 272 F.3d 1177, 1189 (9th Cir. 2002)).

By contrast, under Petitioner's theory, even if an officer's use of force was reasonable at the time it was exercised, a plaintiff could still allege that it was *unreasonable* based on some action the officer took perhaps minutes or hours earlier that might possibly have made the use of force more likely. As a result, "'in close cases, a jury," *would* "'automatically get to second-guess these life and death decisions'" just because a "'plaintiff has an expert and a plausible claim that the situation could better have been handled differently.'" *But see Saucier*, 533 U.S. at 216 n.6 (Ginsburg, J., concurring in judgment) (quoting *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994), for the proposition this should *not* happen).

D. This has been amply demonstrated by the Ninth Circuit's use of its now-defunct "provocation" doctrine, which closely mirrors Petitioner's theory by allowing a court to strip officers of their immunity if they "created [the] situation which . . . required the officers to use force that might have otherwise been reasonable." *Espinosa v.*

City & County of San Francisco, 598 F.3d 528, 539 (9th Cir. 2010); *see also, e.g.*, *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1366-67 (9th Cir. 1994) (denying "summary judgment . . . on defendants' qualified immunity claim" when the plaintiff claimed officers acted unreasonably in "creating the situation" in which they used force); Resp.Br.3 (noting the consistency between the provocation doctrine and Petitioner's theory).

Specifically, in applying its provocation doctrine, the Ninth Circuit found "triable issues of fact" even when "the officer's use of deadly force—viewed from the standpoint of the moment of the shooting—was reasonable as a matter of law." *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1229 (9th Cir. 2014), *rev'd*, *Sheehan*, 575 U.S. 600. It was enough under this rule to proceed to trial if "genuine issues of fact" existed "regarding whether the officers intentionally or recklessly provoked a confrontation." *Espinosa*, 598 F.3d at 539. This standard very closely tracks whether or not the officer acted in good faith—the very question "inherently requiring resolution by a jury" that caused this Court to abandon the subjective aspect of the qualified-immunity inquiry so many years ago. *Harlow*, 457 U.S. at 816.

Once again, Petitioner conspicuously never questions this precedent, let alone attempts to meet her "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). That alone is reason enough to reject Petitioner's attempt to erode qualified immunity, which is "irreconcilable" with that precedent. *Plumhoff*, 572 U.S. at 776 n.3.[16]

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[16] At the very least, the fact that Petitioner has not asked this Court to revisit this caselaw means that Sergeant Felix is entitled

III. Adopting Petitioner's Theory Would Undermine the Functioning of Amici States and the Safety of Their Citizens.

Such a departure from this Court's prior caselaw would be particularly harmful as, like so many other doctrines governing the jurisdiction of the federal courts, it is built around the fundamental notion that "Our Federalism" functions best when there is "sensitivity to the legitimate interests of both State and National Governments," and where the "National Government, anxious though it may be to vindicate and protect federal rights," takes care to "do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *see generally* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229 (2020). In particular, qualified-immunity doctrine has been developed over a period of decades to "seek[] a proper balance between two competing interests": providing individuals with a "realistic avenue for vindication" of their constitutional rights and ameliorating the "substantial social costs" of opening such a route to police liability. *Ziglar*, 582 U.S. at 150.

A. Petitioner's theory would harm Amici States' financial interests.

Although the amount and mechanism will vary slightly, Petitioner's effort to expand officer liability to

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to qualified immunity. Regardless of the ground upon which the Court granted review, it "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). The rule Petitioner seeks is no more established today than the Ninth Circuit's closely related provocation doctrine was in 2017. *Cf. Mendez*, 581 U.S. at 428 (describing the provocation doctrine as "novel").

any use of force that arguably resulted from ill-advised action will have a direct impact on the public fisc of each Amici State. Although section 1983 suits are nominally against officers in their individual capacities, as a practical matter, States and their political subdivisions often indemnify its officers for part or all of settlements and judgements, sometimes resulting in "jurisdictions disbanding their police forces following large payouts." Nielson & Walker, *Federalism*, *supra*, at 267 n.229; *cf.* Congressional Rsch. Serv., *Policing the Police: Qualified Immunity and Considerations for Congress* (Feb. 21, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10492.

This Court recognized half a century ago that qualified immunity exists to ensure a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). Nonetheless, police liability has been rising since the 1960s. *See Over Two Decades, Civil Rights Cases Rise 27 Percent*, UNITED STATES COURTS (June 9, 2014), https://perma.cc/9DHX-DMSL.

That phenomenon has only gotten worse as "[p]ublic perception of law enforcement has worsened since the highly publicized incidents of 2020." Timothy Karch, *Playing the Long Game: Law Enforcement Recruitment*, FBI LAW ENF'T BULL. (Mar. 7, 2024), https://leb.fbi.gov/articles/featured-articles/playing-the-long-game-law-enforcement-recruitment. Depending on the region, recruitment is down 27 to 60% at the same time that, "between 2020 and 2021, the law enforcement

resignation and retirement rates increased by 18% and 45%, respectively." *Id.*

The result is that from 2020 until 2023, police agencies' staffing numbers decreased. *New PERF Survey Shows Police Agencies Have Turned a Corner with Staffing Challenges*, POLICE EXEC. RSCH. F. (Apr. 27, 2024), https://perma.cc/ST3B-BC5W. This was true even though police departments were "offering hiring bonuses, expediting background checks and increasing salaries." Amanda Hernández, *Some Police Leave Big Cities to Avoid Scrutiny,* GOVERNING (July 18, 2024), https://perma.cc/CHE7-NBJ9. Police departments in large cities are having the hardest time filling their ranks, as many of their "officers move to smaller places, often to escape the intense scrutiny found in big cities." *Id.* Not coincidentally, this was the same time police officers faced increased public scrutiny, and lawmakers attempted to repeal qualified immunity.[17] Adopting Petitioner's rule will inevitably lead to more expensive litigation, further depleting police department budgets when they can least afford it.

B. Petitioner's theory would impede Amici States' ability to enforce their laws and protect their citizens.

In addition to the direct fiscal cost, undermining qualified immunity and the law-enforcement officers it protects represents a direct attack on those interests that are "[p]aramount among the States' retained sovereign powers": "the power to enact and enforce any laws that

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[17] *See, e.g.*, Zina Hutton, *Why It's So Hard to Recruit Police Officers*, GOVERNING (Aug. 12, 2024), https://perma.cc/A6MD-SMYW; *Markey, Pressley Reintroduce Legislation to Fully End Qualified Immunity*, ED MARKEY U.S. SENATOR FOR MASS. (Mar. 1, 2021), https://perma.cc/37J2-TSEL.

do not conflict with federal laws." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022); *see also, e.g.*, *United States v. Lanza*, 260 U.S. 377, 382 (1922).

By protecting reasonable, good-faith mistakes, qualified immunity ensures that "fear of liability will not unduly inhibit officials in the discharge of their duties." *Camreta v. Greene*, 563 U.S. 692, 705 (2011) (quoting *Anderson*, 483 U.S. at 638). Without it, so long as they are economically rational, officials facing potential liability "'should . . . err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (2001) (per curiam) (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)). That is, when "threatened with personal liability," any rational public official "may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988).

This problem of incentivized underenforcement is particularly troubling when combined with the staffing shortages facing our nation's police departments discussed above. "In business" and even other areas of government, "understaffing might lead to less profit, decreased stock prices, or unfinished projects," but here "it means increased crime; a heightened risk to public safety; reduction in service; and overworked officers susceptible to fatigue and burnout." Karch, *supra*. This can lead to "various mental health issues," but also "poor decision-making," *id.*, which in turn leads to increased liability—creating a vicious and unsustainable cycle.[18]

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[18] *See, e.g.*, Libor Jany, *Minneapolis Contemplating Limiting Off-Duty Police Work*, MINN. STAR TRIB. (May 25, 2019),

This problem is far from theoretical; it is happening now. As police staffing has decreased over the last few years, crime rates have risen. Ernesto Lopez & Bobby Boxerman, *Crime Trends in U.S. Cities: Mid-Year 2024 Update*, COUNCIL ON CRIM. JUST. (July 2024), https://perma.cc/3MKL-TX2E. Meanwhile, "[p]olice response times are taking longer in many cities[,] and experts attribute it, in part, to staffing shortages," as departments continue "struggling to fill vacancies left by officers who have quit or retired." Martin Kaste, *Why Data from 15 Cities Shows Police Response Times Are Taking Longer*, NPR (Jan. 17, 2023), https://perma.cc/6KP2-EX2Y. Police investigatory capacity is also suffering, as even murder cases are going unsolved at record rates. Eric Westervelt, *More People Are Getting Away with Murder. Unsolved Killings Reach a Record High*, NPR (Apr. 30, 2023), https://perma.cc/KRJ5-L7FY.

Because larger cities have suffered from these phenomena more than their smaller neighbors, it is no wonder that ordinary citizens (in addition to police officers), are fleeing urban centers for smaller communities. *See* Lindsay Spell & Marc Perry, *More People Moved Farther Away from City Centers Since COVID-19*, U.S. CENSUS BUREAU (May 16, 2024), https://perma.cc/U533-K5XQ. But last year, the Commissioner of the Baltimore Police Department bluntly stated that "[n]ext to violent crime," the shortage of trained staff "is the most important thing that all of us are facing. We're facing it in our large departments, small departments, mid-sized departments, urban, suburban, and rural." *Responding to*

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https://perma.cc/3AMH-NMG5 ("Fatigue produces a physiological response—it's less attention, less focus, eye-to-hand coordination begins to diminish, anger happens more rapidly. . . . As I tell students: 'I can work tired, I'm just not nice when I do it.'").

the Staffing Crisis: Innovations in Recruitment and Retention, POLICE EXEC. RSCH. F. 3 (Aug. 2023), https://perma.cc/BL8P-TAAU. Further extending civil liability beyond what is actually required by section 1983 and the Fourth Amendment will only further devastate police departments that are already struggling to serve their core function of protecting the public interest and public safety.

CONCLUSION

This Court should affirm the Fifth Circuit's judgment in favor of Sergeant Felix.

Respectfully submitted.

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