

SUPREME COURT OF THE UNITED STATES

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.) No. 23-1239

ROBERTO FELIX, JR., ET AL.,)

Respondents.)
- - - - -

Pages: 1 through 92

Place: Washington, D.C.

Date: January 22, 2025

HERITAGE REPORTING CORPORATION

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5 ESTATE OF ASHTIAN BARNES, DECEASED,))
6 Petitioner,)
7 v.) No. 23-1239
8 ROBERTO FELIX, JR., ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Wednesday, January 22, 2025
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:04 a.m.
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 23-1239,
5 Barnes versus Felix.

6 Mr. Zelinsky.

7 ORAL ARGUMENT OF NATHANIEL A.G. ZELINSKY
8 ON BEHALF OF THE PETITIONER

9 MR. ZELINSKY: Mr. Chief Justice, and
10 may it please the Court:

11 We are here today because Ashtian
12 Barnes was shot and killed on the side of a
13 Texas highway after being pulled over for unpaid
14 tolls. The question before this Court is how to
15 determine whether Ashtian's Fourth Amendment
16 rights were violated.

17 The Fourth Amendment prohibits
18 unreasonable seizures. Justice Scalia was no
19 fan of a totality-of-the-circumstances test,
20 but, in Scott, Justice Scalia made clear that
21 courts must "slosh through the fact-bound morass
22 of reasonableness."

23 In this case, the district court and
24 the Fifth Circuit didn't do that. Instead, they
25 applied the "moment of the threat" doctrine.

1 According to the Fifth Circuit decision below,
2 "we may only ask whether Officer Felix was in
3 danger at the moment of the threat," and "any of
4 the officer's actions leading up to the shooting
5 are not relevant."

6 This kind of legal amnesia is
7 incompatible with precedent, conflicts with
8 common law, and defies common sense.

9 Until now, Respondents had embraced
10 the "moment of the threat" doctrine, but, before
11 this Court, Respondents have abruptly shifted
12 position. They now argue that courts should
13 look to what occurs before the moment of the
14 threat and apply the law of self-defense and
15 superseding cause.

16 Absolutely none of this appears in the
17 decision below. All of it confirms why the
18 "moment of the threat" doctrine is so wrong.

19 Finally, as Judge Higginbotham
20 underscored in his concurrence, the facts show
21 that Officer Felix acted unreasonably. But this
22 is a court of review, not of first view. The
23 Court should rule for Petitioner on the sole
24 question presented and remand for the lower
25 courts to apply the correct constitutional

1 standard.

2 I welcome this Court's questions.

3 JUSTICE THOMAS: Under your approach,
4 what would that correct standard look like and
5 how would it be applied here?

6 MR. ZELINSKY: Justice Thomas, we
7 think -- the standard is the "totality of the
8 circumstances" standard that this Court
9 articulated in Graham and Garner, Scott, and
10 Plumhoff. In this particular case, it would
11 require looking at more than just the two
12 seconds in which Officer Felix was on the moving
13 vehicle. It would require asking was there a
14 reason for Officer Felix --

15 JUSTICE THOMAS: How much more of --
16 than the -- than the last two seconds?

17 MR. ZELINSKY: Justice Thomas, if you
18 include an extra three seconds, then you would
19 look at the seizure in its totality.

20 I think that this Court shouldn't be
21 drawing bright-line rules on exactly how much of
22 the seizure should or shouldn't come in. That's
23 what Justice Scalia underscored in Scott. There
24 are no rigid rules.

25 And courts can apply ordinary

1 principles of relevancy and proximate cause to
2 determine the -- the reasonableness of a
3 seizure.

4 JUSTICE KAVANAUGH: Was it reasonable
5 to -- for the officer to jump on the side of the
6 car?

7 MR. ZELINSKY: So -- Justice
8 Kavanaugh, we don't think it was in this
9 particular case, but that's precisely the issue
10 that the lower courts couldn't evaluate because
11 they applied this legal amnesia and only look at
12 the fact that the officer was on the moving
13 vehicle. Judge Higginbotham, in his
14 concurrence, looked to the totality of the
15 circumstances and said: I think it was
16 unreasonable in this case.

17 We want the opportunity for a court to
18 be able to look at that and for us to be able to
19 litigate that core claim.

20 JUSTICE KAVANAUGH: What's an officer
21 supposed to do when at a traffic stop and
22 someone pulls away? Just let him go?

23 MR. ZELINSKY: No, Justice Kavanaugh.
24 I think there are a number of other options that
25 were available to Officer Felix that day. Let

1 me give you four.

2 First, the highway was a
3 camera-controlled highway. So you can monitor
4 all the cars by camera. That's, in fact, how
5 Ashtian Barnes was pulled over in the first
6 place. The cameras automatically identified his
7 car as one with unpaid tolls.

8 Second, he could have radioed to
9 somebody else on the road to follow Ashtian
10 Barnes.

11 Third, he could have gotten back into
12 his squad car and followed him.

13 And, fourth, they also had the car's
14 license plate.

15 So we're not suggesting that somebody
16 should just get away scot-free, but it is
17 unreasonable to use deadly force because what
18 happened was Officer Felix put himself in a
19 position where he had no alternative but to
20 shoot the driver, and that's unreasonable, and
21 you have to look at the whole picture, not just
22 the two seconds in which he's on the car.

23 JUSTICE ALITO: Did the officer
24 violate the Fourth Amendment at any point prior
25 to the time when he used deadly force? If he

1 had not -- if he had not used deadly force, but
2 he had jumped on the side of the car and done
3 everything else he did prior to that moment,
4 would there be a violation of the Fourth
5 Amendment?

6 MR. ZELINSKY: So, Justice Alito, we
7 had brought a predicate came below about the
8 drawing of the firearm. My friends on the other
9 side have suggested we should have brought a
10 predicate claim based on the jumping onto the
11 car. But, at the end of the day, I don't think
12 that it matters whether there is a predicate
13 claim because, in the -- let me give you an
14 analogy. In the search context, you have an
15 obligation to knock before you search. There's
16 no freestanding requirement under the Fourth
17 Amendment if you're an officer standing outside
18 a door to knock. But, if you are going to
19 engage in a search, we evaluate the
20 reasonableness of that search by looking a
21 couple seconds before, did you knock?

22 JUSTICE ALITO: Well, my question --

23 MR. ZELINSKY: It's the same thing
24 here.

25 JUSTICE ALITO: The -- the reason for

1 the question is to probe whether you are using
2 the term "unreasonable" in a sense that's
3 different from the sense in which the Fourth
4 Amendment prohibits unreasonable searches and
5 seizures. So "unreasonable" has a particular
6 meaning when the Court has to decide whether
7 there was a Fourth Amendment violation. But, in
8 lay speech, "unreasonable" could go to whether
9 the action was prudent, whether it was a
10 violation of best police practices or the
11 practices of a particular police department.

12 Those are not necessarily the same
13 thing. In fact, it seems that they're probably
14 different. So you are eliding these two
15 different meanings of "reasonable." Now maybe
16 that's -- maybe that's sound. Maybe that's
17 unsound.

18 MR. ZELINSKY: Justice Alito, what
19 we're asking for is the standard that this Court
20 has applied in Garner, Graham, and Scott and
21 Plumhoff, which is you have to look at the --
22 the balance here. There's, on the one side, the
23 state interest in seizing someone in a
24 particular manner. On the other side, there is
25 the harm to the suspect, here, the ultimate

1 harm, the loss of his life.

2 The problem in this case is that the
3 Fifth Circuit couldn't engage in that core
4 balancing because it couldn't ask was there a
5 really pressing reason for an officer to jump
6 onto a car and give himself no other opportunity
7 but to shoot the driver.

8 JUSTICE ALITO: Well, would -- would
9 you be satisfied with a narrow holding that it
10 is wrong to -- it is wrong for a court to look
11 just at the moment of the threat, that the court
12 has to judge the reasonableness of the alleged
13 unreasonable seizure based on -- taking into
14 account to whatever extent they are relevant the
15 events that occurred before that? Would you be
16 satisfied if we just did that --

17 MR. ZELINSKY: I think we would,
18 Justice --

19 JUSTICE ALITO: -- and not get into
20 these other, more difficult questions?

21 MR. ZELINSKY: One hundred percent. I
22 think it would be helpful if the Court makes
23 clear that that means that you can look at the
24 jump in addition to the shoot, right? That's
25 the core issue that we want to be able to

1 litigate. But, yes, Justice Alito, we'd be
2 happy with a very narrow holding.

3 JUSTICE JACKSON: So, Mr. --

4 JUSTICE SOTOMAYOR: You don't want to
5 limit it just to that, though.

6 MR. ZELINSKY: Well --

7 JUSTICE SOTOMAYOR: I mean, I thought
8 that the totality of the circumstances, as we --
9 described it, has at least three factors: the
10 nature of the crime for which the stop occurred,
11 the circumstances, et cetera.

12 The three minutes, are you starting
13 that from the moment that the stop occurred --

14 MR. ZELINSKY: So --

15 JUSTICE SOTOMAYOR: -- and the reason
16 for it, or are you stop -- or you want to do it
17 just from when he jumped on the car?

18 MR. ZELINSKY: So we don't want to
19 look at it just from when he jumps on the car.

20 JUSTICE SOTOMAYOR: Right.

21 MR. ZELINSKY: I do think you have to
22 consider things like what he's stopped for. My
23 friends on the other side, by the way, agree on
24 that, because they say all of that comes in
25 because it's part of the officer's mind.

1 JUSTICE SOTOMAYOR: I -- I know.

2 MR. ZELINSKY: So --

3 JUSTICE SOTOMAYOR: We'll get to that
4 with them, which is --

5 MR. ZELINSKY: Yeah. So --

6 JUSTICE SOTOMAYOR: -- they -- they --
7 they -- they want to make it a "totality of the
8 circumstance" case, but that's not what the
9 Fifth Circuit said.

10 MR. ZELINSKY: Totally.

11 JUSTICE SOTOMAYOR: But I can ask
12 those -- them that question.

13 Having said that, there is a split of
14 8 to 4 --

15 MR. ZELINSKY: Mm-hmm.

16 JUSTICE SOTOMAYOR: -- on this
17 question: whether the Court needs to look at
18 the totality or just the moment of threat.

19 Correct?

20 MR. ZELINSKY: That's correct, Justice
21 Sotomayor.

22 JUSTICE SOTOMAYOR: So, if we do what
23 Justice Alito has defined as a narrow approach,
24 that's not really narrow. That's deciding a
25 circuit split, correct?

1 MR. ZELINSKY: Yes. Can I add a
2 "but" --

3 JUSTICE SOTOMAYOR: Mm-hmm.

4 MR. ZELINSKY: -- to clarify my answer
5 to Justice Alito?

6 I think you could resolve this case by
7 saying: The "moment of the threat" doctrine is
8 wrong. It was too narrow. It didn't apply the
9 totality of the circumstances. And we, this
10 Court, are not going to try and delineate every
11 mete and bound in every case.

12 I think --

13 JUSTICE SOTOMAYOR: You've given up in
14 your reply brief, I understood, that you're not
15 asking us to -- the -- the -- to address the
16 question of what an officer-created danger rule
17 is like?

18 MR. ZELINSKY: We're not asking for an
19 officer-created danger test at all.

20 JUSTICE SOTOMAYOR: And -- and that
21 wasn't even addressed below, correct?

22 MR. ZELINSKY: That's correct.

23 JUSTICE SOTOMAYOR: Okay. Thank you.

24 JUSTICE JACKSON: Mr. Zelinsky --

25 JUSTICE KAVANAUGH: You --

1 JUSTICE BARRETT: But you're happy
2 with the -- you're happy with the narrow -- I'm
3 going to call it narrow in the sense that if we
4 said moment of the threat is wrong and we don't
5 articulate a precise standard, other than saying
6 our regular "totality of the circumstances" test
7 applies, as Justice Sotomayor said, that's
8 really what you're asking for?

9 MR. ZELINSKY: I think, in this case,
10 we're trying to be able to litigate the fact
11 that he jumped onto a car. And we have sharply
12 different views. My friend on the other side
13 and I have sharply different views about whether
14 it was reasonable to jump onto that car. That's
15 the issue we were not able to litigate.

16 I think this Court doesn't need to go
17 and say: In every case, here are the metes and
18 bounds.

19 I do think, Justice Barrett, if you
20 want to put a little bit of flesh on the bones
21 of that test, you could look to your decision in
22 Biegert for the Seventh Circuit, where you said
23 an officer might act unreasonably where they're
24 primarily responsible for the danger.

25 JUSTICE BARRETT: And you would be

1 happy with that language?

2 MR. ZELINSKY: We would be happy with
3 that language.

4 JUSTICE BARRETT: And you don't have a
5 position on whether a prior Fourth -- it kind of
6 goes to Justice Alito's point -- whether kind of
7 a predicate Fourth Amendment violation that's
8 unrelated to the excessive force necessarily
9 means that if the -- if the officer violated
10 constitutional rights let -- let's imagine it's
11 not a car stop, let's imagine it's a home entry
12 or something like that -- you know, that then
13 it's off the table. After that, even if things
14 devolve --

15 MR. ZELINSKY: No. And --

16 JUSTICE BARRETT: -- the officer put
17 himself in this situation?

18 MR. ZELINSKY: -- in fact -- well, I
19 have two answers to that.

20 The first is, in Mendez, this Court
21 already held that where the damages are the
22 foreseeable consequences of that predicate
23 violation --

24 JUSTICE BARRETT: Yeah.

25 MR. ZELINSKY: -- then they are on the

1 table. I think that goes a long way toward
2 disproving the parade of horrors on the other
3 side because you are, in those cases, going to
4 look at preceding conduct.

5 But the second answer to your question
6 is that we, of course, agree, things like
7 superseding cause. Again, your decision in
8 Biegert for the Seventh Circuit is a great
9 example of that. Superseding cause comes into
10 play.

11 The Fifth Circuit couldn't apply those
12 kinds of tests because all it looks at is the
13 fact that Officer Felix is standing on that
14 vehicle, and that's why it's so concerning. It
15 prevents you from engaging in that core Fourth
16 Amendment balancing: What was the nature of the
17 government interest on the one hand? What was
18 the harm to the individual on the other?

19 JUSTICE KAVANAUGH: Do you agree with
20 the language in the Seventh Circuit opinion that
21 said it applies when the officer created a
22 situation where deadly force became essentially
23 inevitable?

24 MR. ZELINSKY: I think that that is
25 our view of this case, Justice Kavanaugh.

1 Once --

2 JUSTICE KAVANAUGH: And are you asking
3 then -- I realize you're going to say this is
4 for the Fifth Circuit on remand, but I'm going
5 to ask it anyway. Are officers always
6 prohibited at traffic stops, when the car pulls
7 away, from jumping on the car?

8 MR. ZELINSKY: Absolutely not.

9 JUSTICE KAVANAUGH: Okay. When can
10 they and when can't they?

11 MR. ZELINSKY: Let me give you an
12 example when they can. Let's say they see an
13 abducted child in the back seat, and they know,
14 if they don't jump onto the car then, something
15 terrible might happen to that abducted child.

16 That's a -- a type of "totality of the
17 circumstances" inquiry that looks at: What's
18 the nature of the government interest at play?
19 What's the harm to the individual?

20 In this particular case, we're talking
21 about unpaid tolls. So we want to be able to
22 argue down the Fifth Circuit --

23 JUSTICE KAVANAUGH: Well, true. But,
24 obviously, you know, traffic stops sometimes
25 identify people who are doing things that are

1 much worse. Oftentimes, major criminals are
2 apprehended for things like that, and I can give
3 you some historical examples that are obvious,
4 but -- so I don't know that an officer can
5 assume that's the only thing going on.

6 And if someone's pulling away, they
7 could be a danger to others on the road. Who
8 knows what's going on, right?

9 MR. ZELINSKY: So, Justice Kavanaugh,
10 that's precisely -- and -- and maybe this was
11 prefaced in your opening colloquy, but that's
12 precisely what the Fifth Circuit couldn't engage
13 in in this case. And so -- so I agree that
14 there may be some circumstances --

15 JUSTICE KAVANAUGH: And when an
16 officer jumps on the car, the deadly force can
17 be avoided by -- by the driver too.

18 MR. ZELINSKY: Well, in this
19 particular case, Officer Felix's own expert
20 testifies that Officer Felix shot so quickly,
21 Ashtian Barnes didn't have time to stop.

22 And -- and if I could, let me sketch
23 out, Justice Kavanaugh, why it's so dangerous
24 for you to shoot a driver. In fact -- I --
25 there is -- I'm not aware of any police

1 department that recommends that its officers
2 shoot drivers.

3 The high likelihood -- in this
4 particular case, Ashtian Barnes didn't
5 immediately die. He was able to brake the car
6 and put it into park. If he had been
7 immediately killed, that car could have careened
8 and crashed into the highway. Officer Felix put
9 other people on that highway in grave, very
10 serious danger that particular day.

11 So I don't think it's just a he's
12 jumping on to stop Ashtian from getting away.
13 He's also jumping on in a manner that is going
14 to put a lot of other people at risk.

15 JUSTICE JACKSON: Mr. Zelinsky, can I
16 take you back to the question presented, which
17 is whether or not it was correct for the Fifth
18 Circuit to apply the "moment of threat"
19 doctrine. What is your understanding of that
20 doctrine? I guess I was surprised that
21 Respondent in this case at this time sort of has
22 created now a conception of it that did not seem
23 to align with what the Fifth Circuit said.

24 So what is your view of the "moment of
25 the threat" doctrine?

1 MR. ZELINSKY: So, Justice Jackson,
2 Judge Higginbotham was very clear in his
3 decision below. You cannot look at any of the
4 officer's actions prior to the moment of the
5 threat. He's joined in that decision by Judge
6 Elrod and Judge Smith. Respondents themselves
7 agreed below that you can't look at anything
8 prior to the moment.

9 JUSTICE JACKSON: And do you perceive
10 them now to be saying that you can look at some
11 things?

12 MR. ZELINSKY: Yes. I --

13 JUSTICE JACKSON: So that's a
14 different -- concept?

15 MR. ZELINSKY: A hundred percent.
16 And, Justice Jackson, they've gone so far as to
17 say, if an officer jumps in front of a moving
18 car and shoots the driver, that's unreasonable.

19 Well, that's our view of this case.
20 And part of the problem is we weren't able to
21 have a lower court look at the totality of the
22 circumstances and decide was this like a case in
23 which you jump in front of a car and immediately
24 shoot the driver.

25 JUSTICE KAVANAUGH: Do you agree with

1 the language in the Solicitor General's brief
2 that says the circumstances at the moment that
3 force is used will generally have primary
4 significance in the analysis?

5 MR. ZELINSKY: So I think that there's
6 very little daylight between us and the
7 Solicitor General. I think that language,
8 Justice Kavanaugh, is descriptive. So it's
9 describing that in the vast majority of these
10 cases --

11 JUSTICE KAVANAUGH: Do you agree with
12 it?

13 MR. ZELINSKY: I do --

14 JUSTICE KAVANAUGH: Okay.

15 MR. ZELINSKY: -- in its descriptive
16 aspect.

17 JUSTICE KAVANAUGH: And do you agree
18 with when the Solicitor General says the type of
19 situation that was described in Biegert will be
20 rare?

21 MR. ZELINSKY: I think that the --
22 there are a series of reoccurring fact patterns.
23 I think there are two of them. I think that the
24 jumping in front of or onto car does occur with
25 some frequency. So we cited in our reply brief

1 a study of 400 stops that found that there is a
2 routine problem of officers jumping in front of
3 cars -- in the article, it's described "in a
4 Hollywood style" -- and then shooting the
5 driver.

6 The other reoccurring fact pattern is
7 a pattern where officers fail to identify
8 themselves, and the suspect, exercising his or
9 her own Second Amendment rights to self-defense,
10 pulls out a firearm.

11 The Fifth Circuit alone has two cases
12 in which they apply the "moment of the threat"
13 doctrine. The cases are Cass and Royal, and
14 they say: We can't look at the fact that the
15 officer failed to identify himself. We can only
16 look at the fact that the officer faced a loaded
17 gun.

18 And that, by the way, is just sharply
19 inconsistent with how the common law approached
20 the exact same circumstance. And that's a very
21 strong indication --

22 JUSTICE KAVANAUGH: On the jumping in
23 front of the car, I think you said this earlier,
24 but sometimes it'll be reasonable and sometimes
25 not?

1 MR. ZELINSKY: So, yeah, let me give
2 you an example maybe where it might be
3 reasonable just to help flesh it out.

4 Take the tragic terrorist attack in
5 New Orleans. In that particular case, someone
6 used a car as a weapon of terror. If an officer
7 had jumped in front of the car and shot the
8 driver, that officer would be a hero, and it's
9 because the state interest in that case in
10 seizing that terrorist is incredibly high.

11 Again, that's the type of balancing
12 that the Fifth Circuit just couldn't engage in
13 in this case.

14 JUSTICE ALITO: Well, here, the stop
15 is for a failure to pay tolls. But we could
16 ratchet up very gradually the severity of the
17 reason for the stop, and at what point would
18 the -- would the offense become sufficiently
19 serious, if -- at what point, if any, would the
20 offense become sufficiently serious in your
21 judgment to make it reasonable for the officer
22 to get on the sill of the car?

23 MR. ZELINSKY: So, Justice Alito, it's
24 a very difficult question to answer because, as
25 this Court has said, that it is a fact-specific

1 question that's going to depend in each given
2 case. And there are no magic rules. There's no
3 on/off switch. And that's Justice Scalia in
4 Scott. You can't just start drawing the lines
5 precisely because these cases are so numerous
6 and there are so many different permutations.

7 And so I think it would be very
8 dangerous to start drawing those lines.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 Justice --

13 JUSTICE SOTOMAYOR: What do you do
14 with the cases cited by the other side where the
15 Fifth Circuit does appear not to apply the
16 "moment of threat" docket -- doc -- doctrine and
17 does take into account more of the totality of
18 circumstances?

19 MR. ZELINSKY: So, Justice Sotomayor,
20 let me give you three responses.

21 First, there's never a Fifth Circuit
22 case where they actually look at the officer's
23 prior conduct and say that's part of the
24 calculus and it goes against the officer. So
25 it's always it -- it -- whenever they might do

1 it, it's only in the officer's benefit.

2 The second, the best case --

3 JUSTICE SOTOMAYOR: Some of my
4 colleagues might agree with that. Why should we
5 not?

6 MR. ZELINSKY: Because you have to
7 look -- reasonableness. The -- the framers gave
8 us a test of reasonableness, and that is a --
9 it's a two-way street, not a one-way ratchet.
10 And it requires --

11 JUSTICE SOTOMAYOR: The common law --
12 you gave the prime example in the common law,
13 which is, if an officer -- a plain clothes
14 officer doesn't announce he's an officer and
15 pulls out a gun --

16 MR. ZELINSKY: Yes.

17 JUSTICE SOTOMAYOR: -- under that
18 circumstance, the common law would say someone
19 can defend themselves and pull out a gun?

20 MR. ZELINSKY: Yes.

21 JUSTICE SOTOMAYOR: All right.

22 MR. ZELINSKY: Yes.

23 JUSTICE SOTOMAYOR: So -- okay. Go
24 ahead with your --

25 MR. ZELINSKY: And then the other

1 response to your question -- and I -- and I have
2 two more answers. The first is that there's
3 just a wealth of -- of Fifth Circuit cases that
4 come out in the other direction and are just
5 crystal-clear.

6 So I would just direct the Court to
7 the Harris v. Serpas case, and that's quoted by
8 Judge Higginbotham in his decision below. In
9 Harris, the Fifth Circuit goes out of its way to
10 say this Court has narrowed that test, and "that
11 test" is referring to the Graham test. So they
12 are self-consciously clear that they are
13 narrowing this Court's precedent.

14 And the court then goes on to say any
15 of the officer's actions leading up to the
16 shooting are not relevant for the purposes of an
17 excessive force inquiry in this circuit. So
18 that's a categorical bar.

19 And then the third point is that in
20 this case, you don't just have Judge
21 Higginbotham who's describing the split or
22 the -- the "moment of the threat" doctrine; you
23 also have Judge Elrod and Judge Smith who sign
24 on to that panel decision, and all of them agree
25 this is how the doctrine operates in the Fifth

1 Circuit.

2 JUSTICE SOTOMAYOR: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson?

7 Thank you, counsel.

8 Ms. Jacoby.

9 ORAL ARGUMENT OF ZOE A. JACOBY

10 FOR THE UNITED STATES, AS AMICUS CURIAE,

11 SUPPORTING VACATUR AND REMAND

12 MS. JACOBY: Mr. Chief Justice, and

13 may it please the Court:

14 The Fifth Circuit analyzed this case
 15 by examining only the so-called moment of the
 16 threat and categorically ignoring all prior
 17 events. None of the parties defends that
 18 approach. That is because reasonableness is
 19 assessed under the totality of the circumstances
 20 and pre-force events can be critical to that
 21 assessment.

22 Prior events often show that the force
 23 was reasonable. For example, police may have
 24 issued warnings or attempted deescalation, all
 25 of which a split-second "moment of the threat"

1 doctrine misses. Of course, when officers face
2 a moment of danger, that is by far the most
3 important factor under Graham. But, in rare
4 cases, a moment of danger doesn't tell the whole
5 story. If the danger was manufactured entirely
6 by police conduct outside the bounds of
7 reasonable behavior and not by the suspect's
8 intervening apparent misconduct, it is
9 unreasonable to use force in the moment.

10 The panel's approach fails to provide
11 a constitutional backstop in those cases, and it
12 disregards context that may show that force was
13 reasonable in others.

14 I -- I welcome the Court's questions.

15 JUSTICE THOMAS: Would that also
16 include -- those circumstances also include the
17 conduct of the victim -- that preceded the
18 shooting?

19 MS. JACOBY: Absolutely. And, as we
20 explained in our brief, the officer's conduct
21 and the suspect's conduct are often intertwined.
22 It's how the suspect reacted to what the officer
23 did. And that can be very important in the
24 reasonableness assessment.

25 JUSTICE THOMAS: And the other way,

1 how the officer reacted to the victims?

2 MS. JACOBY: Exactly. It -- it's
3 truly a "totality of the circumstances"
4 approach, and the Fifth Circuit's narrow,
5 cramped reasoning didn't allow for any of that
6 to be considered.

7 CHIEF JUSTICE ROBERTS: Is there --

8 JUSTICE BARRETT: Ms. Jacoby, what do
9 you -- oh, sorry, Chief.

10 CHIEF JUSTICE ROBERTS: I just
11 wondered, is there any area where you disagree
12 with the Petitioner?

13 MS. JACOBY: No. I -- I think that
14 what Petitioner's just articulated aligns well
15 with -- with our view, and I'm glad to hear that
16 he endorses some of the statements in our -- in
17 our brief. We agree this Court doesn't need to
18 go further than just saying that the Fifth
19 Circuit's approach here was wrong because it
20 focused only on a narrow two-second snippet of
21 the encounter rather than looking at the
22 entirety, and the Court probably doesn't need to
23 go further and delineate the precise bounds of
24 when force will be sort of reasonable or not.

25 And -- and so I think we don't have a

1 lot of daylight. To be honest, I don't think we
2 have a lot of daylight between us and
3 Respondents either because Respondent also seems
4 to agree now that pre-force circumstances
5 matter. And I think Respondent also agrees that
6 a moment of danger doesn't tell the whole story
7 because, at page 33 and 34 of his brief, he
8 agrees there are circumstances where there can
9 be an imminent danger to the officer and the use
10 of force can still be reasonable.

11 JUSTICE KAVANAUGH: What do you tell
12 an officer who pulls someone over for a traffic
13 violation, but, as often, or not often, but
14 sometimes happens, that person has done or is
15 planning to do something more serious and, you
16 know, driving away is one potential indicator of
17 that? An officer does not get the time we've
18 spent here today to make the decision, do I let
19 it go knowing that this person could do serious
20 harm or has done and we'll never catch the
21 person, or do I jump on the car? And they have
22 to make that decision in about -- *snaps* --
23 what do you tell them?

24 MS. JACOBY: So, Justice Kavanaugh, we
25 completely agree that the -- the Graham inquiry

1 has to be very sensitive and deferential to the
2 officer's need for -- for split-second
3 decision-making. I think the training, the
4 guidance we would have officers be given is one
5 that officers are already trained under, as
6 Petitioner points out at page 41 of -- of her
7 brief. Basically, you may use force to respond
8 to a danger to yourself or the public, but don't
9 manufacture a situation where the use of force
10 becomes essentially inevitable. And I think
11 that kind of guidance would be helpful to
12 officers.

13 When they are in a split-second moment
14 in a traffic stop, as you're discussing, it --
15 it may often be reasonable to use force to stop
16 the -- the vehicle. A vehicle can be a
17 dangerous weapon, as this Court has recognized.
18 But that's not true in every single case, and
19 the Graham inquiry has to be case-sensitive to
20 that also.

21 JUSTICE KAVANAUGH: Well, I think the
22 officers are going to want to know do I let him
23 go or do I not let him go as a general
24 proposition when someone pulls away from a
25 traffic stop, or do I try to jump on the car,

1 jump in front of the car. And I don't know that
2 your -- and I realize we're not going to flesh
3 all this out in this case, but officers are
4 presumably paying attention to this, and they
5 have to make those decisions all the time. I'm
6 curious, let him go or not?

7 MS. JACOBY: Of course. I think it's
8 going to depend on what you've pulled them over
9 for: if you know or suspect them to be armed;
10 how they are behaving in your interaction with
11 them; if you're getting the sense that, as they
12 pull away, they're going to pose right away a
13 big danger to people on the road.

14 And Respondent says that that was the
15 case here, and it may well have been, and it may
16 well have been reasonable to -- to use force to
17 stop the officer or to jump on the car to -- to
18 stop Barnes from -- getting away. But the Fifth
19 Circuit just didn't consider any of that, and
20 that's what we think is wrong.

21 JUSTICE KAGAN: I assume --

22 JUSTICE BARRETT: Ms. Jacoby --

23 CHIEF JUSTICE ROBERTS: Is this an
24 objective or subjective inquiry in terms of what
25 type of conduct is going to create the danger?

1 I mean, it's like -- what about in sort of the
2 equivalent of an eggshell plaintiff? I mean, is
3 the officer subject to varieties in terms of
4 reaction from people that he pulls over?

5 MS. JACOBY: Mr. Chief Justice,
6 it's -- the Fourth Amendment test is always an
7 objective reasonableness test. We're not
8 looking into the subjective state of mind of the
9 officer to see if he was acting in good faith or
10 being particularly sensitive or something like
11 that. It's -- it's whether he acted objectively
12 reasonably. I do want to briefly --

13 CHIEF JUSTICE ROBERTS: I'm thinking
14 more the -- of the -- perpetrator in the
15 officer's mind. I mean, maybe somebody is --
16 really -- really views something as -- as a
17 serious danger, and the officer doesn't know
18 that. Is that at all pertinent?

19 MS. JACOBY: I think the officer
20 should take into account sort of the imminence
21 of the threat he perceives. And he may perceive
22 that the suspect is about to -- you know, has a
23 bad motivation, is about to do something
24 dangerous, and -- and that does matter. But the
25 ultimate inquiry is the reasonableness of the

1 officer's perception that there was an imminent
2 threat and it was reasonable to use force.

3 I -- I do want to just briefly
4 address -- on the subject of objective versus
5 subjective standards. I think Texas argues in
6 its amicus brief, and we haven't had a chance to
7 respond, that we are sort of improperly
8 inserting a subjective element into the
9 qualified immunity inquiry because we say that
10 reasonableness is assessed based on the actual
11 facts that the officer knew.

12 That's not correct. Our test is an
13 objective reasonableness one. And this Court
14 has actually rejected that precise argument that
15 Texas makes in Anderson versus Creighton, which
16 is a case that Texas cites in its brief. If I
17 could quote from page 641 of the U.S. Reports
18 there, the Court says that the qualified
19 immunity inquiry "will often require examination
20 of the information possessed by the searching
21 officials. But, contrary to the Creightons'
22 assertion, this does not reintroduce into
23 qualified immunity analysis the inquiry into
24 official subjective intent that Harlow sought to
25 minimize." So this really is an objective test.

1 Of course, the -- the officer will be
2 making perceptions about whether the subject
3 that he's engaging with is acting in bad faith
4 or about to do something dangerous. But -- but
5 the ultimate inquiry is objective.

6 JUSTICE KAGAN: I assume -- tell me if
7 I'm wrong, but I assume that you would want us
8 to write an opinion that doesn't say anything
9 about the weight to be given to the officer
10 himself creating the danger.

11 But I'm -- I'm trying to think of --
12 of -- given the facts of this case, how an
13 opinion that you would want us to write avoids
14 that question entirely.

15 MS. JACOBY: I think the narrowest
16 opinion this Court could write would just be to
17 say: Prior circums matter -- circumstances
18 matter. They're part of the totality of the
19 circumstances. The Fifth Circuit didn't
20 recognize that.

21 If the Court wants to put more meat on
22 the bones, I think it could say, as we've said
23 in our brief: The circumstances at the moment
24 of the threat are going to have prime
25 importance, and it's going to be a rare case in

1 which an officer is experiencing a moment of
2 danger and it's nevertheless unreasonable to use
3 force.

4 And it's going to be the types of
5 cases where we're talking about and -- of the
6 sort that Justice Barrett recognized in her
7 Biegert opinion, where the officer has done
8 something outside the bounds of reasonable
9 behavior that essentially makes the use of force
10 almost inevitable. There's really no
11 intervening misconduct by the suspect.

12 JUSTICE GORSUCH: Why would we do
13 that? Why would we put a thumb on the scale
14 that way and -- and say that it's almost
15 impossible to make out a Fourth Amendment claim
16 in those circumstances given the varied nature
17 of encounters between police officers and
18 citizens across the country, the standard --
19 we've always said reasonableness is the totality
20 of the circumstances.

21 And, at common law, these are all
22 questions for the jury. And you also have
23 layered on top of the Fourth Amendment qualified
24 immunity to protect the officers in these cases.
25 Why would we -- why would we start creating a

1 new jurisprudence of exceptional circumstances?

2 MS. JACOBY: I -- I don't think it
3 would be a -- a new jurisprudence or a thumb on
4 the scale so much as a reflection that when
5 balancing the Fourth Amendment interests of the
6 individual and the government, the government
7 has a very strong interest when there is an
8 imminent danger to himself or to the public.

9 But you're right, of course, it is a
10 "totality of the circumstances" inquiry. And we
11 wouldn't be asking for a departure of that.

12 I think the reason the Court might
13 want to go further and -- and say it's going to
14 be rare when there truly is a moment of danger
15 is because you want to avoid a situation where
16 courts are taking this as license to do some
17 kind of officer-created danger rule, where
18 merely getting into a bad circumstance, making a
19 bad stop, means that the later use of force is
20 automatically unreasonable.

21 I think that would be what we're
22 trying to guard against, Justice Gorsuch.

23 JUSTICE JACKSON: But wouldn't we --

24 JUSTICE SOTOMAYOR: That's nice, but
25 this is not the issue before this Court,

1 correct?

2 MS. JACOBY: Correct. This Court does
3 not need to go -- to go any further than to say
4 that in this case --

5 JUSTICE SOTOMAYOR: And Justice Scalia
6 was very clear in his Scott writings that we
7 shouldn't be trying to do black-line rules here.

8 MS. JACOBY: Certainly. We're --
9 we're not asking for -- for black-line rules. I
10 think just, if the Court wanted to give more --
11 more color, it could say, as Justice Barrett
12 said in the Biegert opinion: We think, you
13 know, when there's a moment of danger, that's --
14 that's very often going to be dispositive but
15 not -- but not always --

16 JUSTICE SOTOMAYOR: Why -- why don't
17 we just say it's important, just as everything
18 is important, but it's important? You're
19 putting a scale on it. By the words you use,
20 you're putting a thumb on it.

21 MS. JACOBY: This Court certainly
22 doesn't need to -- to say anything further
23 than -- than the narrow opinion that -- that
24 Justice Alito sketched out with my friend.

25 But I -- I do think, given that the

1 question is the reasonableness of the use of
2 force in the moment, the circumstances in the
3 moment and the presence of a danger in the
4 moment will have to be quite important.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Well, it's fine to
10 tell someone, a court or anybody else: Take
11 into account the totality of the circumstances.
12 But that's fairly meaningless unless you also
13 tell that person what -- what you are examining
14 the totality of the circumstances to determine.

15 And that's really the -- the difficult
16 question here. Are you examining the totality
17 of the circumstances to determine whether the
18 act that forms the gravamen of the Fourth
19 Amendment claim -- let's say it is the -- the
20 use -- the -- allegedly -- unreasonable use of
21 deadly force -- is unreasonable?

22 Or are you asking the court or the
23 jury to determine whether the whole course of
24 conduct in which the officer is engaged was
25 unreasonable, in part in the sense that it

1 wasn't prudent, it was in violation of perhaps
2 departmental policies or the best practices that
3 had been established for police department --
4 that -- that some people think should be
5 followed by police departments around the
6 country?

7 That -- that's really the difficult
8 question, and what -- what would you say to
9 that?

10 MS. JACOBY: I would say, Justice
11 Alito, the former. The question is: Was the
12 use of force, the seizure, reasonable in the
13 moment? That's what we're trying to get at when
14 we look at the totality of circumstances.

15 We're not doing some sort of
16 freewheeling inquiry into whether the officer
17 overall, over the course of five minutes, acted
18 reasonably. So -- so that is why we think the
19 circumstances in the moment do have prime
20 importance. But that does not mean that courts
21 have a license to ignore everything before that
22 moment, as the Fifth Circuit did here.

23 JUSTICE ALITO: Well, would it be --
24 would a court hearing this case be obligated to
25 admit expert testimony by various individuals

1 who have a view about what are good police
2 practices and what are not good police
3 practices? Would the -- would that be what the
4 jury's determination would boil down to?

5 MS. JACOBY: So the ultimate
6 determination here about whether the officer
7 acted reasonably is, according to Scott, a pure
8 question of law. The -- the jury's not deciding
9 that.

10 The jury could be making factual
11 determinations about what actually happened, you
12 know, when the officer jumped and -- and all the
13 rest.

14 As the Court is examining whether that
15 initial thing that the officer did here, jumping
16 on the car, was outside the bounds of reasonable
17 behavior, I do think it's appropriate to look at
18 training manuals and the like. That can't
19 resolve the question, but that could provide
20 helpful guidance.

21 JUSTICE ALITO: Well, there are
22 federal -- there are some federal law
23 enforcement officers who make vehicle stops. So
24 what is the -- the teaching? Do you know?
25 What -- what are they taught about placing

1 themselves in front of the car or in a position
2 where they could be killed or injured if the
3 driver decides to try to drive away?

4 MS. JACOBY: I don't know across the
5 board a rule for stepping in front of cars. I
6 know that federal officers are trained to use
7 force to respond to danger but not to enter into
8 situations where the use of force becomes sort
9 of inevitable. That's like the DHS manual that
10 my friend points to at page 41 of her brief.

11 I think, again, we don't really train
12 officers to go right up to the constitutional
13 line. We often will train officers to not enter
14 in these situations to begin with even if, if
15 they ultimately do so, it could end up being not
16 a Fourth Amendment violation. So I suspect we
17 would train officers not to -- you know, to --
18 to frequently avoid using force on roads and
19 whatnot, even if it would be permissible under
20 the circumstances to do so, because we just want
21 to -- to train them more cautiously, I suspect.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: No. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: I just am curious,
5 after this case gets resolved on remand, if it
6 goes back on remand, what the rule will be for
7 officers and what those training manuals will
8 say. You know, put aside the abducted child
9 example.

10 Someone's pulling away, it might be
11 they just don't feel like they want to be
12 hassled for a traffic violation, but they could
13 be, you know, about to drive down the street in
14 New Orleans. You don't know. Or they might be
15 on drugs and about to kill someone else who's,
16 you know, on a bike on the side of the road.

17 And I don't know what we want officers
18 to do, and I don't know how that's going to get
19 fleshed out. But I'm not -- you know, officers,
20 if they're held liable for jumping on cars, for
21 anything that happens thereafter, are just going
22 to let cars go. And maybe that's the rule that
23 the United States thinks is appropriate. I
24 don't know.

25 MS. JACOBY: That's not the rule the

1 United -- States thinks is appropriate. I do
2 think that it is sometimes appropriate to use
3 force to stop a car from -- from pulling away
4 from a stop. I think Brosseau is good guidance
5 on that.

6 But Brosseau also says that the use of
7 force to stop a vehicular flight is necessarily
8 a context-specific -- thing. I think it says in
9 Brosseau that that is an area that depends very
10 much on the facts of each case.

11 So I -- I recognize that can be
12 unsatisfying. In giving guidance to officers,
13 police departments may well say: You know,
14 don't jump on the car no matter what, unless you
15 see a weapon or something like that.

16 That -- again, they may train them not
17 to go all the way up to the Fourth Amendment
18 line, but we don't think that --

19 JUSTICE KAVANAUGH: Well, an
20 individual officer too would be --

21 MS. JACOBY: -- there is at a point
22 until they can't --

23 JUSTICE KAVANAUGH: -- an individual
24 officer would be -- who would -- would be --
25 who's risk-averse on being held liable for

1 something like this is just not going to do it.

2 But anyway, I'll -- I'll stop there.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Ms. Jacoby, to -- to
7 this point, there is a split on this. So what
8 about in the circuits that don't take the
9 "moment of threat" approach, these questions
10 that Justice Kavanaugh is asking about guidance
11 for police officers? I'm just wondering what
12 your view is of how courts are handling these
13 kinds of cases in that circuit in ways that
14 might affect police behavior.

15 MS. JACOBY: So I do think, actually,
16 the split is maybe not so much a two-sided split
17 as a three-sided. I do think there have been
18 some courts that veer a little bit towards an
19 officer-created danger rule, where they seem to
20 say that -- almost suggest that the use of force
21 is automatically unreasonable if earlier in the
22 sequence the officer did anything unreasonable.

23 And we don't think that's correct, and
24 we do think that would be bad guidance for
25 officers and would lead them to police less

1 aggressively than they need to be able to.

2 But I think, in a -- in a court that
3 appropriately takes into account the totality of
4 the circumstances, officers will have good
5 guidance to use force when necessary, when --
6 when there's a danger and they need to protect
7 themselves or the public, but to avoid
8 situations, as I said, where, you know -- to
9 avoid manufacturing a situation where the use of
10 force effectively becomes inevitable. That's,
11 you know, jumping in front of the car, that type
12 of thing.

13 Again, obviously, Respondent disputes
14 that's what he's done here. Petitioner thinks
15 it is. That's what they'll sort of hash out
16 below. But I think guidance that says you can
17 use force to respond to danger, don't
18 manufacture a dangerous situation, would --
19 would go a long way.

20 JUSTICE BARRETT: So you say -- you
21 said it's a three-sided split and you're kind of
22 saying Fifth Circuit on one side and then these,
23 you know, officer-fabricated or officer-caused
24 dangers on the other side. What about those
25 circuits in the middle and this concern that,

1 you know, Justice Kavanaugh is correctly
2 expressing about what cops do in the moment?
3 And in that -- in those circuits that take the
4 more middle approach, I take it that's what the
5 United States is supporting?

6 MS. JACOBY: Correct. Correct.

7 JUSTICE BARRETT: And this isn't a
8 problem in those circuits or -- or it is?

9 MS. JACOBY: I don't think so. I
10 mean, we have amicus briefs on the other side
11 from, for example, the law enforcement officers
12 from Wisconsin --

13 JUSTICE BARRETT: Mm-hmm.

14 MS. JACOBY: -- which is in the
15 Seventh Circuit, which does take this kind of
16 more middle-of-the-road approach, and I -- I
17 don't see in their brief something saying that
18 they have a uniquely difficult time policing. I
19 think they are, of course, going to have to make
20 split-second -- decisions, and very often, in
21 the cases where a court sort of ultimately
22 decides that the decision they made was on the
23 wrong side of the line, they'll still be
24 protected by qualified immunity.

25 So, of course, we are definitely very

1 concerned as the United States about officers
2 not being able to engage in aggressive-enough
3 policing. They need to be able to. But -- but
4 we don't think that a "totality of the
5 circumstances" approach, which is what Graham
6 cautions --

7 JUSTICE BARRETT: Mm-hmm.

8 MS. JACOBY: -- what Scott cautions,
9 what this Court has endorsed over and over
10 again, would lead down that path.

11 JUSTICE BARRETT: And last question.
12 What's the deal -- you know, in Respondents'
13 brief at Footnote 3, it says, "United States
14 questions whether Sergeant Felix jumped onto the
15 door sill shortly before or shortly after. But
16 the parties agree it was after." What's the
17 deal with that factual dispute?

18 MS. JACOBY: I -- I think it's a
19 dispute about where -- the way the district
20 court phrased its opinion. It seems to suggest
21 a distinction between the moment that the car
22 started moving forward and a moment of
23 acceleration. So it -- it seems now everyone
24 agrees that the officer stepped on the car after
25 it started moving forward.

1 There is that passage that we quoted
2 from the district court opinion that says it's
3 not clear if it's before or after the
4 acceleration. I think that may be where the
5 confusion comes from. The fact that there is
6 some confusion about this matter of timing,
7 which could go to the -- to the question whether
8 the decision to jump on the sill was -- was
9 reasonable or not, to me seems like further
10 reason to -- to vacate and remand and send it
11 back to the Fifth Circuit.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yeah. Just to
15 follow up on Justice Barrett's questions, it --
16 it's the majority of circuits that use a
17 totality test, is that correct?

18 MS. JACOBY: Yes, I think that's
19 correct.

20 JUSTICE JACKSON: And is there any
21 indication in those circuits that there is
22 confusion or concern about the application of
23 that test either on the part of the courts or on
24 the part of the officers who do their jobs in
25 that context?

1 MS. JACOBY: Not -- not to my
2 knowledge. I do think that, again, a feature of
3 the sort of "totality of the circumstances"
4 approach that applies to the Fourth Amendment
5 across the board is that it doesn't always
6 provide perfect guidance to officers. That's
7 why we do have the backstop of the "clearly
8 established" prong of the qualified immunity
9 analysis, to make sure that officers are not
10 held liable for things that they sort of weren't
11 on notice were on the wrong side of the line.

12 But I'm not aware of a problem in the
13 circuits that are correctly applying a "totality
14 of the circumstances" approach.

15 JUSTICE JACKSON: And is it the case
16 that in those circuits that are correctly
17 applying the test, officers are regularly found
18 to have engaged in using reasonable force?
19 We're not talking about the application of a
20 test that necessarily results in officer
21 liability, right?

22 MS. JACOBY: Absolutely. Obviously,
23 the United States would not endorse such a test.
24 Of course.

25 JUSTICE JACKSON: And can I just

1 clarify that the United States is not taking a
2 position on the facts of this case and whether
3 or not Officer Felix used reasonable force, and,
4 in fact, you would be satisfied with just a
5 clarification that "moment of the threat"
6 doctrine is not what courts should be using, and
7 then sending it back to the Fifth Circuit for
8 the Fourth Amendment analysis in this situation?

9 MS. JACOBY: That's absolutely
10 correct. Our interest in this dispute is a
11 narrow one. We're really just interested in
12 correcting the Fifth Circuit's legal error.
13 And -- and we have no position on the facts of
14 this case.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. McCloud.

19 ORAL ARGUMENT OF CHARLES L. MCCLOUD

20 ON BEHALF OF THE RESPONDENTS

21 MR. MCCLOUD: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 When an officer doing his duty
24 confronts a threat to his safety or the safety
25 of others, it is reasonable for that officer to

1 use force to end that threat. That's the
2 conclusion this Court has consistently reached,
3 and that's what the Fifth Circuit correctly held
4 below.

5 At the moment Sergeant Felix used
6 force, he was clinging to the side of a fleeing
7 suspect's car, and Felix reasonably believed
8 that his life was in imminent danger. That
9 conclusion should end this case.

10 Petitioner's contrary argument attacks
11 strawman. Let me be very clear. We are
12 defending the decision below and the "moment of
13 threat" doctrine as it actually exists. The
14 core premise of that doctrine is that an officer
15 doesn't lose his right to defend himself just
16 because he made a mistake at an earlier point in
17 time.

18 But applying that rule does not
19 require courts to ignore everything that
20 occurred prior to the use of force. Like other
21 circuits, the Fifth Circuit has repeatedly held
22 that preceding events are relevant to the extent
23 they inform the officer's perception of the
24 danger that he faced. The panel decision below
25 repeatedly cited to and quoted from those very

1 precedents. The panel did not and could not
2 overrule them sub silentio.

3 Petitioner asked the Court to create a
4 new breed of constitutional tort under which an
5 officer facing the barrel of a gun loses his
6 right to defend himself if he previously used
7 bad tactics or poor planning.

8 That's contrary to precedent and
9 common sense. Graham asks only whether an
10 officer's use of force was reasonable in the
11 particular circumstances he faced. It requires
12 courts to put themselves in the shoes of the
13 officer who used force, not to second-guess
14 every decision the officer made in some of the
15 most stressful circumstances imaginable.

16 And Plumhoff and Mendez rejected
17 similar officer-created danger theories as
18 illogical, unwarranted, and inconsistent with
19 precedent. The Court should reject the theory
20 again in this case and affirm the judgment of
21 the court of appeals.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: How would you assess
24 the difference between the Fifth Circuit's
25 approach, what you -- as you see it, and the

1 "totality of the circumstances" approach, as we
2 heard it this morning?

3 MR. McCLOUD: So I don't think that
4 there is any difference between what the Fifth
5 Circuit does and what Graham directs. Both --

6 JUSTICE THOMAS: No, I mean, as --
7 what the Solicitor General and Petitioners, as
8 they see the totality of the circumstances, not
9 so much Graham.

10 MR. McCLOUD: So the difference, I
11 think, between our position and -- and somewhat
12 the government's position is they want to
13 include within the totality of the circumstances
14 arguments that the officer escalated the danger
15 or created the danger.

16 And we think that that is not a
17 relevant consideration under Graham and under
18 the Fourth Amendment. In those cases, the
19 question is: Was there a legitimate threat that
20 the officer is responding to?

21 JUSTICE THOMAS: Were they arguing
22 that this morning?

23 MR. McCLOUD: That was exactly their
24 argument that I heard this morning. He -- he
25 said that -- Mr. Zelinsky said that Sergeant

1 Felix created a dangerous situation by jumping
2 onto the car.

3 JUSTICE THOMAS: But I thought he said
4 he wants to argue that later, when he -- when it
5 goes back.

6 MR. McCLOUD: Well, that was the
7 argument that they tried to advance in the Fifth
8 Circuit. And this is, I think, the one thing I
9 agree with in Judge Higginbotham's solo
10 concurrence. At 15a of the Petition Appendix,
11 he says that argument is foreclosed under Fifth
12 Circuit law.

13 And that is the actual issue that
14 divides the circuits. There is no split on the
15 question of whether you can consider preceding
16 events. Every court in the country considers
17 preceding events. The question is whether you
18 can use those preceding events as a basis for
19 making an argument that the officer made a
20 mistake or used poor planning --

21 JUSTICE JACKSON: But, Mr. McCloud,
22 that's not what you argued before, and I'm very,
23 very confused now. I mean, it -- it seems as
24 though the "moment of the threat" doctrine
25 has -- it exists and as everybody has understood

1 it, is about evidence essentially. It's what
2 can you look at to prove the -- alleged Fourth
3 Amendment excessive force claim. Can you look
4 at anything that occurred outside of the moment
5 of the threat, anything that occurred
6 previously?

7 You seem to be now suggesting that it
8 is about liability. You said that they are
9 creating a new breed of constitutional tort and
10 this is about, you know, whether or not the
11 police officer can be held liable for his own
12 negligence in the time preceding.

13 I haven't seen that concept anywhere.

14 MR. McCLOUD: That -- that was the
15 argument that was made below. Issue Number 1 in
16 Petitioner's Fifth Circuit brief was that
17 Sergeant Felix escalated the danger and was
18 negligent in jumping onto the car, and that is
19 the issue that actually divides the circuits.

20 The Fifth Circuit has never adopted a
21 rule that you can't ever look to anything that
22 happened prior to the use of the force --

23 JUSTICE JACKSON: Did -- is it true
24 that --

25 MR. McCLOUD: -- and the best example

1 I can give --

2 JUSTICE JACKSON: -- isn't it true
3 that in your bio, you stated the Fifth Circuit's
4 approach involves reviewing only the events
5 immediately prior to the use of deadly force as
6 opposed to other prior conduct?

7 MR. McCLOUD: The other prior conduct
8 that was being referred to there is conduct that
9 is alleged to have created the danger.

10 JUSTICE JACKSON: That might -- be
11 what you're saying is referred to now. I --
12 the -- the sentence suggests that the dividing
13 line is between looking only at the events
14 immediately prior to the use of deadly force as
15 opposed to other prior conduct.

16 MR. McCLOUD: No, Your Honor, and on
17 page 33 of the bio, we said there was no circuit
18 split on that issue. We said that every court
19 considers prior events. So --

20 JUSTICE KAGAN: Whatever you said or
21 you didn't say, Mr. McCloud, I think it's pretty
22 clear that if you look at the court below, the
23 court below said: We're only looking at the
24 prior two seconds and we're not going to look at
25 anything before that.

1 And -- and so, again, even if there's
2 some kind of intra-circuit confusion going on in
3 the Fifth Circuit -- there might be. It
4 wouldn't be surprising if, on an issue like
5 this, there were some -- but we have two
6 opinions below, actually, both the circuit court
7 and the district court, who expressed a desire
8 to look beyond two seconds but said: We can
9 only look at the prior two seconds.

10 And -- and you seem to be saying:
11 Well, that is wrong. I mean, you -- you can
12 look back beyond the prior two seconds.

13 So that suggests to me that there's an
14 easy way of just, you know, vacating and
15 remanding and giving it back to the courts below
16 to address, okay, once we look behind -- beyond
17 the two seconds and we have a fuller scope of
18 evidence, then we'll make our reasonableness
19 inquiry, hopefully without our putting a thumb
20 on the scales either way.

21 MR. McCLOUD: So I have a couple of
22 responses on that.

23 First, I don't think that that's the
24 best reading of the panel decision. I
25 understand that that's what Judge Higginbotham

1 asserted in his solo concurrence, but that is
2 not the law, and he doesn't get to make the law
3 for the Fifth Circuit by just asserting things
4 in a solo opinion.

5 JUSTICE GORSUCH: Okay. Fair enough.
6 I understand you read the opinion differently
7 than Justice Kagan does or maybe Justice --
8 Judge Higginbotham did, but what's wrong with
9 proceeding on that understanding?

10 MR. McCLOUD: Well, I think there are
11 a number of things wrong.

12 The first thing I would say is, to the
13 extent you are concerned about the breadth of
14 the statements in the panel decision, I think
15 the better course of action is to affirm the
16 judgment, which is clearly correct.

17 JUSTICE GORSUCH: If the only thing
18 we're concerned with is this two-minute -- this
19 two-second rule, whether it's there or not,
20 Mr. McCloud, and we just clarify that is not the
21 law, send it back, any objections to that?

22 MR. McCLOUD: Yes, because then you
23 would be sending it back for a remand that is
24 going to be pointless.

25 As I said before, the argument that

1 Petitioner wants to make on remand --

2 JUSTICE GORSUCH: That -- Mr. McCloud,

3 the number of remands from this Court that

4 lawyers tell us are pointless --

5 (Laughter.)

6 JUSTICE GORSUCH: -- could fill

7 volumes.

8 MR. McCLOUD: Well, in this case, it's

9 not --

10 JUSTICE GORSUCH: Any other -- any

11 other -- any other objection besides your view

12 that it would be pointless?

13 MR. McCLOUD: Yes. My other objection

14 is it would be creating, I think, a dangerous

15 precedent because it could be seen as endorsing

16 the sort of officer-created danger argument that

17 Petitioner wants to make.

18 And, as Justice Barrett alluded to in

19 some of her questioning earlier --

20 JUSTICE GORSUCH: If we -- fine.

21 That -- that's a --

22 MR. McCLOUD: -- there is a --

23 JUSTICE GORSUCH: -- that's --

24 Mr. McCloud, that's a fair concern. But we've

25 also talked about putting that aside and

1 bracketing that and making clear, as we did in
2 Men -- Mendez, I believe?

3 MR. McCLOUD: Mendez.

4 JUSTICE GORSUCH: -- Mendez, that
5 footnote in Mendez reserved the question, we'd
6 reserve it again, possibly, possibly. Any -- if
7 we do that, any other objections?

8 MR. McCLOUD: So I guess, if I -- if I
9 could ask, if you do that, to do one additional
10 thing, which is to make clear that the standard
11 would have to be high, and mere negligence alone
12 would not be enough to satisfy this
13 officer-created --

14 JUSTICE GORSUCH: Well, now see
15 negligence involves mens rea, and that's
16 subjective. And we've said in the Fourth
17 Amendment it's an objective test. So I -- I --
18 I -- that one, I -- up -- up until then, you had
19 me. But now you -- now I'm afraid I'm getting
20 off the train.

21 MR. McCLOUD: Well, I -- I think the
22 problem is -- I completely agree that negligence
23 is not a relevant consideration, and that's why
24 we object to that test.

25 JUSTICE GORSUCH: Okay. Good. All

1 right. Thank you.

2 MR. McCLOUD: But that is the test
3 that courts of appeals are applying in the
4 country right now. I don't think there's any
5 question about --

6 JUSTICE GORSUCH: So do you want a
7 negligence test or do you not want a negligence
8 test?

9 MR. McCLOUD: I do not want a
10 negligence test.

11 JUSTICE GORSUCH: Okay. All right.
12 All right.

13 MR. McCLOUD: I want a test that says:
14 You only look at conduct that actually is --

15 JUSTICE GORSUCH: You look at the --

16 MR. McCLOUD: -- regulated by the
17 Fourth Amendment.

18 JUSTICE GORSUCH: Yeah.

19 MR. McCLOUD: That's searches and
20 seizures. And so --

21 JUSTICE GORSUCH: Yes. And it's an
22 objective inquiry looking at the totality of the
23 circumstances, right?

24 MR. McCLOUD: It is an objective
25 inquiry that looks at the totality of the

1 circumstances to determine whether the officer
2 genuinely believed there was a threat.

3 You do not look at the totality to
4 determine, well, did the officer make a mistake
5 and should he have gotten himself in that
6 circumstance.

7 JUSTICE GORSUCH: No, whether he
8 genuinely believes or whether there was an
9 excessive use of force. I thought -- I thought
10 the latter was the question.

11 MR. McCLOUD: And this Court has
12 consistently said that when an officer confronts
13 a genuine threat, it is not excessive to use
14 force. And I would be very concerned about an
15 opinion --

16 JUSTICE GORSUCH: That -- that's an
17 objective inquiry, though, isn't it?

18 MR. McCLOUD: That is an objective
19 inquiry, yes, sir.

20 JUSTICE GORSUCH: Okay. All right.
21 Thank you.

22 CHIEF JUSTICE ROBERTS: How broad is
23 the totality of circumstances under your view?
24 Do you get to put in: This is the training
25 record of the officer, and, look, he got D

1 minuses in all the -- the excessive force parts
2 of it?

3 MR. McCLOUD: No.

4 CHIEF JUSTICE ROBERTS: I mean, is
5 that part of the totality as you view it?

6 MR. McCLOUD: No, Your Honor. We
7 don't view that as relevant. I think Whren says
8 that very clearly. Those sorts of policies
9 and -- and procedures do not inform the
10 reasonableness question that is being asked by
11 the Fourth Amendment.

12 And Justice Alito's questioning
13 alluded to this before. The Fourth Amendment is
14 not a regulation on the reasonableness in a
15 general sense of everything that officers do.
16 It is a regulation of very specific conduct,
17 searches and seizures. And this Court has
18 established clear guidelines for determining
19 when searches and seizures are reasonable.

20 The problem with the other side's
21 position is they want to take literally anything
22 that an officer does and say: If a jury,
23 through the lens of hindsight, could say that
24 was a bad call, or if an expert could come in
25 and say I wouldn't have done that if I were in

1 the officer's shoes, that could be the basis for
2 a Fourth Amendment claim.

3 JUSTICE SOTOMAYOR: So it could be
4 that when this goes down below, the Fifth
5 Circuit will actually address that question.
6 But it didn't. It repeatedly said: We can't
7 look at any event ever.

8 You concede in your own brief that
9 there could be situations in which an officer is
10 the aggressor. Page 34, I think, is the page of
11 your brief. You admit that an officer could be
12 an aggressor and act unlawfully in doing so,
13 correct?

14 MR. McCLOUD: Yes. If an officer
15 comes up to mug someone --

16 JUSTICE SOTOMAYOR: But your
17 articulation of this rule is just trying to get
18 us to -- draw -- draw lines that haven't even
19 been addressed by the court below.

20 MR. McCLOUD: I think they have been,
21 Your Honor, respectfully. If you look at the
22 cases --

23 JUSTICE SOTOMAYOR: No, the --
24 respectfully, Mr. McCloud, the court repeatedly
25 said: We can only look at the actions in the

1 two minutes before the moment of threat.

2 If your answer had been -- if he had
3 walked up in an unmarked car, in plain clothes,
4 with a gun drawn, and this person -- and he
5 walked up to the car and this person took off
6 and/or accelerated slightly, and he jumped on
7 and shot blindly, do you think that's
8 reasonable?

9 MR. McCLOUD: I think that would not
10 be reasonable for a number of reasons.

11 JUSTICE SOTOMAYOR: All right. So
12 you've given the game away because, at that
13 point, you have to look at what the officer did.

14 MR. McCLOUD: And, Your Honor, we
15 agree that you can look at what the officer did.
16 And the Fifth Circuit does look at what the
17 officer did. The best example I can give you --

18 JUSTICE SOTOMAYOR: It didn't in this
19 case.

20 MR. McCLOUD: In this case, that's
21 because the only argument that Petitioner made
22 below, the only action she said you should look
23 at, was an action based on officer-created
24 danger.

25 JUSTICE SOTOMAYOR: And we have three

1 judges who said we shouldn't be limited in this
2 way in the -- mine-run of cases, and we -- and
3 so we're stuck with this. We think the -- the
4 judgment is right, but it wasn't addressed at
5 all. Officer-created danger wasn't addressed.

6 And the other side says clearly it's
7 not raising it here.

8 MR. McCLOUD: I -- it is going to
9 raise it on remand. And I think it was
10 addressed --

11 JUSTICE SOTOMAYOR: Then you want
12 an -- and you want an intense -- an anticipatory
13 ruling from us.

14 MR. McCLOUD: No, Your Honor. I think
15 it was addressed, and the best evidence I can
16 give you of that are the cases that the Fifth
17 Circuit itself cited for the proposition that we
18 don't look at the action of the officer.

19 All of those are cases in which the
20 argument that was being made was the argument
21 that they made below, that the officer created a
22 dangerous situation and that was the basis for
23 liability.

24 So that is the argument the Fifth
25 Circuit said it's not considering. And that's

1 what Judge Higginbotham said he wanted to
2 consider. He said --

3 JUSTICE JACKSON: Mr. -- Mr. McCloud,
4 did the plaintiff argue that the court should be
5 looking at the totality of the circumstances?

6 MR. McCLOUD: Yes.

7 JUSTICE JACKSON: And did you object
8 to that as being the test that the court should
9 apply when it decided what it was going to look
10 at to make this determination?

11 MR. McCLOUD: No. Our objection was
12 that you should not be adopting this
13 officer-created danger theory in considering
14 whether Sargeant Felix escalated the situation.
15 That was our --

16 JUSTICE JACKSON: So you did not say
17 the "moment of the threat" doctrine is the --
18 the test in the Fifth Circuit, and that's --
19 only what you should be looking at, you should
20 not be looking at circumstances and facts and
21 things that happened before the moment of the
22 threat?

23 MR. McCLOUD: In --

24 JUSTICE JACKSON: If I look at the
25 record, I'll find that you're arguing that

1 below?

2 MR. McCLOUD: So, in the Fifth Circuit
3 briefing, I don't believe we did because the
4 labeled "moment of the threat" doctrine didn't
5 come up until Judge Higginbotham's opinion in
6 this case. That was not a label that had been
7 recognized prior to that.

8 If you look in Westlaw for "moment of
9 the threat doctrine," I think there are four
10 hits for that, and this is the -- the one that
11 really originated that term.

12 So that was not our argument below.
13 Our argument below was whether Sergeant Felix
14 escalated the danger was irrelevant. And that's
15 consistent with Fifth Circuit precedent. That's
16 what Judge Higginbotham objected to.

17 JUSTICE JACKSON: All right. But do
18 you concede that that's not what the Fifth
19 Circuit held in this case, that it was
20 irrelevant whether or not he accelerated the
21 danger or he contributed to it? That's not
22 their holding in this case -- is it?

23 MR. McCLOUD: That is -- I believe
24 that is their holding. And that is what Judge
25 Higginbotham objected to.

1 So, if you look at page 15a of the
2 Petition Appendix, Judge Higginbotham says: I
3 would come out differently because I believe we
4 should consider the fact that Sergeant Felix
5 escalated the danger of the situation.

6 That was the argument that they made,
7 that he wanted them to consider, and that is the
8 whole basis for the disagreement between us and
9 the court of appeals and the disagreement that
10 actually divides the circuit courts on this
11 question.

12 JUSTICE SOTOMAYOR: Counsel, can I
13 read you three sentences from this opinion?

14 MR. McCLOUD: Certainly.

15 JUSTICE SOTOMAYOR: This is the
16 majority: "We may only ask whether Officer
17 Felix was in danger 'at the moment of the
18 threat' that caused him to use deadly force
19 against Barnes."

20 It said its inquiry was "confined to
21 whether the officers or other persons who were
22 in danger at the moment of the threat resulted
23 in a" -- "in a officer's use of deadly force."

24 And it stated: Any of the officer's
25 actions leading up to the shooting are not

1 relevant for the purposes of an excessive force
2 inquiry in this circuit. So Higginbotham did
3 not make up the "moment of the threat" doctrine.
4 It's been used, it's been cited repeatedly by
5 other circuits. It's well-known by that name.
6 This is not a made-up theory.

7 MR. McCLOUD: Well, Your Honor --

8 JUSTICE SOTOMAYOR: Now -- let me
9 finish. If you concede in page 34 that if
10 the -- that if the officer was the aggressor,
11 then there are circumstances -- you don't think
12 this is one of them -- but there are
13 circumstances in which the officer's actions are
14 relevant, correct?

15 MR. McCLOUD: We agree that the
16 officer's actions are relevant. And the Fifth
17 Circuit considers officer actions. Cole versus
18 Carson is an en banc decision --

19 JUSTICE SOTOMAYOR: You just said the
20 officer's actions leading up to the shooting are
21 not relevant. That -- I -- I can't -- I don't
22 see how I can read that any other way.

23 MR. McCLOUD: So, Your Honor, I think
24 you have to read the --

25 JUSTICE SOTOMAYOR: Again, they didn't

1 say they're not relevant in this case. They
2 said they're never relevant.

3 MR. McCLOUD: And, Your Honor, I think
4 you have to read the opinion that's being cited
5 there. That's Harris versus Serpas. And that
6 is a case that says we apply totality of the
7 circumstances. And then, when it makes the
8 statement that we don't consider the officer's
9 actions, it's referring to --

10 JUSTICE SOTOMAYOR: Totality of the
11 circumstances were not used by this court,
12 correct, in this opinion?

13 MR. McCLOUD: It was. They considered
14 the totality of the circumstances. What they
15 did not consider was Petitioner's argument that
16 Sergeant Felix created the danger.

17 JUSTICE SOTOMAYOR: Can you point me
18 to a place in the opinion where it used the
19 words "totality of the circumstances?"

20 MR. McCLOUD: I -- I -- I cannot, but
21 that was the argument that was made below.

22 JUSTICE JACKSON: Can you explain
23 Judge Higginbotham's concurrence sentence, "I
24 write separately to express my concern with this
25 Circuit's 'moment of the threat' doctrine as it

1 counters the Supreme Court's instruction to look
2 to the totality of the circumstances when
3 assessing the reasonableness of an officer's use
4 of deadly force?"

5 MR. McCLOUD: Yes. He is wrong about
6 that, and the best evidence I can give you of
7 that is Cole versus Carson.

8 JUSTICE JACKSON: I'm asking you, did
9 he believe that there was such a thing as the
10 "moment of threat" doctrine and that it was in
11 opposition to the "totality of the
12 circumstances" test, which is what he was hoping
13 that the court would be able to apply?

14 MR. McCLOUD: I don't know how he
15 could reasonably believe that given that he
16 wrote Cole versus Carson, which is an en banc
17 decision of the Fifth Circuit that is all about
18 pre-shooting facts. In that case, the entire --

19 JUSTICE KAGAN: But, I mean, he did
20 believe it, and that belief produced the
21 decision below.

22 MR. McCLOUD: Well, I don't think that
23 you should attribute his statements in a solo
24 concurrence that others didn't join to the other
25 members of the panel. I -- I think you should

1 read the cases that they cited.

2 JUSTICE KAGAN: Well, he wrote both
3 and he was telling you exactly why he wrote the
4 majority opinion the way he did, because he felt
5 constrained to. And I understand that you think
6 he was not so constrained, but we're supposed to
7 be reviewing this decision, and he was telling
8 us: I, the majority opinion writer, felt that I
9 was constrained to do nothing more than look at
10 the prior two seconds.

11 And you don't say that that's the
12 right rule, so it seems as though we should kick
13 it back and let you guys fight it out as to the
14 relevance of anything that happened beyond the
15 prior two seconds.

16 MR. McCLOUD: So I guess I would
17 encourage the Court, if it does end up
18 remanding, to say a little more than simply do
19 it again, Fifth Circuit. I think it is
20 important to say something about this issue of
21 officer-created danger because it has divided
22 the circuits for a number of years.

23 And the Court has gotten a number of
24 cases that present that issue. Mendez is one.
25 The Bond versus City of Talequah case from a few

1 term ago that was summarily reversed was
2 another. And so it is lurking in the background
3 of many of these excessive force cases, and it
4 is doing real harm in the circuits that apply
5 that, the -- the Ninth Circuit, the Tenth
6 Circuit. That is the reason we have amici from
7 California that say this standard makes it
8 impossible for us to train officers and give
9 them clear guidance.

10 So I think it's incumbent on the Court
11 to offer a little more clarity on that in an
12 opinion even if it does remand.

13 JUSTICE BARRETT: And you want to --
14 just to make sure I have it, what -- what
15 clarity would you want us to give?

16 MR. McCLOUD: So, if the Court is
17 going to offer or accept some version of
18 officer-created danger perhaps along the lines
19 that Your Honor's Biegert opinion suggested, I
20 think you would want to make clear that
21 something like negligence alone is not going to
22 be enough. It's going to be an extraordinary
23 case in which an officer's creation of the
24 danger is the basis for a Fourth Amendment
25 claim.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 JUSTICE THOMAS: As I understand you,
5 you're saying that it isn't so much that the --
6 a -- a difference between whether to use the
7 totality of the circumstances but, rather, what
8 evidence would be available or could be used in
9 that analysis. And, here, you say the
10 officer-created danger should -- that the Fifth
11 Circuit said it could not -- it would not permit
12 that assessment --

13 MR. McCLOUD: That's correct.

14 JUSTICE THOMAS: -- within the context
15 of totality of circumstances?

16 MR. McCLOUD: Exactly.

17 JUSTICE THOMAS: So it's a subcategory
18 of the totality of circumstances I hear you.

19 MR. McCLOUD: It is a particular
20 argument that is off limits in the Fifth Circuit
21 and in the majority of the circuits when you're
22 considering the totality of the circumstances.
23 So you can still look to things that the officer
24 did prior to using force, but you cannot blame
25 the officer for creating a bad situation and --

1 and second-guess all of the decisions he made.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Alito?
4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: I go back, you do
6 believe there are situations -- you admitted it
7 to me earlier -- where an officer's actions can
8 be considered to have created a danger
9 unreasonably?

10 MR. McCLOUD: I don't agree with that
11 framing. I agree that you can consider an
12 officer's actions, and I agree that an officer's
13 actions can make the use of force less
14 reasonable.

15 Again, the Cole versus Carson example
16 is -- is one that's instructive on that. That
17 is a case where the majority of the Fifth
18 Circuit en banc said things that the officers
19 did prior to using force made it unreasonable
20 for them to use force at a later point.

21 But what they did not do is say, well,
22 did they violate policies or could I have made a
23 better decision? And that is the fundamental
24 difference between my approach and Petitioner's
25 approach.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: So the question
3 presented that we took certiorari on is whether
4 courts should apply the "moment of the threat"
5 doctrine when evaluating an excessive force
6 claim. So, to me, what that means is "moment of
7 the threat" doctrine, do you just look at the
8 second or two before, or do you widen the --
9 your scope to look at other things beyond that.

10 What we did not take cert on is the
11 question that you're raising, a very important
12 question, probably one on which there is some
13 confusion, wouldn't be a surprise to me, but
14 definitely not the question in this case, the
15 question of what weight to give the fact that or
16 the possibility that the officer created the
17 danger in the reasonableness inquiry.

18 That's in a completely different
19 question, which we didn't take cert on, which,
20 you know, it does not seem to me we're
21 well-positioned in this case to discuss.

22 MR. McCLOUD: So, if I can just
23 respectfully push back on that, I think, in
24 order to answer the question presented as
25 Petitioner framed it, you have to understand

1 what the "moment of threat" doctrine is.

2 And for all of the reasons we explain
3 in our brief, it is absolutely not a doctrine
4 that says prior events are off limits. There is
5 no court in the country that is applying that
6 version of the standard.

7 The dispute between the courts and --
8 and what divides us in this case is whether,
9 when looking at those prior events, you can
10 identify something the officers did that was
11 unreasonable in a -- a sort of general cosmic
12 sense and say that contributed to the danger.
13 And even though that is not itself a violation
14 of the Fourth Amendment, it is the basis for
15 your Fourth Amendment excessive force claim.
16 That's -- that's the nub of the issue.

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson?

23 Okay. Thank you, counsel.

24 MR. McCLOUD: Thank you.

25 CHIEF JUSTICE ROBERTS: Ms. Pettit.

1 ORAL ARGUMENT OF LANORA PETTIT
2 FOR TEXAS, ET AL., AS AMICUS CURIAE,
3 SUPPORTING RESPONDENT FELIX

4 MS. PETTIT: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 In the last 15 years, this Court has
7 rejected at least three times that an officer's
8 otherwise liable conduct violates the Fourth
9 Amendment because an earlier split-second
10 decision made a confrontation more likely.

11 Properly understood, what Judge
12 Higginbotham dubbed the "moment of threat"
13 doctrine merely applies that rule. As this
14 Court recognized in cases like Mendez and
15 Sheehan, it is necessary because the Fourth
16 Amendment must be applied by thousands of real
17 cops in the real world without, in the words of
18 Kentucky against King, an unacceptable degree of
19 unpredictability.

20 The moment -- the officer-created risk
21 theory which Petitioners have -- continuously
22 pressed at least until the reply brief in this
23 Court is antithetical to that proposition
24 because it invites an open-ended subjective
25 inquiry into the officer's intent that cannot be

1 conducted without the benefit of hindsight. It
2 also, as Mendez recognized, involves tricky
3 questions and fuzzy standards of causation that
4 cannot be easily be applied.

5 Because the Fifth Circuit has properly
6 rejected that proposition, its judgment should
7 be affirmed.

8 And I welcome the Court's questions.

9 JUSTICE THOMAS: Would you articulate
10 for us what you think the district court and the
11 court of appeals held?

12 MS. PETTIT: I think that the district
13 court held -- and I would point Your Honor to
14 Pet. App. page 17a and 24a, Footnote 2 -- under
15 the Fifth Circuit precedent that prior actions
16 that created a risk were not relevant under the
17 Fifth Circuit's test because that is the
18 argument that Petitioner was pursuing at that
19 time.

20 And to Justice Sotomayor's questions
21 earlier, the statements that she is referring to
22 have to be read in light of those arguments
23 because that is what the Fifth Circuit was
24 rejecting when it said the prior actions were
25 irrelevant.

1 JUSTICE JACKSON: I'm sorry, you're
2 saying the statements that the Fifth Circuit
3 made in its opinion regarding what its holding
4 was have to be read in light of the arguments
5 that were before it?

6 MS. PETTIT: I believe that's what
7 the -- they're referring to when they say these
8 actions that you're talking to are irrelevant.

9 JUSTICE JACKSON: Well, what is --
10 what is Judge Higginbotham saying when he says
11 in his concurrence: I write separately to
12 express my concern with the circuit's "moment of
13 the threat" doctrine. And then he doesn't
14 define it in the way that you have. He says:
15 "This doctrine counters the Supreme Court's
16 instructions to look at the totality of the
17 circumstances."

18 MS. PETTIT: Your Honor, I would point
19 your -- to -- you to page 15a of his opinion,
20 where he also says that: "In our reasonableness
21 analysis, references to our supposed obligation
22 to consider the totality of circumstances are
23 merely performative."

24 So the dispute here appears to be not
25 the formulation of the rule as I articulated it

1 but its application.

2 JUSTICE JACKSON: No, he says it's
3 performative -- you didn't read the first part
4 of the sentence -- "if the moment of the threat
5 is the sole determinative factor in our
6 reasonableness analysis."

7 So he says: We have a "moment of the
8 threat" doctrine that tells us we only look at
9 this moment. And what that does is it makes any
10 references to totality merely performative
11 because we're not looking at the totality, we're
12 just looking at the moment of the threat.

13 So do you dispute that at least he
14 conceptualized the doc -- the doctrine in the
15 way that I'm describing and the way that
16 Petitioners have put it forward?

17 MS. PETTIT: There are certainly
18 statements to that effect. He has, for --
19 however, created a very similar concurrence in a
20 case called Mason against Lafayette City from
21 2015 --

22 JUSTICE JACKSON: No, I'm talking
23 about this case. So let me -- let me -- let me
24 tell you what I think is happening, and I just
25 want to get your reaction and then I'll be done.

1 It seems as though the question
2 presented here is asking us to decide which test
3 the courts should apply, and it sees the "moment
4 of the threat" doctrine as different, distinct,
5 from the totality of the circumstances.

6 Which test? The Fifth Circuit applied
7 moment of the threat. Is that right or wrong?

8 It seems now that you are arguing
9 which circumstances, assuming totality, is it
10 okay to include or consider the circumstance of
11 the officer's own conduct. You know, if courts
12 are doing that, is that a problem?

13 That is a separate question that is
14 not, I think, properly within the scope of the
15 question presented, which just asks us which
16 test.

17 So can you help me to understand why
18 we would get into whether or not the particular
19 circumstance you've identified is one that
20 courts should be looking at or not?

21 MS. PETTIT: Because I agree with
22 my -- my colleague that it is difficult to
23 answer the question -- the question presented
24 without getting into that.

25 And I would point this Court to pages

1 15, 23, 28, 32, and 41 to 42 of the Petitioner's
2 opening brief in which they are discussing
3 precisely this type of question.

4 So, while they claim to disclaim it,
5 they actually are talking about creation of the
6 risk. In fact, in responding to questions from
7 Justice Alito and Justice Thomas to articulate
8 their test, I heard them say at least twice that
9 they're asking why was he jumping up on the car.

10 I also heard from the United States
11 multiple times manufacturing the risk.

12 That is conflating the two questions
13 because they are quite related. In fact, they
14 are -- that is the source of the dispute between
15 the -- amongst the circuit courts. The Ninth
16 and the Tenth Circuit say: Intentional and
17 deliberate conduct can -- creating the risk can
18 obviate the officer's ability to defend himself.
19 The Fifth Circuit says that's not the rule.

20 That's the nature of the dispute. And
21 so trying to take it out of that context and say
22 just are you considering two seconds or are you
23 considering 30 gets into the point where there's
24 not a circuit split, as my colleague mentioned.
25 They -- the Fifth Circuit is looking at those

1 issues.

2 In fact, I would point this Court to
3 Singleton against Casanova, in which Judge
4 Higginbotham joined an opinion six months after
5 this one and which -- like Cole v. Carson, which
6 he wrote three years earlier. The Fifth Circuit
7 was describing all pre-force conduct.

8 So the Fifth Circuit is not applying
9 the "moment of the threat" doctrine,
10 notwithstanding some of the comments in Judge
11 Higginbotham's opinion.

12 And this Court ultimately reviews
13 judgments, not -- not statements and opinions.

14 JUSTICE GORSUCH: Counsel, I -- I
15 appreciate that -- that -- that what happened
16 below may be different than what's happening
17 here. At least that's your view.

18 But we did take a -- a question
19 presented about the "moment of threat" doctrine.
20 I understand you think it's not a thing. But
21 what's wrong with resolving just the question
22 presented? And putting aside your -- your
23 record-based concerns, it is a question. We
24 granted cert on it. I think everybody agrees
25 it's wrong.

1 Why -- what's the harm of saying that?

2 MS. PETTIT: As long as Your Honor is
3 very clear that you are not endorsing the
4 creation of the risk theory adopted by the Ninth
5 and Tenth Circuit, then I don't think there's
6 anything necessarily wrong.

7 JUSTICE GORSUCH: Okay.

8 MS. PETTIT: I agree with my colleague
9 that it is unnecessary, and the reason I say
10 that is I point the Court to page 5a of the Pet.
11 App, which the -- the district court -- the --
12 sorry, the Fifth Circuit quoted at length a
13 district court opinion that looked at those
14 earlier circumstances.

15 So I don't think it's necessary. As
16 long as the Court is clear that we are not
17 adopting the creation-of-the-risk theory, we
18 have no quarrel with such an action.

19 JUSTICE GORSUCH: Thank you.

20 MS. PETTIT: Going to the nature of
21 the questions here for just a minute, I would
22 point out that the inquiry here is -- I heard a
23 lot of -- concerns about line-drawing, and I
24 find that interesting because the Petitioner's
25 argument here was that they just wanted to

1 consider the jump as well as the shoot.

2 That itself is a line-drawing
3 question, and it -- and it's very deliberate
4 because they have actually litigated whether
5 everything up until the jump was reasonable, and
6 the district -- court -- court concluded that it
7 was, because, again, courts below are not
8 considering just the two seconds. Instead, they
9 are considering the totality of the
10 circumstances.

11 And to the question from the United
12 States about the subjective nature of the test,
13 this goes, again, to the arguments that had been
14 raised up until the -- the reply brief, which
15 was after our argument, in which -- or our
16 brief, in which the Petitioner was endorsing the
17 view of the Ninth and Tenth Circuit, which this
18 Court in Mendez expressly acknowledged was
19 subjective and therefore inconsistent with the
20 Fourth Amendment, which, again, is why we think
21 this Court, if it is going to remand, which,
22 again, is unnecessary, makes very clear that it
23 is not adopting that view because it would be a
24 fundamental shift in the Fourth Amendment.

25 And it also is a shift that, going to

1 Justice Kavanaugh's questions earlier, would
2 create an impossibility for -- for law
3 enforcement agencies to train their officers for
4 the reasons described in the California
5 Sheriffs' Association's brief.

6 If there are no further questions,
7 we -- I request that you affirm.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?
11 Justice Sotomayor?
12 Justice Kagan?
13 Justice Gorsuch?
14 Justice Kavanaugh?
15 Justice Barrett?
16 Justice Jackson?

17 Okay. Thank you, counsel.

18 Rebuttal, Mr. Zelinsky.

19 REBUTTAL ARGUMENT OF NATHANIEL A.G.

20 ZELINSKY ON BEHALF OF THE PETITIONER

21 MR. ZELINSKY: I have five very brief
22 points.

23 First, Justice Jackson, you asked my
24 friend on the other side when they argued for
25 the test that was applied below. Listen to

1 minutes 28 and 29 of oral argument. Then you'll
2 hear that there.

3 Justice Sotomayor, you noted that my
4 friends on the other side agree in many cases
5 that the jump-in-front-of-car case, you need to
6 look at the whole picture of what the officer
7 did, the jump and the shoot. It is -- there is
8 no rule that -- they can't distinguish that case
9 from this case.

10 Third, Justice Kavanaugh, you had some
11 practical questions about how this is going to
12 impact effective policing. Officers receive
13 qualified immunity. As the Cato brief
14 discusses, 99-plus percent of the time they are
15 also indemnified by the municipality.

16 You have a brief of 22 former
17 high-ranking police chiefs who are in front of
18 you saying that you should rule for Petitioner
19 and it will not hamper but promote good
20 policing.

21 And then, third, the DHS rule is a
22 great example of why this is not going to harm
23 effective policing.

24 Fourth, Justice Alito, I want to be
25 very clear, we are not saying that every single

1 mistake is going to result in liability. What
2 we are saying is you have to look at the whole
3 picture, and, here, that's more than just two
4 seconds.

5 Finally, Justice Gorsuch, we agree
6 wholeheartedly this rule is inconsistent with
7 the common law. If you rule and adopt the
8 "moment of the threat" doctrine, you will
9 essentially enact a hereto unprecedented rule
10 permitting the killing of fleeing misdemeanants.
11 You should not do that. You should vacate and
12 remand.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 11:21 a.m., the case in
18 was submitted.)

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