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

AMICI CURIAE BRIEF OF PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA AND CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN IN SUPPORT OF RESPONDENT ROBERTO FELIX, JR.

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of the Peace Officers Research Association of California ("PORAC") and the California Association of Highway Patrolmen ("CAHP") (collectively "*Amici*") in support of Respondent Roberto Felix.[1]

PORAC was incorporated in 1953 as a professional federation of local, state, and federal law enforcement agencies, and represents over 78,000 law enforcement and public safety professionals in California. It is the largest law enforcement organization in California and the largest statewide association in the Nation. PORAC's mission is to identify the needs of the law enforcement community and provide programs to meet those needs through conducting research, providing education and training, and defining and enhancing standards for professionalism. PORAC has a significant presence in Sacramento, California where it lobbies on behalf of its membership, advocating for the proposal and refinement of new legislation, or amendment of existing laws and regulations, and assisting lawmakers in analyzing the merits of ideas by providing history, context, and perspective on key issues unique to law enforcement professionals. As part of its activities, PORAC also files *amicus curiae* briefs in litigation impacting law enforcement professionals and agencies.

CAHP, founded in 1920, advocates on behalf of the uniformed California Highway Patrol officers in

1. Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was prepared in its entirety by *amici curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici* curiae and its counsel.

matters related to pay, benefits and working conditions. Its philosophy is deeply rooted in collaborative-based initiatives, working with the California Highway Patrol and aimed at ensuring its high level of trust from the public is never taken for granted and, where possible, is improved upon.

This Court's ruling will impact *Amici*'s members, peace officers, who interact with the public and face potential deadly threats daily. The Fourth Amendment pervades every contact with the public. A great majority of them end without incident, but the Fourth Amendment guides all such interactions.

The Petitioner in this matter and its *amici* ask this Court to broaden the scope of conduct which may expose peace officers to liability when making split-second judgments in whether and how much force may be used in encountering imminent threats to the safety of officers and others. The implication is that peace officers and public safety departments may need to alter long-standing understandings of what the constitution permits as reasonable, and thus their conduct, most often in an instant under rapidly evolving situations. As much as anyone, peace officers have an interest in that calculus.

Because of those concerns, *Amici* submit this brief to assist the Court in resolving the proper weight afforded the moment of threat doctrine under the "totality of circumstances" required by *Graham v. Connor*. *Amici* also urge this Court to reject considerations of officer tactics that result in a deadly confrontation to establish a Fourth Amendment violation, consistent with *County of Los Angeles v. Mendez* and California's legislative experience in enacting A.B. 392.

Therefore, *Amici* have a significant interest in this Court reaffirming its rejection of any provocation rule and clarifying that, in considering the totality of the circumstances in a use of force analysis, lower courts must apply realistic and reasonable standards that focus on the threat posed by the suspect rather than hindsight analysis.

SUMMARY OF ARGUMENT

During a traffic stop, Ashtian Barnes failed to produce identification. Barnes turned off the vehicle and put his keys near the gear shifter. Yet he also exhibited nervous behavior and continued to reach around the interior of the car even after Deputy Constable Roberto Felix, Jr. asked him to stop. Felix asked Barnes to exit the vehicle and opened the driver's door. Suddenly, Barnes grabbed the keys and turned the car back on. Felix ordered him to stop. Barnes began to accelerate. But Felix was trapped between the open driver's door and the vehicle. Felix jumped onto the vehicle frame; Barnes continued down the service lane, ignoring commands to stop. Felix shot Barnes to stop the vehicle. Felix was able to extricate himself. Barnes died.

The precise moments are captured on video. Even with the luxury of repeated viewings, Petitioner is unable to articulate why Felix's assessment of the danger of being dragged by the vehicle unless he jumped on—an assessment he was forced urgently to make the moment Barnes began to accelerate—was unreasonable. It is easy to see why this Court holds "judges should be cautious about 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).

Still, Petitioner argues the result below was a product of a doctrine preempting consideration of the "totality of circumstances" of a use of force under *Graham v. Connor*, 490 U.S. 386, 396 (1989). The truth be told, the Fifth and other Circuits focusing on the "moment of threat" adhere to this Court's analysis of uses of force. The Fifth Circuit has applied each of *Graham's* factors to conclude a use of deadly force was reasonable, *Thompson v. Mercer*, 762 F.3d 433, 438 (5th Cir. 2014), and in other circumstances unreasonable. *Lytle v. Bexar Count*y, 560 F.3d 404, 412-13 (5th Cir. 2009.) Other moment of threat circuits have found the use of deadly force unreasonable to prevent flight where the suspect posed little threat to others, *Ludwig v. Anderson*, 54 F.3d 465, 469 (8th Cir. 1995); and that deadly force was initially justified, but continued force unreasonable when the threat abated only seconds later. *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005.) Each *Graham* factor was considered because "the reasonableness of an officer's action is determined based on the information possessed by the officer at the moment that force is employed." *Id.* at 481.

Petitioner asks this Court to adopt an expanded iteration of the provocation rule rejected in *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017), to permit second-guessing of an officer's assessment that may have led to the use of force. Such revision would permit the "20/20 vision of hindsight" this Court prohibits. *Graham, supra*, 490 U.S. at 395.

California, from where *Amici* hail, has twice rejected amendments to its use of force statute that would require burdensome considerations, including whether there was "no reasonable alternative" to the tactics used. This

would have jeopardized lives by causing officers to pause and reevaluate, use the least amount of force instead of a reasonable amount, and imposed a duty to retreat. The amendment eventually adopted comports with this Court's Fourth Amendment jurisprudence to consider the "totality of the circumstances" and rejected variants of a provocation rule. *Koussaya v. City of Stockton*, 54 Cal. App. 5th 909 (2020).

The judgment of the Fifth Circuit should be affirmed, and this Court should resist overtures to complicate the calculus in determining whether a use of force is reasonable.

ARGUMENT

I. The moment of threat doctrine adheres to this Court's analysis of excessive use of force claims.

Petitioner argues that the moment of threat doctrine, employed by the Second, Fourth, Fifth, and Eighth Circuits, "bears no relationship to how ordinary people evaluate reasonableness in the real world." Petitioner's Brief ("PB") at 34. First, the moment of threat doctrine is not applied with blinders on as Petitioner claims; second, whether termed as the "moment of threat" or "totality of circumstances" doctrine, the evaluation of "'reasonableness' of a particular use of force" is "judged from the perspective of a reasonable officer on the scene" and provides for "allowance[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving[.]" *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("*Graham*"). If *Graham* means anything, it is that the

evaluation of reasonableness is not necessarily related to how "ordinary people" might "ordinarily" view it, because to do so inevitably leads to an analysis with "20/20 vision of hindsight" where the use of force, looking back, "may later seem unnecessary in the peace" of a jury deliberation room. *Id*. at 396. Time and again, this Court admonishes that "judges should be cautious about 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).

A. The moment of threat doctrine is consistent with other Circuits that emphasize *Graham's* second factor of "whether the suspect poses an immediate threat to the safety of the officers or others."

Even circuits that do not follow the moment of threat doctrine recognize that the "most important *Graham* factor is whether the suspect posed an immediate threat to anyone's safety." *Nehad v. Browder*, 929 F.3d 1125, 1132 (9th Cir. 2019); *Pauly v. White*, 874 F.3d 1197, 1216-17 (10th Cir. 2017) ("The second *Graham* factor, 'whether the suspect pose[ed] an immediate threat to the safety of the officers or others,' is undoubtedly the 'most important' and fact intensive factor in determining [ ] objective reasonableness[.]"); *McNiel v. City of Easton*, 694 F.Supp.2d 375, 392, fn. 68 (E.D. Penn. 2010).

In furtherance of these concerns, the "moment of threat" doctrine properly emphasizes *Graham's* second factor, but not, as Petitioner asserts, to the exclusion of *Graham's* first and third factors—"severity of the crime at issue" and "whether he is actively resisting arrest or

attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Circuits that employ the moment of threat doctrine recognize these are inextricable from the "factbound morass of 'reasonableness'," in determining whether the suspect poses an immediate threat to anyone's safety at the time the officer uses force. *Lytle v. Bexar County*, 560 F.3d 404, 415 (5th Cir. 2009) (citing *Scott v. Harris*, 550 U.S. 372, 383 (2007)). But not all factors are always relevant. The moment of threat doctrine is a nuanced approach used by some circuits to consider the "totality of circumstances" when analyzing claims of excessive use of force. *Compare, e.g.*, *Estate of Larsen v. Murr*, 511 F.3d 1255, 1260 (10th Cir. 2008) (Tenth Circuit's four-component test to evaluate degree of threat to officer).

B. When relevant, moment of threat circuits consider *Graham's* remaining factors of "severity of the crime" and whether a suspect is "attempting to evade arrest by flight."

Petitioner misconstrues precedent from circuits applying the moment of threat doctrine as encouraging officers to engage in unreasonable conduct by viewing force encounters narrowly. This is at odds with the case law.

Focusing on the Fifth Circuit's decision below, Petitioner asserts that in *Harmon v. City of Arlington*, 16 F.4th 1159 (5th Cir. 2021), the moment of threat doctrine prevented a court from considering that an "officer 'stepped onto the running board' of a moving car" in finding the use of force reasonable. PB at 34. However, Petitioner's rendition is belied by the undisputed facts. There, the circuit court considered whether Officer

Bau Tran "reasonably perceived an imminent threat of personal physical harm" during the brief time between when a driver started the engine of a car and when Tran began shooting. *Harmon*, 16 F.4th at 1161-62. Terry, the driver, and his passenger, Harmon, were pulled over for driving a large SUV with expired registration tags. While the officer who initially stopped them took their information, she smelled marijuana and advised the occupants she would search the vehicle. Officer Tran then arrived, and approached the car from the passenger's side, waiting with the occupants while the first officer went back to her patrol car. "Tran asked them to lower the windows and shut off the vehicle's engine, and Terry [the driver] at first complied." *Id*. at 1162. While engaged in small talk "Terry started raising the windows and reaching for the ignition. [Officer] Tran immediately shouted 'hey, hey, hey, hey,' clambered onto the running board of the SUV," reached through the passenger window with his right hand, and yelled "'hey, stop.'" Terry then started the car, shifted into drive, and "[j]ust after the car lurched forward, Tran drew his weapon, stuck it through the window past Harmon's face, and shot 5 rounds, striking Terry four times." Terry did not survive. *Ibid.*

The Fifth Circuit considered the factors set forth in *Graham* including the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 1163 (quoting *Graham*, 490 U.S. at 396). Consistent with circuits that do not adhere to the "moment of threat" doctrine, the court noted that the "threat-of-harm factor typically predominates the analysis" of the use of deadly force. *Id*. at 1163. Recognizing that the inquiry is

"inherently factbound," the *Harmon* court considered that Terry "abruptly rolled up the windows and reached for his keys," with Tran shouting for him to stop, grabbing onto the still open passenger window and stepping onto the running board. *Id.* at 1164. Because Terry ignored these commands, started the car, and then started to drive off *only after* Officer Tran was already hanging onto the passenger window and "perched on the narrow running board," the court properly focused on this "brief interval" to determine that Tran "reasonably believed he was at risk of serious physical harm." *Ibid. Harmon* does not further Petitioner's point.

Like Petitioner here, the plaintiff mischaracterized the force used as intended to stop Terry. However, Tran did not shoot Terry to prevent him from escaping, but because Tran "faced an all too 'obvious' threat of harm" *Id.* at 1165; *cf. Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("[N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him."). While "severity of the crime" and "attempt to evade arrest by flight" were considered, those factors were irrelevant to whether Officer Tran, like Deputy Constable Felix here, reasonably believed he was at risk of harm during the "moment of threat." In suggesting that such a view "incentivizes officers to engage in unreasonable conduct," PB at 34, Petitioner minimizes the suspect's culpability and argues officers should desist or retreat to avoid potentially violent outcomes. Thus, in *Harmon*, the plaintiff argued the officer could have stepped off the running board, and also "shot too quickly." *Harmon,* 16 F.4th at 1165-66. But this leads to impermissible "second-guessing," *Ryburn v. Huff*, 565 U.S. at 477, instead of analyzing the use of force "from the perspective of the reasonable officer on the

scene[.]" *Graham*, 490 U.S. at 396. "[A]ll that matters" is whether the officer's "actions were reasonable." *Scott,* 550 U.S. at 383; *see also Hart v. City of Redwood City*, 99 F.4th 543, 554 (9th Cir. 2024) (Fourth Amendment "'places less emphasis on pre[-]shooting conduct' [Citation.]" and "one cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.' [Citation].").

Petitioner points to the Fourth Circuit's decision in *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993) as another example of the "moment of threat" doctrine's purported failures. PB at 34. While he was moonlighting as a security guard, employees informed Officer Pratt that Drewitt was driving recklessly with his headlights off. Pratt observed him collide with a parked car and begin to pull away. Pratt ran toward the vehicle with his gun drawn, identified himself as a police officer and ordered him to turn off the vehicle. *Id.* at 776. When Drewitt came to a stop, Pratt approached the driver's door by crossing in front of the vehicle. Drewitt suddenly activated his headlights, accelerated toward Pratt, struck him, and knocked him onto the hood. Pratt then fired a shot into the windshield "in an attempt to stop the vehicle and protect himself." Drewitt survived, admitting he was intoxicated. *Ibid.*

On appeal, Drewitt disputed Pratt's distance when he crossed the vehicle and whether he "could have safely stepped out of the way." *Id.* at 777. Drewitt added that Officer Pratt failed to display his badge. The failure to "display his badge when announcing himself as a police officer and demanding Drewitt to stop his vehicle is irrelevant to the issue of whether at the moment of the shooting" Pratt "had probable cause to believe that

Drewitt posed a threat of death or seriously bodily harm to him." *Id.* at 780. The court rejected the contention that failing to display his badge "'manufactured the circumstances that gave rise to the fatal shooting.'" *Id.* at 779 (quoting *Faire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir. 1992)). This criticism of pre-shooting conduct ignores that Drewitt "sped forward," leading Pratt to "decid[e] to shoot the plaintiff in light of the severe threat of physical harm" after "being thrown on the hood" of the vehicle. *Id.* at 778.

Conversely, Petitioner also asserts that in the Eighth Circuit's decision in *Banks v. Hawkins*, 999 F.3d 521 (8th Cir. 2021), the "moment of threat" doctrine actually "imposes unwarranted liability on officers who act reasonably." PB at 35. *Banks* reiterated that whether force was objectively reasonable must be determined "'from the perspective of a reasonable officer on the scene,' which 'turns on those facts known to the officer at the precise moment he effectuated the seizure.' [Citation.]." 999 F.3d at 525. Petitioner argues *Banks* represents a circumstance where the "moment of threat" doctrine may have rendered an officer's justified use of force as unreasonable, because a "broader analysis of the totality of the circumstances [ ]may have vindicated the officer's actions." PB at 35-36. Petitioner laments that the doctrine forced the Court to "ignore[ ] the potential threat" to a woman the officer heard scream from inside the home prior to shooting the woman's husband immediately upon opening the door to the home, PB at 35, but in fact she had stopped yelling and arguing *ten minutes prior* to the officer's entry. *Banks*, 999 F.3d at 525. The court concluded "there was no reason to think that someone in the house was in imminent danger" given that the officer never saw anyone

commit a crime, and waited ten minutes after hearing screams to attempt entry. *Ibid.*; *see also Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020) ("a few seconds is enough time to determine an immediate threat has passed" thus "extinguishing a[ny] preexisting justification for the use of deadly force."). Thus, a "broader analysis" would not have changed the outcome in *Banks*.

None of Petitioner's authorities supports the assertion that expanding the consideration of pre-shooting conduct would alter the officers' justification under Petitioner's version of the totality of the circumstances. The analysis in each of these cases is consistent with this Court's use of force jurisprudence.

C. Circuits adhering to the moment of threat doctrine also apply all of the *Graham* factors when finding a use of force unreasonable.

In cases where the Fifth Circuit has considered use of deadly force to end a suspect's flight, the determination of reasonableness has differed depending on the particular factual circumstances. *Compare Thompson v. Mercer*, 762 F.3d 433, 438, 440 (5th Cir. 2014) (use of force was reasonable after officers repeatedly attempted to stop chase with "alternative means of seizure before resorting to deadly force" to stop driver who posed "extreme danger to human life") *and Lytle,* 560 F.3d at 412-13 (firing at the back of a fleeing vehicle some distance away was not "reasonable method of addressing the threat" to officer). Petitioner's argument that the "moment of threat" doctrine is insensitive to *Graham's* "totality of circumstances" is contradicted by Fifth Circuit case law, which acknowledges it "must look at all of the facts and

circumstances relevant to the reasonableness" of the use of force, and not "mistaken[ly] focus entirely on threat of harm." *Lytle*, 560 F.3d at 412; *see also Hathaway v. Bazany*, 507 F.3d 312, 322 (5th Cir. 2007) ("extremely brief period of time" between when a car accelerated toward and struck officer and officer's firing of weapon insufficient for officer to perceive "new information indicating the threat was past"). The speed with which an officer resorts to force can factor into the reasonableness analysis. *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012). Circuit Judge Higginbotham's concurrence mistakenly accuses the Fifth Circuit of indifference to the "totality of circumstances."

In *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995), officers shot and killed Ludwig while attempting to detain him. Ludwig was on foot and carrying a knife. After several attempts to seize him using less than lethal tactics, an officer shot him. *Id.* at 468-69. While acknowledging Ludwig posed no threat to the officer while fleeing, the officer explained he shot to prevent Ludwig from "possibly attempting to get across the street" which could have put him in "contact with other citizens." The officer further acknowledged Ludwig never approached bystanders and was actually running away from them. *Id.* at 469.

In analyzing whether the force used was objectively reasonable, the court noted that while even a slight application of physical force effects a seizure, "that seizure does not continue during 'periods of fugitivity.'" *Id.* at 471 (citing *California v. Hodari D.*, 499 U.S. 621, 625 (1991)). Thus, *Ludwig* held that only the seizures themselves—barricading Ludwig, and then later shooting him, and "not the events leading to them" should be scrutinized. *Ibid.* In overturning summary judgment in

favor of the officer, *Ludwig* analyzed the issue in accord with *Scott* by considering the relative "culpability" to the "*reasonableness* of the seizure"—whether "preventing possible harm to the innocent justifies exposing to possible harm the person [Ludwig] threatening them." 550 U.S. at 384, fn. 10 (italics in original).

In finding the use of force unreasonable, *Ludwig* identified as relevant that officers were aware Ludwig may have been homeless and emotionally disturbed. He was also suspected only of misdemeanor crimes, "which arguably placed no one in immediate harm." *Ludwig*, 54 F.3d at 473-74. This is consistent with *Scott,* 550 U.S. at 384; and *Garner,* 471 U.S. at 9 (must have probable cause to believe fleeing felon poses threat of serious physical harm to justify use of deadly force).

Some courts applying the moment of threat doctrine have initially found a use of force reasonable, but that the justification dissipated before the officers stopped shooting. *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) involved the vehicle pursuit of Waterman, who was speeding. As Waterman approached a tunnel leading to a toll plaza, officers radioed other officers at the toll plaza. One officer radioed that Waterman tried to run him off the road. Waterman emerged from the tunnel, drove toward the toll plaza at normal speed, and stopped behind the car ahead of him. Several officers approached his vehicle from the front and passenger sides, yelling for him to stop. *Id.* at 473-74. When the vehicle in front of him moved forward, Waterman's vehicle immediately began accelerating towards the toll plaza and officers. No officers were directly in front of his vehicle, but several were close the vehicle's projected path.

The officers began firing their weapons when Waterman accelerated and continued as he drove past them. The exchange lasted six seconds, and Waterman was fatally struck. *Id*. at 474-75. The Fourth Circuit concluded the first round of shots as Waterman approached was reasonable, but that a jury could conclude the shots fired after he passed the officers were unconstitutional. *Id*. at 477. The court noted that "the officers were forced to immediately decide" whether Waterman was attempting to hit them or just driving by them. Conflicting factors supported a reasonable belief of either intent. However, "the officers did not have even a moment to pause and ponder these many conflicting factors," and had the officers "paused for even an instant, they risked losing their last chance to defend themselves." *Id*. at 478. Two of the officers would have been run over within one second had Waterman suddenly turned slightly. *Ibid*.

The Fourth Circuit stated "[i]t is established in this circuit that the reasonableness of an officer's action is determined based on the information possessed by the officer at the moment that force is employed." *Id*. at 481. But this test includes information held not just when the officer began to employ force, but information that indicated "even seconds later" that the "justification for the initial force has been eliminated." *Ibid*. For this reason, the court held that once Waterman passed officers without veering into their direction, "the threat to their safety was eliminated" and it would be unreasonable for the officers to continue to believe they faced an imminent threat. *Id*. at 482. This analysis comports with circuits not adhering to the moment of threat doctrine. *See*, *e.g.*, *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) (finding continued use of force might become excessive, even if initially justified).

Petitioner's claim that the doctrine fails to sufficiently consider the "totality of circumstances" and produces unjust and anomalous results is not borne out by the jurisprudence from those circuits. Here, the undisputed facts show that Deputy Constable Felix did not shoot Petitioner's decedent to prevent him from escaping, but because Felix "face[d] an all too 'obvious' threat of harm." *Harmon*, 16 F.4th at 1165.

II. *Amici* Seek Affirmation of this Court's Rejection of a Provocation Rule in *Mendez*.

Under the guise of considering the totality of the circumstances, Petitioner attempts to persuade this Court to adopt the provocation rule already rejected in *County of Los Angeles, California v. Mendez*, 581 U.S. 420 (2017). Accordingly, even if the Court finds the "moment of threat" doctrine does not sufficiently consider the totality of the circumstances, *Amici* urge the Court to affirm its holding in *Mendez*, setting forth the proper consideration of officers' pre-shooting conduct.

In *Mendez*, this Court held, "the Fourth Amendment provides no basis for [a provocation rule]. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id.* at 423. *Amici* respectfully request that this Court announce a logical extension of *Mendez* that once a use of force is deemed reasonable under *Graham,* it may not be found unreasonable by reference to an officer's preceding lawful tactical decisions.

Despite finding the shooting was reasonable under *Graham*, the Ninth Circuit in *Mendez* held deputies liable

for the use of force on the theory they intentionally and recklessly brought about the shooting by committing a prior, separate constitutional violation—a warrantless entry. *Id.* at 426. This Court rejected the Ninth Circuit's "two-prong test" for provocation which required: (1) the separate constitutional violation must "creat[e] a situation which led to" the use of force and (2) the separate constitutional violation must be committed recklessly or intentionally. *Id.* at 430. This Court held the analysis must not be miscast as a provocation rule wherein an officer is liable for an otherwise reasonable use of force based on a prior act which established a separate constitutional violation, even when the officer committed the separate violation recklessly or intentionally. In other words, *Mendez* held that a separate constitutional violation, even one that laid the path to the use of force, cannot render an otherwise reasonable use of force a Fourth Amendment violation.

Mendez clarified that "[w]hen an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." *Id.* at 428. The Court made clear that its "settled and exclusive framework" for analyzing Fourth Amendment excessive force claims is set forth in *Graham*. *Ibid*. Importantly, all of the *Graham* factors are known to the officer at the moment of threat. Since reasonableness is considered from the perspective of the officer, the totality of the circumstances is what is known to that officer in that instant. Consequently, the "moment of threat" doctrine is consistent with *Graham* and *Mendez*.

Even among courts not following the moment of threat test, pre-seizure conduct of the officers is usually

irrelevant unless it is "'immediately connected' to the suspect's threat of force" and not otherwise attenuated, either temporally or by an intervening event. *Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997); *see also Sherrod v. Berry*, 856 F.2d 802, 805-06 (7th Cir. 1988); *Chappell v. City of Cleveland*, 585 F.3d 901, 909 (6th Cir. 2009). It is but one of many factors to consider, with "whether the suspect poses an immediate threat" given the most weight. The moment of threat necessarily must be given heightened weight because it is precisely then when "police officers are often forced to make split-second judgment" without the luxury of "a moment to pause and ponder" various strategies without "losing their last chance to defend themselves" or others. *Waterman,* 393 F.3d at 478. Similarly, this process appropriately "take[s] into account not only the number of lives at risk, but also their relative culpability," including the intentional conduct of the suspect that created the threat. *Scott*, 550 U.S. at 384. Otherwise, officers will hesitate to act, potentially putting themselves and the public at greater risk.

In *Mendez*, this Court criticized the provocation rule as searching for a different Fourth Amendment violation to render an otherwise reasonable use of force unreasonable on the basis that it in some sense provoked the need to use force. Because this rule uses one constitutional violation to manufacture an excessive use of force claim where one does not exist, it lacks a constitutional basis. If an encounter generates multiple Fourth Amendment violation claims, each violation must be analyzed separately.

The Court should affirm that liability must be limited to circumstances where an officer's Fourth Amendment

violation itself proximately causes the harm. "Proper analysis of this proximate cause question required consideration of the 'foreseeability or the scope of the risk created by the predicate conduct,' and required the court to conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Mendez*, 581 U.S. at 431 (citations omitted). This analysis must be conducted for *each* Fourth Amendment claim. Critically, liability for a use of force Fourth Amendment violation is viable only if the conduct was both unreasonable under *Graham* and proximately caused the damages.

Following this framework will not "lessen[ ] the Fourth Amendment's protection of the American public," as feared by Petitioner and Circuit Judge Higginbotham. If an officer committed a constitutional violation that is not excused by qualified immunity, and that action proximately caused an injury, the officer will be liable. That is precisely what happened on remand in *Mendez*, notwithstanding this Court's rejection of the provocation rule. Although the shooting itself was found reasonable under *Graham*, the lower court found the unconstitutional warrantless entry, for which there was no qualified immunity, proximately caused the shooting, and thus the injuries. *Mendez v. County of Los Angeles*, 897 F.3d 1067, 1077-78 (9th Cir. 2018).

Here, the facts do not even rise to a level requiring the *Mendez* analysis. Felix conducted a lawful stop, directed Barnes to exit the vehicle and cease rummaging about the interior, brandished his weapon when the driver overtly disobeyed that command and restarted his car. Just as the car began to move, causing the driver's door to close on him, Felix instinctively jumped onto the door

sill, clearly ordered the driver to stop, and then fired his weapon when his life was in imminent danger caused by the driver's refusal to stop. Petitioner tried but failed to connect additional constitutional violations precipitating the officer's use of force. Petitioner originally raised a Fourth Amendment claim against Felix for brandishing his weapon. However, the lower court found no violation in that instance, and Petitioner did not pursue an appeal of that holding. Further, Petitioner initially raised, but then abandoned, a claim that stepping onto the door sill of the car constituted a separate constitutional violation.

Having failed to isolate a separate constitutional violation that proximately caused the injury as required under *Mendez*, Petitioner now inappropriately seeks a narrowing of *Graham's* thrust to permit "second-guessing" the officer's lawful conduct for any sign of questionable judgment or provocation. *See Menuel v. City of Atlanta*, 25 F.3d 990, 997 (11th Cir. 1994) (recognizing that "police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time"). The only disputed tactic used by the officer was jumping on the door sill, which he did instinctively to avoid being trapped by the door closing on him upon acceleration and dragged or run over by the car or other cars on the highway. This is a prime example of a "split-second" decision in circumstances that were "tense, uncertain, and rapidly evolving." *Graham,* 490 U.S. at 397. Scrutinizing that action with "the 20/20 vision of hindsight" is exactly what this Court has expressly prohibited. *Ibid*. This Court should not allow an officer's choices, and even mistakes, in tactics and judgment to be the basis for a Fourth Amendment violation if they were not independently unlawful.

Petitioner cites to this Court's decision in *Scott*, 550 U.S. at 386, to argue Officer Felix must be held responsible for his action of jumping on the door sill because "[t]he Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." PB at 34. Ironically, the quotation expresses quite the opposite of Petitioner's stance, as the Court was actually concerned with the "perverse incentive" generated from "a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger." *Scott,* 550 U.S. at 385 (italics in original). In finding the officer's shooting reasonable, the Court considered the "relative culpability" of the suspect "who intentionally placed himself" and others in danger by engaging in a reckless, high-speed chase. *Ibid.* Connecting these concepts to *Mendez*, a provocation rule would create equally "perverse incentives" for a suspect to flee or otherwise act recklessly because officers may be too tentative to respond for fear of escalating the situation and then being accused of using excessive force in response. Though not a pursuit case, Barnes bears a culpability for "intentionally plac[ing]" Felix in danger that Petitioner simply will not acknowledge.

Mendez held a separate constitutional violation cannot reverse an otherwise reasonable use of force. *Amici* seek confirmation that the holding in *Mendez* equally means that once a use of force is deemed reasonable under *Graham,* it may not be found unreasonable by reference to an officer's preceding tactics. If the matter before this Court is remanded, *Amici* urge the Court to clarify that lawful conduct preceding a seizure, even if it potentially escalated the encounter, cannot be the basis of a Fourth Amendment claim.

III. The California Legislature Analyzed and Rejected the Provocation Rule.

In California, peace officers possess a right to use reasonable force to detain or apprehend a suspect, and "need not retreat or desist from their efforts by reason of th[eir] resistance" or attempt to flee. Cal. Penal Code § 835a; *see also Koussaya v. City of Stockton*, 54 Cal. App. 5th 909, 942 (2020). Moreover, just as officers possess a right to self-defense under the United States Constitution, in California "[t]he right to defend life is one of the inalienable rights guaranteed by the constitution of the state." *People v. McDonnell*, 32 Cal. App. 694, 704 (1917); Cal. Const. art. I, sec. 1.

California caselaw and recent amendments to statutory law are consistent with this Court's Fourth Amendment precedent by focusing on the totality of the circumstances known to or perceived by the officer "at the moment" of the use of force. *Graham,* 490 U.S. at 396. Below, *Amici* describe attempts to legislatively resurrect a necessity or provocation rule, and the sound reasoning that defeated those efforts, ultimately resulting in a statutory definition of "totality of the circumstances" that conforms with this Court's Fourth Amendment precedent.

In recent years, the California Legislature has twice rejected a provocation rule. In the 2017-2018 session, the state legislature considered Assembly Bill ("A.B.") 931. That bill sought to strip officers of the justification defense if their conduct was "such a departure from the expected conduct of an ordinarily prudent or careful officer under the same circumstances as to be incompatible with a proper regard for human life, and where an officer of ordinary prudence would have foreseen that the conduct

would create a likelihood of death or great bodily harm." Draft A.B. 931 (June 12, 2018). This rule would have put unreasonable expectations on peace officers to assess every possibility and foresee every consequence before acting. As the California Police Chiefs Association expressed:

> "Instead of assessing and responding instantly, our officers will be forced to satisfy a number of new requirements regardless if they are in a life or death situation. If our officers cannot respond to emergency situations until backup arrives or are forced to employ a checklist during rapidly advancing and extraordinarily dangerous situations, ***everyone involved is placed at a higher risk.***" Senate Committee on Public Safety, June 19, 2018. (Emphasis in original.)

Moreover, the bill's focus on pre-shooting conduct would have deemed use of deadly force justified only if there was "no reasonable alternative" to the officer's tactics. Draft A.B. 931 (June 12, 2018). This standard would have replaced *Graham*'s "objectively reasonable" standard with a so-called "necessary" standard that would effectively mandate officers to use the least amount of force possible and create a duty to retreat in the face of resistance, if feasible. This would require officers to pause and reevaluate their actions under any change in circumstance lest they unintentionally provoke an escalation of the situation and become civilly and criminally liable for the outcome. While such a framework sounds ideal in the abstract, it is impractical and dangerous in reality. *Amici* strongly opposed the bill, explaining:

- "The legislation defines 'necessary' as meaning there is 'no reasonable alternative' to the use of deadly force. Whether deadly force was the only reasonable option can only be determined in hindsight, and does not embody allowance for the fact that police officers are often forced to make split-second judgments.

- The cost of a 'necessary' standard will be officer hesitation. Hesitation will place our communities at greater risk as officers delay the response to a rapidly evolving and dangerous situation in order to review and evaluate a checklist of options before acting to protect the public safety.

- The existing standard already takes necessity into account. An officer can only use that amount of force that under the totality of circumstances is reasonable. For the force to be reasonable, it must be objectively necessary given everything the officer knew and believed to be true at the time the force decision was made." Senate Committee on Public Safety, June 19, 2018.

For reasons similar to those asserted by *Amici*, the Ninth Circuit found a substantively similar standard unconstitutional. That court recognized "[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). The court warned of the ramifications:

> "In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment." *Id.* at 915.

The proposed focus on the pre-shooting conduct of the officer in A.B. 931 would have inevitably produced these very concerns. Understandably, numerous local and statewide law enforcement associations joined with *Amici* to oppose the bill, including California Police Chiefs Association and the California State Sheriffs' Association. Ultimately, A.B. 931 was held before reaching the Senate floor for a vote and died as an inactive bill.

Several months later, a related bill, A.B. 392, was introduced in the California Legislature during its 2019-2020 session. Like its predecessor, it established liability for use of force unless there was "no reasonable alternative . . . that would prevent death or serious bodily injury to the peace officer or to another person." A.B. 392 (as introduced on February 6, 2019). Furthermore, the originally proposed definition of "totality of the circumstances" eschewed *Mendez* by focusing on all the "tactical conduct and decisions of the officer leading up

to the use of deadly force" rather than the threat posed by the suspect. *Id.*

Attempting to resuscitate the provocation rule, A.B. 392 initially would also have made a justification defense unavailable if "the necessity for the use of deadly force was created by the peace officer's criminal negligence." *Id.* In contradiction to *Mendez*, this would strip officers of the right of self-defense if their tactics or decisions prior to the use of force are deemed negligent. This language was even more expansive than the Ninth Circuit's rejected *Mendez* provocation rule and incompatible with this Court's excessive force jurisprudence. The California State Sheriffs' Association aptly recognized:

> "In addition to creating tremendous and routinely life-threatening risk to peace officers, AB 392 could discourage proactive policing. Fearing repercussions ranging from employee discipline to criminal prosecution based on this new standard, it is possible that officers who today would purposefully put themselves in harm's way to do their job might tomorrow decline to act. Knowing this reality, criminals will be given carte blanche, if not encouraged, to flee from officers, disobey commands, and victimize our communities." Assembly Committee on Public Safety, April 9, 2019.

Based on the continued strong opposition, the "no reasonable alternative" and other provocation language was amended out of the bill entirely. The final amendments to the Bill removed all remnants of the provocation rule and instead the California Legislature codified *Graham's*

"objectively reasonable" principle by requiring that the officer's decision to "use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time." Cal. Penal Code 835a(a)(4). The statute expressly acknowledges judgment must not be made based on the benefit of hindsight, and that the totality of the circumstances must "account for occasions when officers may be forced to make quick judgments about using force." *Id.* Under the new law, totality of the circumstances means "all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force." *Id.* § 835a(e)(3). This definition allows for consideration of pre-seizure conduct, especially in terms of its impact on the officer's mindset, while rejecting a rule that makes pre-seizure conduct dispositive under a provocation rule.

Since the enactment of A.B. 392, California courts have continued considering "an officer's pre-shooting conduct . . . as part of the totality of circumstances surrounding the use of force," while rejecting variants of the provocation rule, instead focusing on the culpability of the suspect in creating the threat faced by the officer. For example, in *Koussaya*, 54 Cal. App. 5th at 942, the court rejected a claim that an officer's conduct negligently escalated the pursuit and led to the shooting, thereby rendering the use of force unreasonable. The court held the officer "had every right to pursue the robbers" and "was not required to retreat or desist from his efforts to apprehend them on account of their violent resistance." *Id.* The court found the officer's conduct reasonable under the circumstances. *Id.*

The *Koussaya* court cautioned, "we must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Id.* at 936. The court confirmed that under California's revised use of force standards, "[l]aw enforcement personnel have a degree of discretion as to how they choose to address a particular situation." *Id.* (affirming *Hayes v. County of San Diego,* 57 Cal.4th 622, 632 (2013)). The court affirmed that "[a]s long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability. . . ." *Id*. This description reasonably balances the sanctity of human life with the realities and necessities of the complex situations faced by peace officers.

Other California use of force cases incorporate state negligence claims, broadening the analysis by considering whether pre-shooting conduct rendered the ultimate use of force unreasonable. Nevertheless, "in a case . . . where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." *Hayes*, 57 Cal. 4th at 632. This analysis considers whether a particular use of force was reasonable given

the complete context, but does not permit a plaintiff to litigate each decision made by an officer in isolation. *Id.* at 637-38. For that reason, pre-shooting conduct, even if unreasonable or reckless, or arguably provoked the use of force, is only one of many factors considered in the totality of the circumstances. Importantly, even a finding of negligent pre-seizure conduct would not automatically render a subsequent use of force unreasonable. Rather, like *Mendez*, any liability would be determined through a proximate causation analysis to determine the foreseeable results of the particular actions in question. Uprooting *Graham* and its progeny is not necessary.

CONCLUSION

Circuit Judge Higginbotham's concurrence urges this Court to adopt a construction of the totality of the circumstances analysis that would effectively overturn *Mendez* and resemble the provocation rule the California Legislature twice rejected by focusing on an "officer's role in bringing about the 'threat' precipitating the use of deadly force." *Barnes*, 91 F.4th at 398. With the benefit of time and tranquility, Judge Higginbotham urges this Court to adopt a standard wherein a disputed tactic, here the split-second decision to jump on the floorboard, would render the force excessive because the tactic is deemed to have escalated the encounter. *Id.* at 401 (Higginbotham, J., concurring). In that moment, it is truly difficult to imagine what other decision Deputy Constable Felix could have made. While characterized as the "full review of the totality of the circumstances," the concurrence's and Petitioner's focus of the officer's tactic turns a blind eye to Barnes's culpability in unlawfully fleeing and intentionally endangering Officer Felix by accelerating his vehicle with

Officer Felix on the floorboard. In so doing, Barnes created an imminent danger to human life. His reasons for doing so do not matter.

Whether referred to as the "moment of threat" or "totality of circumstances," the analysis and outcome are the same; this case does not give cause to uproot the Court's Fourth Amendment use of force jurisprudence. *Amici* respectfully urge this Court to vindicate its long-standing Fourth Amendment standards that permit police officers to effectively perform their critical work without generating a paralyzing fear of liability by affirming the judgment of the Fifth Circuit.

Respectfully submitted,

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