

No. 25-\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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

v.

ROBERTO FELIX JR.; COUNTY OF HARRIS, TEXAS,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTION PRESENTED

The Fourth Amendment prohibits a police officer from using “unreasonable” force. U.S. Const. amend. IV. In *Tennessee v. Garner* and *Graham v. Connor*, this Court held that reasonableness depends on “the totality of the circumstances.” *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 9 (1985)). *Garner* expanded upon *Graham* in addressing whether deadly force is justifiable in preventing individuals from attempting to escape custody, ruling the common law “fleeing felon” rule unconstitutional and establishing that officers can only use deadly force to stop a fleeing suspect if they have probable cause to believe the suspect poses a significant threat of death or serious physical harm to the officer or others. But in the issue on appeal, the Fifth Circuit not only rejected the limitations of the fleeing felon rule imposed by *Garner* but effectively expanded the old rule to apply to *any* detainee who poses a “risk of flight”, including those merely suspected of criminal activity, and in so doing has created a circuit split on the issue with all of the other appellate courts and with the Supreme Court’s forty-year-old precedent in *Garner*. Abandoning even its own established precedent requiring “sloshing through the fact-filled morass” of each case, the Fifth Circuit now applies a new doctrine that establishes a per se rule allowing the use of deadly force any time a suspect—felon or not—poses a “risk of flight”, regardless of the “totality of the circumstances” surrounding the incident.

The question presented is:

Whether the mere “risk of flight” renders a suspect so dangerous to the public at large that police are justified under the Fourth Amendment in using deadly force to prevent their escape.

**PARTIES TO THE PROCEEDING**

Janice Hughes Barnes was the Plaintiff-Appellant below and is the Petitioner in this Court, individually and as representative of the estate of Ashtian Barnes. Roberto Felix, Jr. and the County of Harris, Texas, were Defendants-Appellees below and are Respondents in this Court.

Tommy Duane Barnes was a pro se Plaintiff-Appellant below and is therefore treated as a Respondent in this Court. *See* Sup. Ct. R. 12.6.

**STATEMENT OF RELATED CASES**

All proceedings directly related to this Petition include:

- *Barnes v. Felix*, No. 23-1239 (Sup. Ct.)
- *Barnes v. Felix*, No. 22-20519 (5th Cir.)
- *Barnes v. Felix*, No. 21-20180 (5th Cir.)
- *Barnes v. Felix*, No. 4:18-CV-725 (S.D. Tex.)
- *Barnes v. Felix*, No. 2017-86034 (Tex. D. Ct.—Harris County [129th Dist.]

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## **OPINIONS BELOW**

The Supreme Court's decision in this case is reported at 145 S. Ct. 1353 (2025). The Fifth Circuit's original decision (Pet. App. 1a-16a) is reported at 91 F.4th 393 (5th Cir. 2024), and the newer, remanded decision is included herein as an appendix. The District Court's decision (Pet. App. 17a-32a) is reported at 532 F. Supp. 3d 463 (S.D. Tex. 2021).

## **JURISDICTION**

The Fifth Circuit entered judgment on September 18, 2025. All appeals and requests for rehearing were exhausted on November 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Fourth Amendment to the Constitution provides in relevant part: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated \* \* \*. U.S. Const. amend. IV.

## **INTRODUCTION**

This case has already been to the Supreme Court and was remanded back to the Fifth Circuit following a 9-0 vote reversing that Circuit's reliance on a "moment of the threat" doctrine in place of this Court's "totality of the circumstances" rule. The Fifth Circuit subsequently dismissed the case once again on remand (without any type of argument or full briefs on the merits), relying almost entirely upon its misinterpretation of Justice Kavanaugh's concurrence in the case to create a new per se rule allowing the use of deadly force any time a motorist poses a "risk of flight" in a traffic stop.

On an April afternoon in 2016, Ashtian Barnes was driving his girlfriend's rental car on the Sam Houston Tollway outside of Houston, Texas. That same afternoon, Officer Roberto Felix, Jr., was patrolling for toll violations. Through no fault of Barnes, there were toll violations associated with the rental car's license plate, and Felix initiated a traffic stop. Felix asked Barnes for his license and the rental car's insurance paperwork. Barnes indicated that the paperwork might be in the trunk, and Felix instructed Barnes to get out of the vehicle. A dash camera recorded what happens next: The car starts moving slowly forward, and Officer Felix jumps onto the door sill of the vehicle. At almost the same instant, Officer Felix begins shooting inside the vehicle, striking Barnes twice. Officer Felix then holds Barnes at gunpoint until he bleeds to death in the rental car.

Petitioner is Janice Hughes Barnes, Barnes' mother. Janice lost her only son because Officer Felix used excessive force and violated Ashtian's constitutional rights—over a toll violation. She respectfully requests that the Court grant certiorari and reverse the decision below.

Under longstanding Supreme Court precedent, a court should evaluate the reasonableness of an officer's use of force based on "the totality of the circumstances." *Graham v. Connor*, 490 U.S. 386 (1989) (quotation marks omitted). But that had long not been the Fourth Amendment standard in this Circuit. Instead, until the Supreme Court intervened in this case, the Fifth Circuit had applied a more restrictive moment of the threat doctrine, under which "the excessive-force inquiry is confined to whether the officers or other persons were in danger *at the moment of the threat* that resulted in the officers' use of deadly

force.” *Barnes v. Felix*, 91 F.4th 393, 397 (5th Cir. 2024) (*Barnes II*) (quotation marks omitted).

In the decision below, the district court applied this Circuit’s highly restrictive moment of the threat doctrine. As result, the district court ignored everything that occurred prior to Officer Felix’s jumping onto Barnes’ moving car, and evaluated only “the two seconds before Felix fired.” *Barnes v. Felix*, 532 F. Supp. 3d 463, 471 (S.D. Tex. 2021) (*Barnes I*). Based on that blinkered analysis, the district court concluded that Felix acted reasonably when he shot Barnes.

In the initial appeal in 2024, Judge Higginbotham authored a decision affirming the district court’s decision and applying the moment of the threat doctrine. Judge Higginbotham then took the extraordinary step of concurring in his own majority opinion. He urged the Supreme Court to overturn the moment of the threat doctrine. Judge Higginbotham also specifically emphasized that, had he been able to analyze “the totality of the circumstances,” he would have found “Officer Felix violated Barnes’s Fourth Amendment right to be free from excessive force.” *Barnes II*, 91 F.4th at 401 (Higginbotham, J., concurring).

In a unanimous decision, the Supreme Court answered Judge Higginbotham’s call. The Court overturned the moment of the threat doctrine and explained that it “conflict[ed]” with precedent requiring courts “to analyze the totality of the circumstances” instead. *Barnes v. Felix*, 605 U.S. 73, 81 (2025) (*Barnes III*). The Supreme Court then remanded for “the courts below” to “consider the reasonableness of the shooting” under the appropriate totality of the circumstances standard. *Id.* at 84.

On remand, the panel requested short letters from the parties providing guidance on how to proceed. In response, all the parties agreed the Court was not well positioned to decide whether Felix acted unreasonably. But the Court instead chose an option none of the parties advocated. Without the benefit of a lower court opinion—let alone briefing and argument—the Court decided the merits *sua sponte*.

In yet another decision by Judge Higginbotham, the panel concluded that Officer Felix *acted reasonably* under the totality of the circumstances because fleeing drivers like Barnes present a “risk of flight” and necessarily “pose a deadly threat for others on the road.” Pet. App. 9 (quotation marks omitted); *see also* Pet. App. 10 (finding use of force reasonable because “Barnes *could* have started a perilous high-speed chase” [italics added]); Pet. App. 11 (holding that Felix acted “reasonably in using deadly force to end the risk of flight” (brackets and quotation marks omitted)). This conclusion by Judge Higginbotham directly contradicted his own analysis in his 2024 concurrence, reaching an entirely opposite conclusion despite the fact that nothing in the case had changed in the interim.

In this decision, the Fifth Circuit effectively held that any time a driver poses a “risk of flight” in a motor vehicle, the driver’s flight constitutes a deadly threat as a matter of law and officers may therefore use deadly force against the driver. That conclusion conflicts with binding Circuit precedent, is irreconcilable with Supreme Court case law, and has created a massive circuit split. Indeed, for more than a decade, the Fifth Circuit has conclusively held that a driver “fleeing in a motor vehicle” does not “render” the use of deadly force reasonable—the exact opposite of what

the panel held in this case. *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 415 (5th Cir. 2009).

It is difficult to understate the stakes: If this Court does not take up this case for further review, the Fifth Circuit’s ruling will effectively “declare open season on suspects fleeing in motor vehicles.” *Id.* at 414. Here, a man was tragically shot dead over “an outstanding toll fee.” *Barnes II*, 91 F.4th at 401 (Higginbotham, J., concurring). That result is deeply unjust, and the panel’s decision will exacerbate the already disturbing phenomenon of police killing drivers “for minor” “violations.” *Crane v. City of Arlington*, 50 F.4th 453, 458 (5th Cir. 2022) (Higginbotham, J.); *see Barnes II*, 91 F.4th at 398-399 (5th Cir. 2024) (Higginbotham, J., concurring). This new Fifth Circuit doctrine carves out a special rule for deadly force cases that has no basis in the Constitution’s text, Supreme Court or Fifth Circuit precedent, or the common law tradition.

In this case, the Fifth Circuit failed to consider either “the severity of the crime” that prompted Felix to seize Barnes (a minor traffic violation), or the fact that Barnes had posed no “immediate threat” to Officer Felix when he initiated the seizure—despite *Graham* instructing courts to evaluate those specific factors when considering the totality of the circumstances. *Graham*, 490 U.S. at 396. Nor did the Fifth Circuit attempt to balance the competing private and public interests at stake or consider the parties’ “relative culpability”—also factors which this Court has stressed are critical to evaluating reasonableness under the Fourth Amendment. *Scott v. Harris*, 550 U.S. 372, 384 (2007); *see Graham*, 490 U.S. at 396.

Further, this new “risk of flight” doctrine conflicts with the common law tradition, in which officers who acted unreasonably faced civil and even criminal

liability for their actions. It produces deeply unjust outcomes. And it bears no relationship to the real world “policies adopted by” modern “police departments.” *Garner*, 471 U.S. at 15-16, 18.

This Court should not enshrine this Kafkaesque rule into constitutional law. To rule for Petitioner on the question presented, the Court need only hold that the “risk of flight” doctrine is wrong. On remand, the lower courts may then evaluate in the first instance whether Officer Felix used “unreasonable” force under the totality of the circumstances. U.S. Const. Amend. IV.

## STATEMENT OF THE CASE

### A. Statement of Facts.

On the afternoon of April 28, 2016, 24-year-old Ashtian Barnes was driving a rental car on the Sam Houston Tollway. Pet. App. 2a. The license plate of the car, which had been rented by Barnes’s girlfriend, was linked to outstanding toll violations incurred by another driver. *Id.* at 2a.

Respondent Roberto Felix, Jr. was “a traffic enforcement officer” for the Harris County Precinct Five Constable’s Office. *Id.* at 1a-2a. Officer Felix heard a radio broadcast identifying Barnes’s rental car as having “outstanding toll violations.” *Id.* at 2a. Officer Felix spotted the vehicle and initiated a traffic stop by engaging his emergency lights. Barnes complied and pulled onto “the median on the left side of the Tollway out of the immediate traffic zone.” *Id.*

Officer Felix exited his cruiser, approached the driver’s side of the rental car, and asked Barnes for his license and proof of insurance. *Id.* Barnes replied that “he did not have the documentation” and began “digging around in the car.” *Id.* at 2a (quotation marks

omitted). Officer Felix told Barnes to stop searching the car, claiming that he smelled marijuana. *Id.* at 2a–3a. Barnes told Officer Felix that he “might have the requested documentation in the trunk,” opened his trunk, and turned off the car. *Id.* at 3a (quotation marks omitted). No marijuana, other drugs, or any kind of drug paraphernalia were ever found in the car.

The District Court provided a summary of events, as recorded by the dashboard camera on Officer Felix’s cruiser:

“• At about 2:45:43, Felix asks Barnes to step out of the vehicle, and it appears that Barnes opens the driver’s-side door.

“• As the door opens, Felix’s right hand was on the holster of his gun.

“• At about 2:45:48, the vehicle’s taillights turn on.

“• About one second later, Felix draws his gun, and the vehicle starts to move forward.

“• Felix appears to step onto the door sill of the vehicle as the door begins to close.

“• As the vehicle accelerates, Felix yells, ‘Don’t fucking move!’ twice.

“• Felix briefly pulls his gun hand out of the vehicle.

“• At about 2:45:52, Felix fires his first shot.

“• Two seconds later, the vehicle comes to a complete stop.” *Id.* at 26a-27a.<sup>1</sup>

For nearly two minutes, “Officer Felix held Barnes at gunpoint until backup arrived while Barnes sat

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<sup>1</sup> The dash cam video was in evidence below and can be viewed at: [https://youtu.be/9gbM\\_22fUbY](https://youtu.be/9gbM_22fUbY).

bleeding in the driver's seat." *Id.* at 4a. "Barnes was pronounced dead at the scene." *Id.*<sup>2</sup>

In total, the traffic stop lasted less than three minutes. *Id.* at 17a. Less than ten seconds passed between the moment Officer Felix ordered Barnes to exit the vehicle and the moment Officer Felix jumped on the vehicle, "shoved his gun into Barnes's head, pushing his head hard to the right," and shot Barnes. *Id.* at 4a (quotation marks omitted).

### **B. Procedural History.**

1. Petitioner Janice Hughes Barnes is Ashtian Barnes's mother. She filed suit in state court against Officer Felix and Harris County under 42 U.S.C. § 1983. Her complaint alleges that Felix used excessive force in violation of Ashtian Barnes's Fourth Amendment rights. Respondents removed to federal court. At summary judgment, the District Court held that Felix's use of deadly force was reasonable under the Fifth Circuit's "moment-of-the-threat doctrine." Pet. App. 17a-32a.

In this Court's landmark decision in *Graham v. Connor*, the Court explained that determining whether the use of force is "reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation marks omitted). This test "is not capable of precise definition or mechanical application." *Id.* (quotation marks omitted). A court should consider "whether the totality of

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<sup>2</sup> Police later found a firearm in the car. It is undisputed that Officer Felix did not know about the firearm when he shot Barnes.

the circumstances” justified an officer’s use of deadly force, paying “careful attention to the facts and circumstances of each particular case.” (quotation marks omitted). *Graham*, 490 at 469 identified non-exhaustive factors to consider, “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.* This wholistic inquiry is “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” and “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Id.* at 396-397. The officer’s actual “intent or motivation” is irrelevant to whether a use of force was constitutional. *Id.* at 397. What matters instead is whether the officer’s use of force was “objectively reasonable.” *Id.*

As the District Court explained, however, “in cases involving the use of deadly force, the Fifth Circuit has developed a much narrower approach.” Pet. App. 23a24a. The Fifth Circuit asks only “whether the officer or another person was in danger at the moment of the threat that resulted in the officer’s use of deadly force.” *Id.* at 25a (quotation marks omitted). “The Fifth Circuit does not consider what had transpired up until the shooting itself in assessing the reasonableness of an officer’s use of deadly force.” *Id.* at 29a-30a (quotation marks omitted).

At summary judgment, the district court ruled for Felix and Harris County. The district court explained that “the Fifth Circuit has developed” a “narrow[] approach” for evaluating the reasonableness of an officer’s use of deadly force. *Id.* at 469. Under this

Court's moment of the threat doctrine, a court must "ask whether the officer or another person was in danger at the moment of the threat that resulted in the officer's use of deadly force." *Id.* (quotation marks omitted).

The district court concluded that "the moment of the threat" in this case occurred after Felix jumped onto the door sill, "in the two seconds before Felix fired his first shot." *Id.* at 471. "In that moment, Felix was still hanging onto the moving vehicle and believed it would run him over." *Id.* According to the district court, viewing just those two seconds in isolation, Felix acted reasonably.

2. On appeal, a Fifth Circuit panel affirmed in an opinion authored by Judge Higginbotham.

That panel reiterated that, under its established doctrine, it could "only ask whether Officer Felix was in danger at the moment of the threat that caused him to use deadly force against Barnes." *Barnes II*, 91 F.4th at 397 (quotation marks omitted). The Court underscored that "[a]ny of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit." *Id.* (quotation marks omitted). The panel agreed with the district court "that the moment of threat occurred in the two seconds before Barnes was shot," after Felix had jumped onto the moving car. *Id.* at 397. And the Court affirmed the holding that—viewing those two seconds in isolation—Felix acted reasonably. *Id.*

Judge Higginbotham concurred separately in his own majority opinion. Judge Higginbotham underscored that this Circuit's doctrine "counters the Supreme Court's instruction to look to the totality of the circumstances when assessing the reasonableness

of an officer's use of deadly force.” *Id.* at 398 (Higginbotham, J., concurring). He urged the Supreme Court to intervene. *Id.* at 401.

Judge Higginbotham also emphasized that “the totality of the circumstances merits finding that Officer Felix violated Barnes's Fourth Amendment right to be free from excessive force.” *Id.* In his words, “the use of lethal force” against Barnes “preceded any real threat to Officer Felix’s safety. *Id.* “Barnes’s decision to flee was made before Officer Felix stepped on the running board. His flight prompted Officer Felix to jump on the running board and fire within two seconds,” lest Barnes “get away with driving” a “rental car with an outstanding toll fee.” *Id.*

3. The Supreme Court granted review and reversed the panel’s decision in a unanimous decision. The Supreme Court explained that this Circuit’s doctrine “constricts the proper inquiry into the ‘totality of the circumstances.’” *Barnes III*, 605 U.S. at 79.

The Supreme Court also noted that—had he been able to analyze the totality of the circumstances—“Judge Higginbotham would have found that Felix’s shooting of Barnes was unreasonable.” *Id.*

The Court then “return[ed]” the case “to the courts below” “for them” “to consider the reasonableness of the shooting” under the appropriate legal standard. *Id.* at 84.

4. On remand, the panel “requested simultaneous letter briefs from the parties regarding the next steps that counsel recommend.” ECF 215.

In response, all the parties agreed the Court was not well positioned to decide the merits. Barnes explained that the Court should follow its ordinary course and

remand the case to the district court for it to analyze the totality of the circumstances in the first instance. *See Barnes Ltr.*, ECF 263. Felix argued that the Court should “address the constitutionality of” “Felix’s use of force under the ‘totality of the circumstances’ test” but only after receiving “full merits briefing.” *Felix Ltr.*, ECF 264 at 2. Meanwhile, Harris County likewise urged the Court to request “additional briefing” “regarding the reasonableness of the shooting” before deciding that question. *Harris Cty. Ltr.*, ECF 262 at 10.

The Court did something that no one advocated. Without the benefit of briefing or oral argument—to say nothing of a lower court decision—the panel decided the case *sua sponte*, focusing not on an analysis of the totality of the circumstances but on an issue that had never been briefed or argued by the parties, the new “risk of flight” doctrine.

As in 2024, Judge Higginbotham authored the panel’s opinion. But in sharp contrast to 2024, Judge Higginbotham concluded that Felix acted reasonably. According to the panel decision, had Felix not used deadly force against Barnes, “Barnes *could* have started a perilous high-speed chase.” (emphasis added) Pet. App. 10 (Opinion included in Appendix). In other words, Felix “act[ed] reasonably in using deadly force to end the risk of flight.” Pet. App. 11 (quotation marks and alterations omitted). This directly contradicted Judge Higginbotham’s conclusion in his own 2024 concurrence.

This Petition follows.

**REASONS FOR GRANTING THE PETITION****A. THE PANEL'S HOLDING BREAKS WITH LONG-STANDING SUPREME COURT AND FIFTH CIRCUIT PRECEDENT.**

The Fourth Amendment protects “the right of the people to be secure in their persons” “against unreasonable” “seizures,” which includes the right to remain free from excessive force. U.S. Const. Amend. IV; *see Torres v. Madrid*, 592 U.S. 306, 309 (2021). A staple of Fourth Amendment jurisprudence is that the question of whether an officer’s use of force is reasonable in a particular case turns on “the totality of the circumstances.” *Garner*, 471 U.S. at 8; *accord Los Angeles County v. Mendez*, 581 U.S. 420, 421 (2017); *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014); *Scott*, 550 U.S. at 383; *Graham*, 490 U.S. at 396. In this context, the Fourth Amendment does not supply “rigid” rules or “magical on/off switch[es],” *Scott*, 550 U.S. at 382. A court must “slosh” “through the factbound morass of ‘reasonableness.’” *Scott*, 550 U.S. at 38.

But in this case, the Fifth Circuit engaged in no “slosh[ing]” whatsoever, and in leaping to assert a novel new interpretation of Fourth Amendment law, the Fifth Circuit has effectively expanded qualified immunity to cover the use of deadly force any time an individual an individual poses a risk of disengaging from police detention—as a per se rule negating any additional need for a “totality of the circumstances” inquiry.

1. Let us start with the Fifth Circuit’s own precedent. The new Fifth Circuit decision represents a clear and decisive break from that Court’s own prior published decisions, which make clear that “a suspect that is fleeing in a motor vehicle is not so inherently

dangerous that an officer’s use of deadly force is *per se* reasonable.” *Lytle*, 560 F.3d at 416.<sup>3</sup> Now, in contrast, the Court has flipped that precedent on its head, establishing that not only flight, but simply the mere “risk of flight” (a purely subjective standard that seemingly relies upon an officer’s own perception of a detainee’s intent) is sufficient *per se* to justify an officer’s use of deadly force, a singularly perverse and inexplicable new development in the law that cries out for correction as previously delineated in *Garner*.

2. The panel’s new *per se* rule (hereafter the “risk of flight doctrine”) that officers may use force against drivers posing a “risk of flight” also conflicts with outstanding Supreme Court precedent.

As a threshold matter, the decision is in direct conflict with landmark Fourth Amendment case law.

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<sup>3</sup> The central case is *Lytle*, in which the Court held that it was unreasonable for an officer to use deadly force when a “chase took place at high speeds within a residential area, there were children playing somewhere nearby” but there was no “immediate danger.” *Id.* The Court acknowledged the truism that “any suspect fleeing in a motor vehicle poses some threat of harm to the public.” *Id.* at 415. But the Court stressed that “real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable.” *Id.* The panel’s decision—permitting an officer to use deadly force when a driver seeks to flee—is simply impossible to square with *Lytle*.

Nor does *Lytle* stand alone. The Fifth Circuit has on several other occasions reaffirmed the principle that an officer may not use deadly force against a fleeing driver. *See Baker v. Coburn*, 68 F.4th 240 at 249 (5th Cir. 2023) (explaining an officer may shoot at “a speeding car” only if officer has “cause to believe that the car poses an immediate threat,” citing *Lytle*, and denying summary judgment); *Edwards v. Oliver*, 31 F.4th 925 at 932 (5th Cir. 2022) (explaining precise threat car posed was “material to the excessive force claim,” citing *Lytle*, and denying summary judgment); *Flores*, 381 F.3d at 399 (unreasonable to shoot at driver who “did not drive erratically” or pose a threat).

Under *Tennessee v. Garner*, 471 U.S. 1, 20 (1985), it is unreasonable to use deadly force simply because a felon flees the scene—let alone someone who flees a misdemeanor traffic stop. But the Court’s holding here means *Garner*’s prohibition on killing fleeing suspects is now inapplicable on roadways. Instead, in the Fifth Circuit, an officer can now use deadly force against a fleeing driver simply because the driver poses a risk of flight.

In contrast, the Supreme Court has never applied this kind of per se rule permitting deadly force against fleeing drivers. Instead, in its car chase cases, the Court has analyzed the specific factors unique to each case that demonstrated why a specific driver posed a serious threat and why deadly force was warranted in that individual case. That mode of analysis—sloshing through the “factbound morass”—is incompatible with the Court’s ruling here. *Barnes*, 605 U.S. at 80.

For example, in *Scott v. Harris*, the Supreme Court concluded that an officer had acted reasonably in using deadly force to terminate a dangerous car chase. But the Court did not apply a per se rule. Instead, the Court underscored that there is no “easy-to-apply legal test in the Fourth Amendment context.” *Scott* 550 U.S. at 383. The Court stressed that, in every case, it must “must 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.” *Id.* (quotation marks omitted). The Court analyzed the lengthy “Hollywood-style car chase of the most frightening sort,” and underscored that the driver in that particular case had “posed an actual and imminent threat” to “pedestrians,” “civilian motorists, and to the officers.” *Id.* at 380, 384.

In *Plumhoff v. Rickard* (which the Fifth Circuit’s new doctrine relies upon heavily), this Court likewise found an officer’s use of force to be reasonable in a car “chase” that “exceeded 100 miles per hour,” “lasted over five minutes,” and concluded that—based on those facts—the driver “pose[d] a deadly threat for others on the road.” 572 U.S. at 776-777. That extensive factual analysis—focused on the specific danger the driver posed—would have been unnecessary if there was a per se rule permitting the use of deadly force against a non-compliant driver. See also *Mullenix v. Luna*, 577 U.S. 7, 18 (2015) (driver was “fleeing arrest, at speeds over 100 miles per hour,” “was armed and possibly intoxicated,” “had threatened to kill any officer he saw,” and was “racing towards” another officer’s “position”).

Instead of sloshing “through” the “factbound morass” and “careful[ly] balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake” in accordance with this Court’s decisions in *Garner* and *Graham*, the panel simply concluded without any attempt at analysis or balancing whatsoever that:

“all that a reasonable police officer could have concluded was that [Barnes] was intent on . . . flight and that, if he [were] allowed to do so, he would . . . pose a deadly threat for others on the road”—the vehicle would enter traffic in the fast-lane of the freeway. Because the very “fact that a suspect flees when suspected of a minor offense could well be indicative of a larger danger,” Felix faced a split-second decision between only bad options. Had Felix remained flatfooted on the pavement, Barnes could have started a

perilous high-speed chase during rush hour on Houston's busiest toll road—or, even if he did not speed away, he could have seriously injured Felix with the car. Pet. App. 9-10.

The panel leaned heavily on this Court's ruling in *Plumhoff* in coming to this conclusion. However, in direct contrast to the facts in this case, in *Plumhoff* "Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper was flush against a patrol car, an officer fired three shots into Rickard's car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshot wounds and injuries suffered when the car eventually crashed." But the panel's sole explanation of why Barnes' actions imperiled "others on the road" was to simply replace the name "Rickard" with the name "Barnes" in quoting *Plumhoff*: "all that a reasonable police officer could have concluded was that [Barnes] was intent on . . . flight and that, if he [were] allowed to do so, he would . . . pose a deadly threat for others on the road." One page later the panel *asserted* that it had considered the "totality of the circumstances" in reaching its conclusion, but no such analysis is at all evident in their opinion. In short, the panel totally ignored this Court's clear instruction that the case be remanded to the lower courts "for further proceedings consistent with this opinion" "to consider the reasonableness of the shooting, using the lengthier timeframe we have prescribed," and instead dashed off a new opinion *sua sponte* without any arguments or briefs on the merits, effectively rubberstamping the

end result of its original finding under its now-prohibited “moment of the threat” doctrine.

Given that the Fifth Circuit panel ignored long-standing Supreme Court precedent, its own precedent, and this Court’s clear guidance on remand, this Court should grant certiorari and take this case up for review.

### **B. THE PANEL’S HOLDING CREATES A DEEP CIRCUIT SPLIT.**

The panel decision also creates a sizable circuit split. As the Fifth Circuit already detailed in *Lytle*, a “number of” other circuits “have found police officers’ shooting of fleeing motorists to be unreasonable.” 560 F.3d at 416. Indeed, two years ago, the Third Circuit outlined the “robust consensus of cases” across the Courts of Appeals—including the Fifth Circuit’s decision in *Lytle*—“establishing that” it is unreasonable to shoot “an otherwise non-threatening individual . . . engaged in vehicular flight.” *Jefferson v. Lias*, 21 F.4th 74, 81-86 (2021).

Thus, for example, the Fourth Circuit held in 2019 that an officer violated clearly established law when he shot a fleeing driver but was not “in the car’s trajectory.” *Williams v. Strickland*, 917 F.3d 763, 770 (2019). The Ninth Circuit has similarly held that an officer acted unreasonably when he shot a driver as a car “rolled backwards away from him.” *Adams v. Speers*, 473 F.3d 989, 992 (2007). And in 2020, the Tenth Circuit explained that the “use of deadly force is clearly unreasonable when (1) the only threat is one posed by reckless driving and (2) the immediacy of the threat to the officer is a disputed fact that a reasonable jury could resolve against the officer.” *Reavis v. Frost*, 967 F.3d 978, 994 (2020); see also, e.g., *Vaughan v. Cox*,

343 F.3d 1323, 1333 (11th Cir. 2003) (unreasonable to shoot fleeing driver where “reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour . . . would transform the risk of an accident on the highway into a virtual certainty”); *Smith v. Cupp*, 430 F.3d 766, 775 (2005) (explaining that “officer must have reason to believe that the car presents an imminent danger”); *Cowan v. Breen*, 352 F.3d 756, 763 (2003) (finding it unreasonable to shoot a driver); *McCaslin v. Wilkins*, 183 F.3d 775, 779 (8th Cir. 1999) (same); *Starks v. Enyart*, 5 F.3d 230, 234 (1993) (same).

The panel considered none of this authority—and in so doing created a circuit split—in no small part because it decided this consequential case without any briefing. That panel then attempted to gloss over the lack of any real logical underpinning to its decision by simply claiming in the end that it could reach its decision “based on the undisputed events depicted in the video and Felix’s uncontested sworn testimony [and] based on the totality of the circumstances, that no genuine dispute of material fact exists as to whether Felix used excessive force in an objectively unreasonable manner at any time in the traffic stop.” Therefore, “because the plaintiffs have failed to satisfy the first step of the qualified-immunity analysis—raising a dispute of material fact on whether Barnes’s Fourth Amendment right to be free from excessive force was violated—we do not reach whether the violated right was ‘clearly established’ at the time of the incident. Accordingly, the plaintiffs have failed to meet their burden to defeat Felix’s invocation of qualified immunity, and Felix is entitled to summary judgment on the excessive- and deadly-force claims against him. And as the plaintiffs have failed to show a constitutional violation, their claims against the

county fail.” Pet. App. 11-12. But that assertion is false on its face. Throughout the thousands of pages of evidence, briefs and arguments that have been filed in this case, the parties have made it clear that there is substantial and substantive disagreement as to the facts of this case, and specifically Petitioner has made it clear up to and including the letter briefs she filed with the Court that “Felix’s uncontested sworn testimony” was in fact highly contested, as it varied substantially from one sworn statement under oath to the next. As noted *supra*, all the parties agreed that the Court had insufficient information and understanding in the case to render a judgment, and certainly none of the parties was ever asked to argue or brief the merits of the panel’s determination that Barnes’ seconds-long attempt to escape custody posed any real danger to Officer Felix or the public at large. Instead, following the aberrant path it settled on when it disregarded well-established procedural norms by requesting short letter briefs on how to move forward with the case with no guidance whatsoever as to the issues to be addressed, and then proceeded without delay to issue a ruling that completely shattered existing precedent in fleeing suspect cases, the panel leapt from a ten-page analysis of the problems wrought by fleeing suspects to a convenient if facially false assertion that it had, indeed, considered “the totality of the circumstances” and then leaped once again to the jolting conclusion that the extreme danger posed by fleeing suspects resolved all of the remaining controversies in the case.

Even if the proposed new “risk of flight doctrine” was not by itself enough to give pause as it applies to this one case, this corollary interpretation yields a far more dangerous result: in direct conflict with *Garner*, courts in the Fifth Circuit no longer have to “slosh” through a

morass of facts in order to determine whether deadly force can be used to prevent *any* suspect from fleeing custody, or even posing a mere *risk* of flight. Further, while in this case the doctrine appears to address only vehicular escapes, the lack of any balancing inquiry whatsoever lends itself to an easy expansion to draw in suspects on foot, suspects who might simply be *considering* fleeing, or for that matter any suspects who are resisting arrest. At a time when the boundaries of qualified immunity are coming under greater examination than at any time since that policy's inception, the Fifth Circuit opinion opens the door for officers to justify deadly force by simply asserting they believed a suspect was making plans to escape custody. That alone should be a sobering thought.

**C. THE USE OF DEADLY FORCE TO PREVENT POSSIBLE EVASION AND ESCAPE BY DETAINEES LACKS ANY BASIS IN THE COMMON LAW.**

This new Fifth Circuit doctrine also has no apparent basis in the Anglo-American common law tradition. That is unsurprising. The courts that have adopted this counterintuitive rule root it in a misreading of modern precedent. That this doctrine is of such comparatively recent vintage provides yet another reason to reject it. *See Lange v. California*, 594 U.S. 295, 309 (2021); Brief for Amici Curiae Cato Institute et al. *Amicus* Br. 3-9.

At common law, officers could not “use more force than [wa]s necessary.” Harvey Cortlandt Voorhees, *The Law of Arrest in Civil and Criminal Actions*, (1904). They faced civil liability “in trespass” for using excessive force, and they were “guilty of manslaughter or even murder” if they killed a suspect unnecessarily. *Id.* Officers were specifically warned “to be very

careful that they do not misbehave themselves in the discharge of their duty,” lest they “forfeit” their “special protection” from prosecution. Foster, *supra* at 319; see 4 William Blackstone, Commentaries \*180 (“[T]here must be an apparent necessity on the officer’s side \* \* \* without such absolute necessity, it is not justifiable.”); see also Brief for Amici Curiae Due Process Institute et al. at 17-19 (discussing original purpose of Section 1983 in holding law enforcement accountable).

When assessing the propriety of an officer’s use of force, common law courts evaluated the totality of the circumstances. See, e.g., *Barrett v. United States*, 64 F.2d 148, 150 (D.C. Cir. 1933) (holding court improperly “restricted the inquiry of the jury to the occasion of the arrest and ignored precedent circumstances”); *Colorado v. Hutchinson*, 9 F.2d 275, 278 (8th Cir. 1925) (allowing jury to decide whether “under all the circumstances” officer reasonably jumped onto car and shot driver); *Jackson v. State*, 66 Miss. 89 (1888) (explaining that officer who used deadly force against fleeing felon must show other “means had failed,” and jury must consider “all the circumstances attending the officer and the deceased at the time”); *Reneau v. State*, 70 Tenn. 720, 722 (1879) (officers “will not be excused for taking life in any case, where, with diligence and caution, the prisoner could be otherwise held”).

In particular, considering the fleeing felon rule, under that common law doctrine, officers could use deadly force “to effect the arrest of a fleeing felon, though not a misdemeanor.” *Garner*, 471 U.S. at 13; see 1 Matthew Hale, *Historia Placitorum Coronae* (1736). In other words, at common law, the lawfulness of an officer’s use of force often hinged on “the severity of the crime at issue.” *Graham*, 490 U.S. at 396. In this case, the offense at issue was a trivial misde-

meanor: Barnes was driving with outstanding toll violations. A common law court *would* likely have considered the nature of Barnes’s offense in determining whether to impose civil or criminal liability on Officer Felix. *See Hale, supra* at 481 (“[I]f a man be in danger of arrest by a *Capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder.”). In sharp contrast to the common law, however, the Fifth Circuit’s new risk of flight doctrine prevented that Court from evaluating the minor nature of the offense which prompted Officer Felix’s deadly seizure. Pet. App. 15a (Higginbotham, J., concurring).

In *Garner*, this Court rejected the fleeing felon doctrine because criminal law evolved in ways that undermined the foundations of the common law rule. Felonies are no longer universally “punishable by death,” as they were at common law, and many “misdemeanors” “at common law are now felonies.” *Garner*, 471 U.S. at 14. But the fact that a common law court would consider the severity of Barnes’s offense—and the Fifth Circuit could not—demonstrates how this new doctrine has no basis in common law tradition.

In addition—in direct contrast to the panel’s unexplained determination that Officer Felix acted appropriately and in full compliance with his training when he leaped on board Barne’s car and then fired two fatal shots within mere seconds— at common law, officers who overstepped their authority and placed themselves in dangerous situations faced liability for using deadly force. As one treatise explained, “[i]f an officer has brought peril upon himself by his own unlawful act, \* \* \* he will not be justified in taking the life of his prisoner.” Voorhees, *supra* at 111; *see Commonwealth v. Weathers*, 7 Luzerne Legal Reg. 1

(1892); *Carter v. State*, 17 S.W. 1102, 1105 (Tex. App. 1891) (explaining that where officer placed himself “in a situation where” “it was necessary for him to defend himself,” “the law justly limits his right of self-defense, regulates it according to the magnitude of [the officer’s] wrong”); *Roberson v. State*, 14 S.W. 902, 903 (Ark. 1890) (“[H]e could not justify a homicide, though done in self-defense, for its necessity grew out of his wrongful act.”).<sup>4</sup>

Here too, the new per se risk of flight doctrine is in deep tension with the Anglo-American tradition. Again, unlike at common law, this new doctrine ignores everything the officer did prior to “the millisecond at which an officer deploys deadly force.” Pet. App. 12a (Higginbotham, J., concurring).

**D. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT, AND THIS CASE OFFERS AN IDEAL VEHICLE TO ADDRESS IT.**

The question presented is extraordinarily important. Janice Barnes is not the only parent grieving the unnecessary loss of a child. Every year, law enforcement officers deploy force or the threat of force against approximately 1 million people in the United States, leading to 75,000 injuries requiring hospital treatment, and between 600 and 1,000 deaths.<sup>5</sup> The

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<sup>4</sup> See also, e.g., William M. McKinney & Burdett A. Rich, eds., *Ruling Case Law* (1916) (“A peace officer who attempts illegally to make an arrest \* \* \* cannot plead self-defense in justification of the killing of such person, where the necessity grows out of resistance to such arrest”); *Coleman v. State*, 49 S.E. 716, 718 (Ga. 1905); *Peter v. State*, 5 S.W. 228, 230 (Tex. App. 1887).

<sup>5</sup> Facts and Figures on Injuries Caused by Law Enforcement, Law Enf’t Epidemiology Project, Univ. Of Ill. Chi.: Sch.

Fourth Amendment and its reasonableness standard governs each interaction. See *Graham*, 490 U.S. at 396. The issue at the heart of this case—what facts and circumstances a court may analyze when evaluating reasonableness—is critical to distinguishing the constitutional use of force from unlawful encounters that violate the foundational liberty protections embodied in the Fourth Amendment.

Simply put, the Fifth Circuit’s new risk of flight produces deeply unjust results, is unadministrable, and bears little relationship to how many major police departments train their officers. This Court should not enshrine this illogical doctrine into constitutional law.

The core question presented in this appeal is exceptionally important—and exceptionally simple: does the rule enshrined in *Garner* limiting the use of deadly force to stop fleeing motorists still apply? As a result of the panel’s decision, anytime a driver poses a risk of leaving the scene of a “misdemeanor traffic violation”—indeed, any traffic stop for any reason—that driver poses the deadly threat of “a perilous high-speed chase,” and an officer may use deadly force to stop the driver. Pet. App. 8, 10.

That holding will have devastating consequences, greatly exacerbating the all-too common phenomenon of deadly traffic stops. See *Barnes*, 91 F.4th at 398-399 (Higginbotham, J., concurring); *Crane*, 50 F.4th at 458 (Higginbotham, J.). In this case, a man tragically and unnecessarily lost his life over “an outstanding toll fee.” *Barnes*, 91 F.4th at 401 (Higginbotham, J.,

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Of Pub. Health, <https://policeepi.uic.edu/data-civilian-injuries-lawenforcement/facts-figures-injuries-caused-law-enforcement/> (last visited May 20, 2024).

concurring). That result alone is deeply unjust, and this matter cries out for this Court's review.

**1. The Risk of Flight Rule Unnecessarily Expands the Umbrella Coverage of Qualified Immunity.**

As detailed above, longstanding precedent and the common law have acted to shield fleeing suspects from the use of deadly force by officers unless the suspects' actions clearly demonstrate a grave risk to the officers or the general public. Granted, as Justice Kavanaugh and three others fully articulated in the concurrence issued in conjunction with their previous decision in favor of Petitioners, a suspect's decision to flee raises some serious concerns that should be considered by a court (following a "totality of the circumstances" analysis as laid out in *Garner*), and such a scenario typically yields no obvious right answers. But this ruling by the Fifth Circuit attempts to transform those real concerns and guidance into a massive expansion of qualified immunity law by imposing a new per se rule wherein *any* motorist posing a risk of flight (or, by extension, a suspect on foot) will justify the use of deadly force.

**2. Risk of Flight Rule Mischaracterizes Dangers Created by a Fleeing Suspect.**

In a publication that was in process prior to issuance of the Fifth Circuit's opinion and was released roughly a month later, *The Harvard Law Review* raised a concern that the four-Justice concurrence "offered the greatest insight into the potential future of deadly force claims. Under traditional flight doctrine, the plaintiff's decedent, Ashtian Barnes, was not 'fleeing' from the officer when he was shot. Yet the concurrence

mischaracterized his failure to comply with a police order to exit his vehicle as flight. The concurrence imprecisely applied the Court's flight precedent to Barnes's noncompliance, an analytical approach lower courts would be remiss to adopt. Doing so would broaden the scope of behavior that can result in officers legally deploying deadly force, potentially facilitating the use of such force in everyday traffic interactions."<sup>6</sup> Summarizing Kavanaugh's analysis of the various options available to officers when suspects attempt to flee, the Law Review article noted:

"There are no . . . risk-free answers" to an officer who encounters a fleeing driver, according to Justice Kavanaugh. The officer could (1) "let the driver go," but this could cause a moral hazard for drivers; (2) "give chase," but this enhances the public safety risk; (3) shoot at the car's tires, but this is often ineffective or even dangerous; or (4) "attempt to stop the fleeing driver . . . by jumping on or reaching into the car," as Felix did, but this could endanger the officer and the public.

As the concurrence itself makes clear, then, the only real risk imposed by letting the driver escape is some kind of "moral hazard". Compared to the far more significant risks imposed by all the other options, therefore, it would seem to be a far superior alternative to the use of any form of deadly force—and yet the cursory analysis laid out in the Fifth Circuit opinion came to the exact opposite conclusion. This is the problem the Law Review so presciently addressed, that "the concurrence could lead lower courts astray,

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<sup>6</sup> Harvard Law Review, *Barnes v. Felix*, 139 Harv. L. Rev. 291, available at <https://harvardlawreview.org/print/vol-139/barnes-v-felix/>.

effectuating adverse doctrinal and practical consequences.” And that is precisely what has happened here, making it imperative that this Court clarify its guidance to those same courts by taking up this case for further review.

**3. Current events have left the public and the police equally confused as to the permissible use of deadly force in police encounters.**

As current events have underscored, never has there been more need for clarity as to when a federal or local agent may use deadly force against a suspect. The deaths of Renee Good and Alex Pretti in Minneapolis at the hands of agents of the Immigration and Customs Enforcement agency have ignited a firestorm of controversy regarding when a law enforcement officer may employ deadly force. According to statements released by top law enforcement officials of the current presidential administration in the wake of these shootings, there are apparently few if any limitations on their agents’ use of force. Newspapers and other news outlets across the country are already racing to reconcile this stance with this Court’s previous opinion in *Barnes*, in particular whether the officer in the Good shooting was justified using deadly force against a fleeing suspect due to being physically in some form of danger (a danger, like that of Officer Felix’s, that was almost fully self-imposed).<sup>7</sup>

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<sup>7</sup> See, for example: David French, *Trump and Vance Are Fanning the Flames. Again.*, New York Times, January 11, 2026; Rob Doar, *Opinion | The cases for and against self-defense in the killing of Renee Good*, Minneapolis Star Tribune, January 12, 2026; Matt deGrood, *What are the rules for police use of deadly force? How the Supreme Court decided in a Texas case*, Houston

The police community is equally interested in clarification as to the use of deadly force in these scenarios. Ruling for Petitioner will promote “effective law enforcement.” *Garner*, 471 U.S. at 15-16. The totality of the circumstances standard provides officers a wide measure of discretion to respond to dangerous circumstances. The Fifth Circuit’s new risk of flight doctrine, by contrast, has no relationship to real-world policing. Police officers protect and serve their communities with courage and honor. Ruling for Petitioner will not prevent officers from defending themselves or the public.<sup>8</sup>

Under *Graham*, judges cannot second guess officers with “the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396. Instead, they must evaluate an officer’s conduct from the perspective of that particular officer “on the scene.” *Id.* Where officers make reasonable, “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving”—they do not run afoul of the Fourth Amendment. *Id.*

This generous standard permits officers to make reasonable “mistake[s]” in the heat of the moment—including mistakes that run counter to training, mistakes that violate police procedure, and mistakes that lead to unnecessary use of deadly force. *Id.*; see *Saucier v. Katz*, 533 U.S. 194, 204 (2001) (“If an officer

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Chronicle, January 13, 2026; Martin Kaste, *State officials say they’ll do their own probes of shootings by federal officers*, NPR, January 9, 2026; Chip Brownlee, *Immigration agents are shooting people. Is it legal?*, MinnPost, January 14, 2026; Samantha Michaels, *Misconduct Expert Says State Has the Right to Charge ICE Officer Who Killed Renée Good*, Mother Jones, January 9, 2026.

<sup>8</sup> See Seth W. Stoughton, *The Legality of Deadly Force: Three Critical Questions about the ICE Shooting in Minneapolis*, Verdict, January 9, 2026.

reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.”); *Biegert v. Molitor*, 968 F.3d 693, 698 (2020)(Barrett, J.) (recognizing that officers may make reasonable mistakes without violating the Fourth Amendment).

In addition, in every Section 1983 case, officers receive the added protection of qualified immunity. *See Saucier*, 533 U.S. at 205. An officer will thus not face civil liability unless he *both* uses objectively unreasonable force *and* “existing precedent” “placed the statutory or constitutional question beyond debate.” *White v. Pauly*, 580 U.S. 73, 79 (2017) (quotation marks omitted). The combination of *Graham*’s lenient standard and qualified immunity dramatically reduces the chance that “an officer” who “act[s] in good faith” will be accidentally penalized. *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015).

Ruling for Petitioner will reinforce how police use force in the real world. Modern police departments train officers on *Graham v. Connor* and the totality of the circumstances standard.<sup>9</sup> Nullifying *Garner* and expanding the old common law fleeing felon rule to cover all attempts by detainees to flee custody, by contrast, conflicts with “policies adopted by” “police departments” around the country. *Garner*, 471 U.S. at 18.

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<sup>9</sup> Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 Cornell L. Rev. 1281, 1303 (2019) (use-of-force policies from seventy five of the country’s largest cities universally “contain[ed] a reference to the reasonableness standard from *Graham v. Connor*”).

If this Court allows the Fifth Circuit's aberrant ruling to stand by failing to take up this case for review, it would open the door for other circuits to follow suit, and any last remaining guardrails of unconstitutional seizures (i.e. deadly force) will be consigned to the dustbin of history.

### **CONCLUSION**

For the foregoing reasons, we ask that this Court take up this case for further review and a summary reversal of the Fifth Circuit's decision. We cannot give Janice Hughes back the life of her son, but we can still give her some measure of justice.

Respectfully submitted,

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February 12, 2026

## **APPENDIX**

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**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[Filed September 18, 2025]

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No. 22-20519

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JANICE HUGHES BARNES, Individually and  
as Representative of the ESTATE OF ASHTIAN BARNES,  
Deceased; TOMMY DUANE BARNES,

*Plaintiffs-Appellants,*

*versus*

ROBERTO FELIX, JR.; COUNTY OF HARRIS, TEXAS,

*Defendants-Appellees.*

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Appeal from the United States District Court for the  
Southern District of Texas  
USDC No. 4:18-CV-725

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ON REMAND FROM THE SUPREME  
COURT OF THE UNITED STATES

Before Elrod, *Chief Judge*, and Higginbotham and  
Smith, *Circuit Judges*.

Patrick E. Higginbotham, *Circuit Judge*:

As advances of the genre of the Morse code, with its  
twenty-six letters and ten numerals, railroads, and  
flight challenged the social order and perforce its legal  
regime, today we repair to the horseless carriage with  
its then unimaginable role in daily life, and as with

each of the past challenges to the essential task of policing its usage. From a unanimous Supreme Court came pretextual stops, enabling police officers to stop an automobile upon probable cause that any traffic violation has occurred, even if the stop is in search of another violation.<sup>1</sup> Even before that, the Court, aware of the “inordinate risk confronting an officer as he approaches a person seated in a vehicle,” had granted officers the right to order the driver out of the vehicle.<sup>2</sup> The import of these decisions cannot be understated, as traffic stops are among the most common interactions the public has with police.

And while *Mimms*’s common-sense protection enables the officer to distance the driver from weapons or contraband in the vehicle, it also prevents a high-speed car chase. The officer’s power to preempt flight by separating the suspect from his vehicle is crucial as “[a] driver who speeds away from a traffic stop can pose significant dangers to both the officer and the

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<sup>1</sup> *Whren v. United States*, 517 U.S. 806, 810, 813 (1996) (holding “the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred” and rejecting the argument that “the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved”); accord *Heien v. North Carolina*, 574 U.S. 54, 60 (2014) (“[O]fficers need only reasonable suspicion—that is, a particularized and objective basis for suspecting the particular person stopped of breaking the law.” (quotations and citation omitted)).

<sup>2</sup> *Pennsylvania v. Mimms*, 434 U.S. 106, 110–11 (1977) (per curiam) (holding police officer conducting lawful stop for traffic violation may order driver out of vehicle as a matter of course without violating the Fourth Amendment, even if officer has no reason to suspect foul play from driver at time of the stop); accord *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (confirming *Mimms* rule applies to passengers as well as drivers).

surrounding community.”<sup>3</sup> It follows that the choice to use deadly force in such a situation is “presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others.”<sup>4</sup>

This well-settled precedent dictates the outcome of this excessive-force case. Deputy Roberto Felix fatally shot Ashtian Barnes on the Sam Houston Tollway. Barnes’s parents sued Felix and Harris County under 42 U.S.C. § 1983.<sup>5</sup> The district court granted summary judgment on the plaintiffs’ excessive- and deadly-force claims against Felix and their *Monell* claims against Harris County.

Bound by this circuit’s “moment-of-threat” rule, we affirmed.<sup>6</sup> Under that doctrine, “[t]he excessive force inquiry is confined to whether the [officer] was in danger at the moment of the threat that resulted in the [officer’s] shooting,” and “any of the officers’ actions leading up to the shooting are not relevant.”<sup>7</sup>

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<sup>3</sup> *Barnes v. Felix*, 605 U.S. 73, 87 (2025) (Kavanaugh, J., concurring).

<sup>4</sup> *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009); see also *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (officer may take a life only if it is necessary to prevent an escape and officer has probable cause to believe the suspect poses a significant risk of physical harm to himself or another).

<sup>5</sup> The plaintiffs also brought claims under the Texas Tort Claims Act but have since abandoned them.

<sup>6</sup> *Barnes v. Felix*, 91 F.4th 393, 397–98 (5th Cir. 2024).

<sup>7</sup> *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (alterations in original) (citation omitted); see also, e.g., *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) (“[R]egardless of what had transpired up until the shooting itself, [the suspect’s] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm.”).

While the Fifth, Second, Fourth, and Eighth Circuits have applied this truncated analysis, the majority of our sister circuits consider the totality of the circumstances in determining the reasonableness of an officer's use of deadly force.<sup>8</sup> A concurring judge on this

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<sup>8</sup> See, e.g., *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (“We first reject defendants’ analysis that the police officers’ actions need be examined for ‘reasonableness’ under the Fourth Amendment only at the moment of the shooting. We believe that view is inconsistent with Supreme Court decisions and with the law of this Circuit.”); *Carswell v. Borough of Homestead*, 381 F.3d 235, 243 (3d Cir. 2004) (“All of the events leading up to the pursuit of the suspect are relevant.”); *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) (considering the totality of circumstances even in the context of deadly force); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) (“Where a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.”); *Est. of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (“If a fleeing felon is converted to a ‘threatening’ fleeing felon *solely* based on the actions of a police officer, the police should not increase the degree of intrusiveness.”); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018) (“While a Fourth Amendment violation cannot be established ‘based merely on bad tactics that result in a deadly confrontation that could have been avoided,’ the events leading up to the shooting, including the officers['] tactics, are encompassed in the facts and circumstances for the reasonableness analysis.” (citations omitted)); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159–60 (10th Cir. 2008) (considering totality of the circumstances leading up to the use of force, including “whether an officer’s own ‘reckless or deliberate conduct’ in connection with the arrest contributed to the need to use the force employed.” (citation omitted)); *Ayers v. Harrison*, 650 F. App’x 709, 719 (11th Cir. 2016) (“[The officer’s] argument that our precedent precluded [the plaintiff] from advancing an ‘officer created danger’ theory at trial is both factually and legally incorrect.”); *Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (“[W]hatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, where, as here, a [F]ourth [A]mendment violation is alleged, the

panel urged the Supreme Court to resolve the circuit split over the application of a doctrine deployed daily across this country.<sup>9</sup>

And it did. In a unanimous opinion, the Supreme Court reversed, holding the moment-of-threat rule improperly constrains a court’s temporal analysis of whether an officer acted reasonably in using force.<sup>10</sup> The Court found that *Tennessee v. Garner* and its progeny control;<sup>11</sup> any claim “that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its reasonableness stand-

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inquiry remains whether the force applied was reasonable.”). *But see Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (“[The 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.”); *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005) (“[T]he reasonableness of the officer’s actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed.” (citations omitted)); *Banks v. Hawkins*, 999 F.3d 521, 525–26 (8th Cir. 2021) (“In any event, we evaluate the reasonableness of [the officer’s] conduct by looking primarily at the threat present *at the time* he deployed the deadly force.” (citation omitted)).

<sup>9</sup> *Barnes*, 91 F.4th at 401 (Higginbotham, J., concurring) (“This case should have enjoyed full review of the totality of the circumstances. It is time for this Court to revisit this doctrine, failing that, for the Supreme Court to resolve the circuit divide.”).

<sup>10</sup> *Barnes*, 605 U.S. at 80 (“[T]he ‘totality of the circumstances’ inquiry into a use of force has no time limit.”).

<sup>11</sup> *Id.* at 80–81; 471 U.S. at 8–9.

ard.”<sup>12</sup> In doing so, the court must consider the “totality of the circumstances.”<sup>13</sup>

Four justices also concurred in a separate writing of Justice Kavanaugh, in which he emphasized the weight courts should give to a suspect’s flight, however innocuous the initial reason for the stop may be.<sup>14</sup> He stressed the dangers inherent in traffic stops, as officers suffer a “tactical disadvantage when approaching an unknown vehicle, with limited visibility and unpredictable threats,” and moreover, how the dangers to the public and police “multiply” when a driver flees.<sup>15</sup> “[N]o easy or risk-free answers” present themselves when a driver takes off.<sup>16</sup> Letting the driver go endangers the surrounding community and creates perverse incentives,<sup>17</sup> degrading the respect due to those who protect and serve. Intervention is even more dangerous, whether by giving chase, shooting out the driver’s tires, or jumping onto the vehicle.<sup>18</sup> Thus, “[t]he Fourth Amendment [totality of the circumstances] analysis must also take account of the suspect’s attempt ‘to evade’ the officer by ‘flight.’”<sup>19</sup> So here, our analysis of Felix’s qualified-immunity defense “must appreciate the extraordinary dangers and

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<sup>12</sup> *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>13</sup> *Id.* at 396 (quoting *Garner*, 471 U.S. at 8–9).

<sup>14</sup> *Barnes*, 605 U.S. at 84–90 (Kavanaugh, J., concurring).

<sup>15</sup> *Id.* at 85–86 (quotations and citation omitted).

<sup>16</sup> *Id.* at 87.

<sup>17</sup> *Id.* (“If doing nothing in response to a fleeing driver became a known and regular practice among police officers, that would presumably embolden some drivers who otherwise might have thought twice about taking off.”).

<sup>18</sup> *Id.* at 87–89.

<sup>19</sup> *Id.* at 87 (quoting *Graham*, 490 U.S. at 396).

risks facing police officers and the community at large” when a “driver has suddenly pulled away.”<sup>20</sup>

On remand, and with the power of the moment-of-threat doctrine’s temporal strictures lifted away, we review *de novo* whether summary judgment is proper in light of the totality of the circumstances leading to Barnes’s death.<sup>21</sup> We AFFIRM.

### I.

To establish a Fourth Amendment violation based on an officer’s use of excessive force, plaintiffs “must show: (1) an injury[;] (2) which resulted from the use of force that was clearly excessive to the need[;] and (3) the excessiveness of which was objectively unreasonable.”<sup>22</sup> The court considers the totality of the circumstances, *i.e.*, “(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.”<sup>23</sup> This is no cursory review; the court must “slosh [its] way through the factbound morass of reasonableness,” careful to balance “the nature and quality of the intrusion on the

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<sup>20</sup> *Id.* at 90.

<sup>21</sup> *DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 490 (5th Cir. 2018) (citation omitted); Fed. R. Civ. P. 56(a).

<sup>22</sup> *Ramirez v. Martinez*, 716 F.3d 369, 377 (5th Cir. 2013) (quotations and citation omitted).

<sup>23</sup> *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 332 (5th Cir. 2020) (citing *Graham*, 490 U.S. at 396).

individual's Fourth Amendment interests against the countervailing governmental interests at stake."<sup>24</sup>

But when an officer invokes qualified immunity, as here, the burden shifts to the plaintiff to first demonstrate (1) the officer violated a constitutional right and (2) "the unlawfulness of [the officer's] conduct was clearly established at the time."<sup>25</sup> "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law."<sup>26</sup>

## II.

The facts giving rise to the plaintiffs' claims unfolded in under two minutes. On April 28, 2016, Deputy Felix patrolled the Sam Houston Tollway as a traffic-enforcement officer for Harris County. A radio broadcast around 2:40 p.m. alerted him to a Toyota Corolla with outstanding toll violations. Felix located and stopped the Corolla on the left shoulder of the freeway soon thereafter—a reasonable decision given his probable cause to believe a misdemeanor traffic violation had occurred.<sup>27</sup> The dashcam footage shows

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<sup>24</sup> *Scott v. Harris*, 550 U.S. 372, 383 (2007) (quotations omitted); *Graham*, 490 U.S. at 396 (quotations and citations omitted).

<sup>25</sup> *Dist. of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (quotations and citation omitted).

<sup>26</sup> *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quotations and citations omitted).

<sup>27</sup> Tex. Transp. Code § 370.177(a) ("[T]he operator of a vehicle . . . that is driven or towed through a toll collection facility of a turnpike project shall pay the proper toll. The operator of a vehicle who drives or tows a vehicle through a toll collection facility and does not pay the proper toll commits an offense. An

the Corolla's taillights extinguish while its left blinker remains on, indicating the driver turned the engine off but kept the keys in the ignition.

At 2:43 p.m., Felix exited his vehicle, approached the Corolla, and requested the driver's license and proof of insurance.<sup>28</sup> The driver, Ashtian Barnes, told Felix that he did not have his license and the car was rented in his girlfriend's name. Barnes began to reach around the console and floorboard and rummage through papers.<sup>29</sup> Felix claimed Barnes maintained eye contact with him as he did so, and Barnes stopped after Felix repeatedly told him to "stop digging around." Felix said he smelled marijuana and asked Barnes if there was anything in the car he should know about, and called for backup.<sup>30</sup> Barnes then claimed his identification was in the trunk, and opened it for Felix to

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offense under this subsection is a misdemeanor punishable by a fine not to exceed \$250."); *see Whren*, 517 U.S. at 810.

<sup>28</sup> Tex. Penal Code § 38.02 (officer has a right to request driver's identifying information and proof of insurance); *see also Delaware v. Prouse*, 440 U.S. 648, 658–60 (1979) (officer may permissibly check the driver's license and inspect the automobile's registration and proof of insurance during a lawful traffic stop); *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005) ("In the course of effectuating [a temporary detention], a police officer may permissibly examine the driver's license and registration and run a computer check on them to investigate whether the driver has any outstanding warrants and if the vehicle is stolen.").

<sup>29</sup> *See Reese v. Anderson*, 926 F.2d 494, 496, 500–01 (5th Cir. 1991) (refusing to find excessive force where the suspect repeatedly refused to keep hands raised and appeared to be reaching for an object).

<sup>30</sup> The Houston Police Department's investigation of the incident revealed Barnes had a criminal record and a loaded handgun under the driver's seat.

retrieve himself. Barnes placed his keys near the gearshift and the blinker turned off.

At 2:45 p.m., exercising his right of self-protection, Felix ordered Barnes to exit the vehicle and placed his right hand on his holster as the door opened.<sup>31</sup> Ignoring Felix’s order, Barnes grabbed his keys, started the engine, and began to drive away.<sup>32</sup> Understandably, Felix recognized this conduct as an attempt to flee.<sup>33</sup> Felix said something to the effect of “don’t do it.”

In that moment, “all that a reasonable police officer could have concluded was that [Barnes] was intent on . . . flight and that, if he [were] allowed to do so, he would . . . pose a deadly threat for others on the road”—the vehicle would enter traffic in the fast-lane of the freeway.<sup>34</sup> Because the very “fact that a suspect

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<sup>31</sup> *Mimms*, 434 U.S. at 110–11; see also *United States v. Banuelos-Romero*, 597 F.3d 763, 767 (5th Cir. 2010) (officer conducting traffic stop may investigate further upon reasonable suspicion of additional criminal activity); *United States v. Garcia*, 592 F.2d 259, 260 (5th Cir. 1979) (per curiam) (holding that reasonable suspicion “was supplied by the smell of the marijuana”); *United States v. Conley*, No. 22-30037, 2023 WL 2327457, at \*3 (5th Cir. Mar. 2, 2023) (per curiam) (unpublished) (same).

<sup>32</sup> See *Young v. City of Killeen*, 775 F.2d 1349, 1351, 1352–53 (5th Cir. 1985) (upholding the use of deadly force when the suspect refused to exit the vehicle and “reached down to the seat or floorboard of his car” as if to retrieve something).

<sup>33</sup> Felix testified he “already had a perception of maybe something, a weapon or him trying to flee at the same moment.”

<sup>34</sup> *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014); see also *Barnes*, 605 U.S. at 86 (Kavanaugh, J., concurring) (“[W]hen, as in this case, the driver suddenly pulls away in the midst of a stop, the risks multiply. A driver speeding away from a traffic stop could easily endanger bystanders and other drivers.”).

flees when suspected of a minor offense could well be indicative of a larger danger,” Felix faced a split-second decision between only bad options.<sup>35</sup> Had Felix remained flatfooted on the pavement, Barnes could have started a perilous high-speed chase during rush hour on Houston’s busiest toll road—or, even if he did not speed away, he could have seriously injured Felix with the car.<sup>36</sup> If Felix stepped onto the car, he could at least hang on and command Barnes to stop.<sup>37</sup>

Felix mounted the doorsill with one foot, placing his body partially inside the car. Then, as the vehicle accelerated, Felix stepped on with both feet and yelled, “don’t f---ing move!” twice. In the little time Felix had to act, and with the little he knew about Barnes, Felix did not act unreasonably in protecting himself and possibly others.<sup>38</sup> Instead, Felix—having spent eleven

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<sup>35</sup> *Lange v. California*, 594 U.S. 295, 331 (2021) (Roberts, C.J., concurring); see also *Barnes*, 605 U.S. at 86 (Kavanaugh, J., concurring) (“Fleeing from the traffic stop could suggest that the driver is preparing to commit or has committed a more serious crime—and is attempting to evade detection or arrest.”); Tex. Penal Code § 38.04 (intentionally fleeing from police officer attempting lawful detainment constitutes an offense). Felix testified he “had nothing on Mr. Barnes, not even a name, so I didn’t know who he was, what he was capable of or what he could do. So for him trying to flee in this situation definitely threw up a flag that there was something . . . that needed to be stopped.”

<sup>36</sup> See *Barnes*, 605 U.S. at 87–89 (Kavanaugh, J., concurring) (discussing an officer’s potential responses to flight, none of which are “particularly good or safe options”).

<sup>37</sup> See *id.*

<sup>38</sup> See *Graham*, 490 U.S. at 396–97 (“[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”); *Thompson v. Mercer*, 762 F.3d 433, 438 (5th Cir. 2014) (stating it was the fleeing driver, and not the officer, “who intentionally placed himself and the public in danger by unlawfully engaging in the

years on the job with an Advanced Peace Officer license—did exactly what he was trained to do.

As Felix clung to the doorframe of the accelerating car, he withdrew then reinserted his weapon into the passenger compartment toward the driver's seat. Barnes kept driving. Felix shot inside the vehicle, “act[ing] reasonably in using deadly force to end [the] risk [of flight].”<sup>39</sup> And because Barnes still did not stop, Felix acted reasonably in firing a second shot.<sup>40</sup> Felix continued to hold Barnes at gunpoint until backup arrived, and Barnes was pronounced dead at the scene at 2:57 p.m.

Based on the undisputed events depicted in the video and Felix's uncontested sworn testimony, we find, based on the totality of the circumstances, that no genuine dispute of material fact exists as to whether Felix used excessive force in an objectively unreasonable manner at any time in the traffic stop.<sup>41</sup>

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reckless, high-speed flight that ultimately produced the [officer's] choice between two evils”); *Davis v. Romer*, 600 F. App'x 926, 930 (5th Cir. 2015) (finding argument that the “officer could have moved away from the car is, unfortunately, a suggestion more reflective of the peace of a judge's chambers than of a dangerous and threatening situation on the street” (cleaned up) (citation omitted)).

<sup>39</sup> *Plumhoff*, 572 U.S. at 777; see also *Young*, 775 F.2d at 1352–53; *Graham*, 490 U.S. at 396–97.

<sup>40</sup> See *Plumhoff*, 572 U.S. at 777 (“It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”).

<sup>41</sup> See Fed. R. Civ. P. 56(a). The plaintiffs contend material factual disputes exist regarding Barnes's conduct during the stop. Some allegations cannot be independently verified by the dashcam footage and are supported only by Felix's testimony, which the plaintiffs claim varies “wildly.” True, Felix has

And because the plaintiffs have failed to satisfy the first step of the qualified-immunity analysis—raising a dispute of material fact on whether Barnes’s Fourth Amendment right to be free from excessive force was violated—we do not reach whether the violated right was “clearly established” at the time of the incident. Accordingly, the plaintiffs have failed to meet their burden to defeat Felix’s invocation of qualified immunity, and Felix is entitled to summary judgment on the excessive- and deadly-force claims against him. And as the plaintiffs have failed to show a constitutional violation, their claims against the county fail. Summary judgment is proper as to all claims against Harris County. For the foregoing reasons, we AFFIRM.

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provided several explanations for his conduct, *i.e.*, fear for his life and the safety of others on the road, along with a suspicion that Barnes’s flight indicated a more serious crime prompting his evasion. But these reasons are not mutually exclusive. The plaintiffs “provide no evidence to support their skepticism, and at the summary judgment stage, we require evidence—not absolute proof, but not mere allegations either.” *Ontiveros*, 564 F.3d at 383 (quotations and citation omitted). Moreover, our inquiry is one of “objective reasonableness,” not subjective intent, viewed from “the perspective of a reasonable officer on the scene.” *Id.* at 382; *Graham*, 490 U.S. at 396. We need not venture to divine Felix’s thoughts; instead, we ask whether a reasonable officer under Felix’s circumstances would have resorted to deadly force to protect himself and others and to prevent an attempted evasion.

**APPENDIX B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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Civil Action No. 4:18-CV-725

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JANICE HUGHES BARNES, *et al*,  
*Plaintiffs*,  
vs.  
ROBERTO FELIX JR., *et al*,  
*Defendants*.

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Filed: March 31, 2021

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**ORDER**

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Before the Court are Defendants’ Consolidated Motion for Summary Judgment (the “Motion”) (Doc. #42); Plaintiffs’ Response (Doc. #44), and Defendants’ Reply (Doc. #45). At issue is the lawfulness of an officer’s actions during a traffic stop that ended, not more than three minutes after it began, with the officer having fatally shot the driver of the vehicle. The question is whether the Court can consider the officer’s conduct precipitating the shooting—which included jumping onto a moving vehicle and blindly firing his weapon inside—in determining whether the officer used excessive force in violation of the Fourth Amendment. Under Fifth Circuit precedent, the answer is no. The Motion is therefore granted.

## I. BACKGROUND

### A. The Shooting

On April 28, 2016, Roberto Felix Jr., a traffic enforcement officer for the Harris County Precinct 5 Constable's Office, was patrolling the Sam Houston Tollway. Doc. #42, Ex. 1 ¶ 4. At about 2:40 p.m., he heard a radio broadcast from the Harris County Toll Road Authority regarding a prohibited vehicle on the Tollway. *Id.* After requesting more information, he receive a license plate number for the vehicle and began looking for it. *Id.* He located the vehicle, a Toyota Corolla, and initiated the traffic stop by activating his emergency lights. *Id.* ¶ 5. The driver, Ashtian Barnes, pulled over to the left shoulder of the Tollway, and Felix parked his car behind the Corolla. *Id.*

At about 2:43 p.m., Felix exited his vehicle and approached Barnes. *Id.*, Ex. 3, Video 1 at 85T14. When Felix asked for Barnes's driver's license and proof of insurance, Barnes informed him that he did not have his license and that he had rented the vehicle a week earlier in his girlfriend's name. *Id.*, Ex. 1 ¶ 5. Felix stated that Barnes was reaching around the vehicle and rummaging through papers. *Id.* ¶ 7. Several times, Felix warned Barnes to stop "digging around." *Id.*, Ex. 3, Video 1 at 85T14. Felix also asked Barnes whether he had anything in the vehicle he should know about, claiming he smelled marijuana. *Id.* At some point, Barnes reached over and turned off the vehicle's ignition, placing his keys near the gear shift. *Id.*, Ex. 1 ¶ 7. Felix then told Barnes to open his trunk. *Id.*, Ex. 3, Video 1 at 85T14.

At about 2:45 p.m., Felix next asked Barnes to step out of the vehicle, his right hand guarding his holster

as the driver's side door opened. *Id.* Felix stated that, instead, Barnes grabbed his keys and turned on the vehicle. *Id.*, Ex. 1 ¶ 9. At that time, Felix was standing next to the open driver's side door. *Id.*, Ex. 3, Video 1 at 85T14. Felix jumped onto the door sill of the vehicle, though it is unclear whether that occurred before or after the vehicle had already begun accelerating. Doc. #42, Ex. 1 ¶ 10; *id.*, Ex. 5

¶ 27; Doc. #44, Ex. 2 at 90:19–24. As the vehicle moved forward, Felix yelled, “Don’t fucking move!” twice. Doc. #42, Ex. 3, Video 1 at 85T14. Felix briefly drew his right hand out of the vehicle, holding onto his gun, before reinserted toward Barnes. *Id.*; Doc. #44 at 96:11–16. One second later, Felix shot inside the vehicle, his gun pointed downward, with “no visibility” of where he was aiming. *Id.* at 94:13–15, 97:1–3; Doc. #42, Ex. 3, Video 1 at 85T14. The next second, he fired another shot. *Id.* After about two seconds, the vehicle came to halt, and Felix yelled, “Shots fired!” into his radio. *Id.* Felix held Barnes at gunpoint until backup arrived, while Barnes sat bleeding in the driver's seat. *Id.*, Ex. 1 ¶ 12; Doc. #44, Ex. 2 at 100:1–4. At 2:57 p.m., Barnes was pronounced dead at the scene. Doc. #42, Ex. 5.

## B. The Suit

Following the shooting, the Homicide Division of the Houston Police Department investigated the incident and presented a report to the Harris County District Attorney's Office. Doc. #44, Ex. 10 at 7. The District Attorney's Office presented the report to a grand jury on August 26 and August 31, 2016. *Id.* The grand jury ultimately returned a “no bill” in the case. *Id.* Harris County Precinct 5 Constable's Office also conducted an internal investigation and found no violations of its Standard Operating Procedures. *Id.*; *id.*, Ex. 11.

On December 29, 2017, Plaintiffs Janice Hughes Barnes and Tommy Duane Barnes filed an Original Petition in state court on behalf of Ashtian Barnes, asserting claims against Felix and Harris County, Texas (collectively “Defendants”) under 42 U.S.C. § 1983 and the Texas Tort Claims Act.<sup>1</sup> Doc. #1, Ex.

2. Defendants removed the action to this Court on March 7, 2018. Doc. #1. Defendants now move for summary judgment on Plaintiffs’ § 1983 claims, arguing that Felix did not violate Barnes’s constitutional rights and is entitled to qualified immunity. Doc. #42. Defendants also seek judgment as a matter of law as to Plaintiffs’ municipal liability claims against Harris County. Doc. #44.

## II. LEGAL STANDARD

### A Federal Rule of Civil Procedure 56

Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. When a public official raises “a good faith assertion of qualified immunity,” the plaintiff has the burden of showing that the defense is not available. *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 329–30 (5th Cir. 2020) (citing *Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016)). To do so, the plaintiff must first demonstrate “that there is a genuine dispute of material fact and that a jury could return a verdict entitling the plaintiff to relief for a constitutional injury.” *Id.* at 330. Once qualified immunity is involved, “the plaintiff’s version of those disputed facts

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<sup>1</sup> Plaintiffs do not address their cause of action under the Texas Tort Claims Act in the Response to the Motion. *See* Doc. #44. Because Plaintiffs have presented no evidence to support such relief, those claims are hereby DISMISSED.

must also constitute a violation of clearly established law.” *Id.*

As with any motion for summary judgment, the court “must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.” *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Devine v. Marcantel*, 567 F.3d 156, 164 (5th Cir. 2009)). But the court will “assign greater weight, even at the summary judgment stage, to the facts evident from video recordings taken at the scene.” *Id.* (quoting *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)).

#### B. Section 1983

Section 1983 imposes liability for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws” caused by any person acting “under color of any statute, ordinance, regulation, custom, or usage, of any State.” 42 U.S.C. § 1983. The injured party may bring may a § 1983 claim against a state actor in their individual or official capacity or against a governmental entity of the state. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 277 (5th Cir. 2016), *as revised* (June 16, 2016)(citing *Goodman v. Harris Cnty.*, 571 F.3d 388, 395 (5th Cir. 2009)). To prevail on a claim under § 1983, the plaintiff must establish (1) a violation of a right secured by federal law (2) that “was committed by a person acting under color of state law.” *Id.* (quoting *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013)).

##### 1. Qualified Immunity Defense

When a public official asserts qualified immunity against a § 1983 claim, the court must ask (1) whether the alleged conduct violated a constitutional right and (2) “whether the right in question was clearly

established at the time of the alleged violation” as to put the official “on notice of the unlawfulness of his or her conduct.” *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019), *as revised* (Aug. 21, 2019), *cert. denied sub nom. Hunter v. Cole*, 141 S. Ct. 111, 207 L. Ed. 2d 1051 (2020) (citing *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam)) (internal quotation marks omitted). “The officer is entitled to qualified immunity if there is no violation, or if the conduct did not violate law clearly established at the time.” *Id.*

The Supreme Court has walked back the requirement that a court must resolve the constitutional question first, leaving it to the sound discretion of the courts to decide “the order of decision-making that will best facilitate the fair and efficient disposition of each case.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *cf. Saucier v. Katz*, 533 U.S. 194, 201 (2001) (requiring courts considering qualified immunity claim to first address whether a violation occurred to promote “the law’s elaboration from case to case”). Even so, the Fifth Circuit has recognized the “value in addressing the constitutional merits to develop robust case law on the scope of constitutional rights.” *Joseph*, 981 F.3d at 332. Thus, the Court’s analysis proceeds under the first prong—whether Felix violated Barnes’s constitutional right to be free from excessive force.

### III. ANALYSIS

Any claim “that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard.” *Graham v. Connor*, 490 U.S. 386, 395 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). To establish a Fourth

Amendment violation based on an officer's use of excessive force, the plaintiff must show (1) an injury, (2) "which resulted from the use of force that was clearly excessive to the need," (3) "the excessiveness of which was objectively unreasonable." *Ramirez v. Martinez*, 716 F.3d 369, 377 (5th Cir. 2013)(quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)).

Ordinarily, a court considers three factors in determining whether an officer's use of force was reasonable: "(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Joseph*, 981 F.3d at 332 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). But in cases involving the use of deadly force, the Fifth Circuit has developed a much narrower approach, effectively eschewing the first and third factors. In this Circuit, the use of deadly force is "presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009) (citing *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir.2003)). And so, when an officer in this Circuit reasonably believes he has encountered such a threat, the constitutional inquiry ends there.<sup>2</sup> See *Manis v. Lawson*, 585 F.3d

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<sup>2</sup> To be sure, this approach is not uniform among the circuit courts of appeals. The Seventh, Six, and Tenth Circuits have adopted a more nuanced framework when the officer's own conduct exacerbates the excessiveness of the deadly force used. See *Est. of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) ("If a fleeing felon is converted to a 'threatening' fleeing felon solely based on the actions of a police officer, the police should not increase the degree of intrusiveness."); *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008) ("Where a police officer unreasonably

839, 843 (5th Cir. 2009) (citing *Ontiveros*, 564 F.3d at 382) (“An officer’s use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others.”).

In evaluating the reasonableness of the officer’s belief, the court must only ask “whether the officer or another person was in danger *at the moment of the threat* that resulted in the officer’s use of deadly force.” *Rockwell*, 664 F.3d at 991 (5th Cir. 2011) (quoting *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 493 (5th Cir.2001)) (alterations omitted and emphasis in original); *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) (citing *Young v. City of Killeen*, 775 F.2d 1349, 1352 (5th Cir.1985)) (“[R]egardless of what had transpired up until the shooting itself, [the suspect’s] movements gave the officer reason to believe, at that moment, that there was a threat of

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places himself in harm’s way, his use of deadly force may be deemed excessive.”); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159–60 (10th Cir. 2008) (citation omitted) (“We also consider whether an officer’s own ‘reckless or deliberate conduct’ in connection with the arrest contributed to the need to use the force employed.”); *but see Cnty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1546, 198 L. Ed. 2d 52 (2017) (citing *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002)) (striking down Ninth Circuit permitting excessive force claim under Fourth Amendment “where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation”). Similarly, the Third Circuit considers the totality of the circumstances, even if deadly force is involved. *See Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir.1999) (“Giving due regard to the pressures faced by the police, was it objectively reasonable for the officer to believe, in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect’s escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others?”).

physical harm.”). To that end, courts in this Circuit should focus on “the act that led the officer to discharge his weapon.” *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020), *cert. denied*, No. 20-585, 2021 WL 850625 (U.S. Mar. 8, 2021) (quoting *Manis*, 585 F.3d at 845) (alteration omitted). In doing so, the court must view the act “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” taking into account “that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Id.* (quoting *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 729 (5th Cir. 2018)); see *Ramirez v. Knoulton*, 542 F.3d 124, 129–30 (5th Cir. 2008) (quoting *Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004)) (internal quotation marks omitted) (“To gauge the objective reasonableness of the force used by a law enforcement officer, [the court] must balance the amount of force used against the need for force, paying careful attention to the facts and circumstances of each particular case.”).

With that framework in mind, the Court now turns to the facts in the record, viewing them in the light most favorable to Plaintiffs. See *Newman*, 703 F.3d at 761. Because the record contains a dash cam recording of the incident, the Court starts there. *Id.* In chronological order, the dash cam video shows the following:

- Felix pulls over Barnes’s vehicle at 2:43 p.m. and walks over to the vehicle about a minute later.
- Beginning at 2:45 p.m., Barnes orders Barnes to “stop digging around” at least three times.

- Barnes tells Felix that he has identification in the trunk.
- At about 2:45:33, the trunk opens.
- At about 2:45:43, Felix asks Barnes to step out of the vehicle, and it appears that Barnes opens the driver's-side door.
- As the door opens, Felix's right hand was on the holster of his gun.
- At about 2:45:48, the vehicle's taillights turn on.
- About one second later, Felix draws his gun, and the vehicle starts to move forward.
- Felix appears to step onto the door sill of the vehicle as the door begins to close.
- As the vehicle accelerates, Felix yells, "Don't fucking move!" twice.
- Felix briefly pulls his gun hand out of the vehicle.
- At about 2:45:52, Felix fires his first shot.
- Two seconds later, the vehicle comes to a complete stop.

Doc. #42, Ex. 3, Video 1 at 85T14.

Plaintiffs have not cited any evidence that would obfuscate the events depicted in the dash cam recording. Rather, Plaintiffs point to Felix's inconsistent testimony regarding the events leading up to the shooting. For instance, Felix stated that he jumped onto the door sill because he was afraid the door would close on him, causing him to be "pinned" and "drug" by the vehicle. Doc. #44, Ex. 2 at 91:19–94:3, 178:8–9; *id.*, Ex. 3 at 12; *id.*, Ex. 7 at 3; *id.*, Ex. 8 at 2; *see also id.* at

11 (“[M]y initial reaction was, I’m going to get run over.”); *id.* at 12 (“When he drove off and that door pinned me . . . I believed if I were to let go I would have got run over by the car.”); *id.* at 14 (“The only option that I had at that point was to grab a hold of something and my body reacted to hold on and jump on.”). Yet, Felix’s testimony also suggests that he was determined to prevent Barnes from fleeing, even before the vehicle began to move, ostensibly to protect the general public. *Id.*, Ex. 2 at 80:17–19, 106:23–107:2; *see also id.* at 81:17–21

(“[M]y actions were to draw my weapon because I already had a perception of maybe something, a weapon or him trying to flee at the same [] moment.”); *id.* at 178:21–23 (“My attempt was to . . . stop him from fleeing,” from causing injury to myself or others and that was my actions on that day.”); 107:4–7 (“Along with leaving the scene . . . in a motor vehicle is a felony charge . . . it is evading . . . that’s why I drew my weapon.”); *id.*, Ex. 3 at 10 (“At that point I reached in with my left hand to try to keep him from putting the car in gear and driving off and possibly causing another situation.”); *id.* at 16 (“[W]hen he went for the key and my thought was, something is that severe that he’s going to put my life in danger, he could easily put somebody else’s life in danger as well.”). Felix also conceded that

I had nothing on Mr. Barnes, not even a name, so I didn’t know who he was, what he was capable of or what he could [] do. So for him trying to flee [] in this situation definitely threw up a flag that there was something . . . that needed to be stopped.

*Id.*, Ex. 2 at 179:8-13. But this testimony, while relevant to Felix’s decision-making and motivations,

has no bearing on whether Felix was in danger “*at the moment of the threat*” that caused him to use deadly force against Barnes. *See Rockwell*, 664 F.3d at 991.

In fact, “the moment of the threat” occurred *after* Felix jumped onto the door sill at about 2:45:50, in the two seconds before Felix fired his first shot. Doc. #42, Ex. 3, Video 1 at 85T14; *see also id.*, Ex. 9 at 9. In that moment, Felix was still hanging onto the moving vehicle and believed it would run him over.<sup>3</sup> Doc. #44, Ex. 2 at 127:4–12; *id.*, Ex. 3 at 12; *id.*, Ex. 7 at 3. Additionally, Defendants’ law enforcement expert Jared Zwickey stated that Felix “reasonably believed his life was in imminent danger of death or great bodily injury when Mr. Barnes refused to follow the deputy’s commands to stop the vehicle from moving while the deputy’s left foot was partially standing on the door sill of the vehicle.” Doc. #42 at 33

Plaintiffs contend that any danger perceived by Felix was “created solely by himself, and not through the actions of [] Barnes.” Doc.#44 at 18. But the Fifth Circuit does not consider “what had transpired up until the shooting itself” in assessing the reasonableness of an officer’s use of deadly force, even when

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<sup>3</sup> Felix has also stated that, while standing on the door sill, he felt “pressure” or a “tug” against his gun holster and “had to discharge my weapon to stop that threat.” Doc. #44, Ex. 2 at 95:3–9; *id.*, Ex. 3 at 11, 13. In other words, according to Felix, his use of deadly force was also justified by the “tug” or “pressure” he felt near his holster. Not only is this not depicted in the dash cam recording, but it also suggests that Barnes was attempting a maneuver of near stuntman proportions, attempting to disarm Felix while simultaneously operating the vehicle. Because the possibility of such danger is slight, and the evidence supporting it scant, the Court finds this purported feeling insufficient to give Felix “reason to believe, at that moment, that there was a threat of physical harm.” *See Young*, 775 F.2d at 1352.

the officer's conduct departs from established police procedures. *See Fraire*, 957 F.2d at 1276 (“Even a negligent departure from established police procedure does not necessarily signal violation of constitutional protections.”); *Rockwell*, 664 F.3d at 992 (finding argument that officers’ breach of locked door “necessarily caused the shooting” was ‘nothing more than speculation’). Likewise, it is immaterial that Felix fired the second shot “almost immediately after the first,” as noted by Plaintiffs’ law enforcement expert Todd Maloney. Doc. #44, Ex. 6 at 9. Once the use of deadly force is justified, nothing in the Fourth Amendment bars the officer from protecting himself, even if that means firing multiple rounds. *City & Cty. of San Francisco, Calif v. Sheehan*, 575 U.S. 600 (2015).

In short, viewing the evidence in Plaintiffs’ favor, the Court finds Felix’s use of deadly force “presumptively reasonable” under controlling Fifth Circuit precedent. *See Ontiveros*, 564 F.3d at 382. Once Felix decided to jump onto the door sill, escalating the encounter even further, Barnes’s continued operation of the vehicle put Felix at risk of serious harm. Because it is this act—and this act alone—that the Fifth Circuit has instructed courts to evaluate, this Court’s inquiry begins and ends there. *See Amador*, 961 F.3d at 724. Therefore, because Barnes posed a threat of serious harm to Felix, his use of deadly force was not excessive, and there can be no constitutional violation. *See Manis*, 585 F.3d at 843.

Accordingly, because Plaintiffs have failed to demonstrate a genuine dispute of material fact as to a constitutional injury, their § 1983 claim fails even without considering Felix’s qualified immunity defense. *See Joseph*, 981 F.3d at 329–30. Barring a consti-

tutional injury, Plaintiffs also cannot assert municipal liability against Harris County. *See Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020), *as revised* (Jan. 13, 2020) (quoting *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)) (“Municipal liability under § 1983 requires proof of (1) a policy-maker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom.”).

#### IV. CONCLUSION

The Court is mindful that police officers often must “make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Amador*, 961 F.3d at 728. But as Judge Higginbotham wrote in *Mason v. Lafayette*,

At some point, an officer crosses the line between setting up a risky situation and actually himself directly causing the “threat.” Officers are at risk in nigh every traffic stop as they approach a vehicle, as are the persons in that vehicle—so also with street confrontations. Yet no one will maintain that an officer can lawfully avoid all risk by simply shooting and asking questions later.

*Mason v. Lafayette City-Par. Consol. Gov’t*, 806 F.3d 268, 288–89 (5th Cir. 2015) (Higginbotham, J., concurring in part and dissenting in part); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1162, 200 L. Ed. 2d 449 (2018) (“[The Court’s decision] sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”). By limiting the focus of the judicial inquiry so narrowly as to only examine the

precise moment the officer decided to use deadly force, the Fifth Circuit has effectively stifled a more robust examination of the Fourth Amendment's protections when it comes to encounters between the public and the police. The Court invites this Circuit to consider the approach applied by its sister courts, affording § 1983 claimants the opportunity to have each party's conduct reviewed objectively and, if appropriate, hold officers accountable when their conduct has directly resulted in the need for deadly force and infringed upon the rights secured by the Fourth Amendment.

But ultimately duty bound to faithfully apply current Fifth Circuit precedent in cases involving the use of deadly force, the Court determines that at the exact moment Felix was hanging onto Barnes's vehicle, and Barnes was attempting to flee, Barnes posed a serious threat of harm to Felix. Accordingly, the Motion is GRANTED. This case is hereby DISMISSED.

It is so ORDERED.

Mar 31, 2021 /s/ Alfred H. Bennett

Date                   The Honorable Alfred H. Bennett  
United States District Judge