

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JANICE HUGHES BARNES, INDIVIDUALLY )

AND AS REPRESENTATIVE OF THE )

ESTATE OF ASHTIAN BARNES, DECEASED, )

Petitioner, )

v. ) No. 23-1239

ROBERTO FELIX, JR., ET AL., )

Respondents. )  
- - - - -

Pages: 1 through 92

Place: Washington, D.C.

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7                                            v.                        ) No. 23-1239  
8       ROBERTO FELIX, JR., ET AL.,        )  
9                                            Respondents.        )  
10      - - - - -

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12                                           Washington, D.C.  
13                                           Wednesday, January 22, 2025  
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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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6 United States, as amicus curiae, supporting  
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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Zelinsky.

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

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

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

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

In this case, the district court and the Fifth Circuit didn't do that. Instead, they 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 than  
16 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, Just -- 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 claim 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 you be  
9 satisfied with a narrow holding that it is wrong  
10 to -- it is wrong for a court to look just at  
11 the moment of the threat, that the court has to  
12 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. I mean, I  
6 thought that the totality of the circumstances,  
7 as we described it, has at least three factors:  
8 the nature of the crime for which the stop  
9 occurred, the circumstances, et cetera.

10 The three minutes, are you starting  
11 that from the moment that the stop occurred --

12 MR. ZELINSKY: So --

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

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

18 JUSTICE SOTOMAYOR: Right.

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

24 JUSTICE SOTOMAYOR: I -- I know.

25 MR. ZELINSKY: So --

1 JUSTICE SOTOMAYOR: We'll get to that  
2 with them, which is --

3 MR. ZELINSKY: Yeah. So --

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

8 MR. ZELINSKY: Totally.

9 JUSTICE SOTOMAYOR: But I can ask  
10 those -- them that question.

11 Having said that, there is a split of  
12 8 to 4 --

13 MR. ZELINSKY: Mm-hmm.

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

17 Correct?

18 MR. ZELINSKY: That's correct, Justice  
19 Sotomayor.

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

24 MR. ZELINSKY: Yes. Can I add a  
25 "but" --

1 JUSTICE SOTOMAYOR: Mm-hmm.

2 MR. ZELINSKY: -- to clarify my answer  
3 to Justice Alito?

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

10 I think --

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

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

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

20 MR. ZELINSKY: That's correct.

21 JUSTICE SOTOMAYOR: Okay. Thank you.

22 JUSTICE JACKSON: Mr. Zelinsky --

23 JUSTICE KAVANAUGH: You --

24 JUSTICE BARRETT: So you're happy with  
25 the -- you're happy with the narrow -- I'm going

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

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

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

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

23 JUSTICE BARRETT: And you would be  
24 happy with that language?

25 MR. ZELINSKY: We would be happy with



1 that language.

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

13 MR. ZELINSKY: No. And --

14 JUSTICE BARRETT: -- the officer put  
15 himself in this situation?

16 MR. ZELINSKY: -- in fact -- well, I  
17 have two answers to that.

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

22 JUSTICE BARRETT: Yeah.

23 MR. ZELINSKY: -- then they are on the  
24 table. I think that goes a long way toward  
25 disproving the parade of horrors on the other

1 side because you are, in those cases, going to  
2 look at preceding conduct.

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

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

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

22 MR. ZELINSKY: I think that that is  
23 our view of this case, Justice Kavanaugh.  
24 Once --

25 JUSTICE KAVANAUGH: And are you asking

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

6 MR. ZELINSKY: Absolutely not.

7 JUSTICE KAVANAUGH: Okay. When can  
8 they and when can't they?

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

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

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

21 JUSTICE KAVANAUGH: Well, true. But,  
22 obviously, you know, traffic stops sometimes  
23 identify people who are doing things that are  
24 much worse. Oftentimes, major criminals are  
25 apprehended for things like that, and I can give

1 you some historical examples that are obvious,  
2 but -- so I don't know that an officer can  
3 assume that's the only thing going on.

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

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

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

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

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

25 The high likelihood -- in this

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

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

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

21           So what is your view of the "moment of  
22 the threat" doctrine?

23           MR. ZELINSKY: So, Justice Jackson,  
24 Judge Higginbotham was very clear in his  
25 decision below. You cannot look at any of the

1 officer's actions prior to the moment of the  
2 threat. He's joined in that decision by Judge  
3 Elrod and Judge Smith. Respondents themselves  
4 agreed below that you can't look at anything  
5 prior to the moment.

6 JUSTICE JACKSON: And do you perceive  
7 them now to be saying that you can look at some  
8 things?

9 MR. ZELINSKY: Yes.

10 JUSTICE JACKSON: So that's a  
11 different concept?

12 MR. ZELINSKY: A hundred percent.

13 And, Justice Jackson, they've gone so far as to  
14 say, if an officer jumps in front of a moving  
15 car and shoots the driver, that's unreasonable.

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

22 JUSTICE KAVANAUGH: Do you agree with  
23 the language in the Solicitor General's brief  
24 that says the circumstances at the moment that  
25 force is used will generally have primary

1 significance in the analysis?

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

8 JUSTICE KAVANAUGH: Do you agree with  
9 it?

10 MR. ZELINSKY: I do --

11 JUSTICE KAVANAUGH: Okay.

12 MR. ZELINSKY: -- in its descriptive  
13 aspect.

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

18 MR. ZELINSKY: I think that the --  
19 there are a series of reoccurring fact patterns.  
20 I think there are two of them. I think that the  
21 jumping in front of or onto car does occur with  
22 some frequency. So we cited in our reply brief  
23 a study of 400 stops that found that there is a  
24 routine problem of officers jumping in front of  
25 cars -- in the article, it's described "in a

1 Hollywood style" -- and then shooting the  
2 driver.

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

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

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

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

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



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

8           Again, that's the type of balancing  
9 that the Fifth Circuit just couldn't engage in  
10 in this case.

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

20           MR. ZELINSKY: So, Justice Alito, it's  
21 a very difficult question to answer because, as  
22 this Court has said, that it is a fact-specific  
23 question that's going to depend in each given  
24 case. And there are no magic rules. There's no  
25 on/off switch. And that's Justice Scalia and

1 Scott. You can't just start drawing the lines  
2 precisely because these cases are so numerous  
3 and there are so many different permutations.

4 And so I think it would be very  
5 dangerous to start drawing those lines.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Justice Thomas, anything further?

9 Justice --

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

16 MR. ZELINSKY: So, Justice Sotomayor,  
17 let me give you three responses.

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

24 The second, the best case --

25 JUSTICE SOTOMAYOR: Some of my

1 colleagues might agree with that. Why should we  
2 not?

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

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

13 MR. ZELINSKY: Yes.

14 JUSTICE SOTOMAYOR: -- under that  
15 circumstance, the common law would say someone  
16 can defend themselves and pull out a gun?

17 MR. ZELINSKY: Yes.

18 JUSTICE SOTOMAYOR: All right.

19 MR. ZELINSKY: Yes.

20 JUSTICE SOTOMAYOR: So -- okay. Go  
21 ahead with your --

22 MR. ZELINSKY: And then the other  
23 response to your question -- and I -- and I have  
24 two more answers. The first is that there's  
25 just a wealth of Fifth Circuit cases that come

1 out in the other direction and are just  
2 crystal-clear.

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

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

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

24 JUSTICE SOTOMAYOR: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Kavanaugh?

2 Justice Barrett?

3 Justice Jackson?

4 Thank you, counsel.

5 Ms. Jacoby.

6 ORAL ARGUMENT OF ZOE A. JACOBY

7 FOR THE UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING VACATUR AND REMAND

9 MS. JACOBY: Mr. Chief Justice, and  
10 may it please the Court:

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

19 Prior events often show that the force  
20 was reasonable. For example, police may have  
21 issued warnings or attempted deescalation, all  
22 of which a split-second "moment of the threat"  
23 doctrine misses. Of course, when officers face  
24 a moment of danger, that is by far the most  
25 important factor under Graham. But, in rare

1 cases, a moment of danger doesn't tell the whole  
2 story. If the danger was manufactured entirely  
3 by police conduct outside the bounds of  
4 reasonable behavior and not by the suspect's  
5 intervening apparent misconduct, it is  
6 unreasonable to use force in the moment.

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

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Would that also  
13 include -- those circumstances also include the  
14 conduct of the victim that preceded the  
15 shooting?

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

22 JUSTICE THOMAS: And the other way,  
23 how the officer reacted to the victim?

24 MS. JACOBY: Exactly. It -- it's  
25 truly a "totality of the circumstances"

1 approach, and the Fifth Circuit's narrow,  
2 cramped reasoning didn't allow for any of that  
3 to be considered.

4 CHIEF JUSTICE ROBERTS: Is there --

5 JUSTICE BARRETT: Ms. Jacoby, what do  
6 you -- oh, sorry, Chief.

7 CHIEF JUSTICE ROBERTS: I just  
8 wondered, is there any area where you disagree  
9 with the Petitioner?

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

22 And -- and so I think we don't have a  
23 lot of daylight. To be honest, I don't think we  
24 have a lot of daylight between us and  
25 Respondents either because Respondent also seems

1 to agree now that pre-force circumstances  
2 matter. And I think Respondent also agrees that  
3 a moment of danger doesn't tell the whole story  
4 because, at page 33 and 34 of his brief, he  
5 agrees there are circumstances where there can  
6 be an imminent danger to the officer and the use  
7 of force can still be reasonable.

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

21 MS. JACOBY: So, Justice Kavanaugh, we  
22 completely agree that the -- the Graham inquiry  
23 has to be very sensitive and deferential to the  
24 officer's need for -- for split-second  
25 decision-making. I think the training, the



1 guidance we would have officers be given is one  
2 that officers are already trained under, as  
3 Petitioner points out at page 41 of -- of her  
4 brief. Basically, you may use force to respond  
5 to a danger to yourself or the public, but don't  
6 manufacture a situation where the use of force  
7 becomes essentially inevitable. And I think  
8 that kind of guidance would be helpful to  
9 officers.

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

18           JUSTICE KAVANAUGH: Well, I think the  
19 officers are going to want to know do I let him  
20 go or do I not let him go as a general  
21 proposition when someone pulls away from a  
22 traffic stop, or do I try to jump on the car,  
23 jump in front of the car. And I don't know that  
24 your -- and I realize we're not going to flesh  
25 all this out in this case, but officers are

1 presumably paying attention to this, and they  
2 have to make those decisions all the time. I'm  
3 curious, let him go or not?

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

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

18 JUSTICE KAGAN: I assume --

19 JUSTICE BARRETT: Ms. Jacoby --

20 CHIEF JUSTICE ROBERTS: Is this an  
21 objective or subjective inquiry in terms of what  
22 type of conduct is going to create the danger?  
23 I mean, it's like -- what about in sort of the  
24 equivalent of an eggshell plaintiff? I mean, is  
25 the officer subject to varieties in terms of

1 reaction from people that he pulls over?

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

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

16 MS. JACOBY: I think the officer  
17 should take into account sort of the imminence  
18 of the threat he perceives. And he may perceive  
19 that the suspect is about to -- you know, has a  
20 bad motivation, is about to do something  
21 dangerous, and -- and that does matter. But the  
22 ultimate inquiry is the reasonableness of the  
23 officer's perception that there was an imminent  
24 threat and it was reasonable to use force.

25 I do want to just briefly address --

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

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

23           Of course, the -- the officer will be  
24 making perceptions about whether the subject  
25 that he's engaging with is acting in bad faith

1 or about to do something dangerous. But -- but  
2 the ultimate inquiry is objective.

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

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

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

18 If the Court wants to put more meat on  
19 the bones, I think it could say, as we've said  
20 in our brief: The circumstances at the moment  
21 of the threat are going to have prime  
22 importance, and it's going to be a rare case in  
23 which an officer is experiencing a moment of  
24 danger and it's nevertheless unreasonable to use  
25 force.

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

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

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

24           MS. JACOBY: I don't think it would be  
25 a -- a new jurisprudence or a thumb on the scale

1 so much as a reflection that when balancing the  
2 Fourth Amendment interests of the individual and  
3 the government, the government has a very strong  
4 interest when there is an imminent danger to  
5 himself or to the public.

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

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

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

20 JUSTICE JACKSON: But wouldn't we --

21 JUSTICE SOTOMAYOR: That's nice, but  
22 this is not the issue before this Court,  
23 correct?

24 MS. JACOBY: Correct. This Court does  
25 not need to go -- to go any further than to say

1 that in this case --

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

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

13 JUSTICE SOTOMAYOR: Well, why don't we  
14 just say it's important, just as everything is  
15 important, but it's important? You're putting a  
16 scale on it. By the words you use, you're  
17 putting a thumb on it.

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

22 But I do think, given that the  
23 question is the reasonableness of the use of  
24 force in the moment, the circumstances in the  
25 moment and the presence of a danger in the



1 moment will have to be quite important.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas?

5 Justice Alito?

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

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

19 Or are you asking the court or the  
20 jury to determine whether the whole course of  
21 conduct in which the officer is engaged was  
22 unreasonable, in part in the sense that it  
23 wasn't prudent, it was in violation of perhaps  
24 departmental policies or the best practices that  
25 had been established for police department --

1 that -- that some people think should be  
2 followed by police departments around the  
3 country?

4 That -- that's really the difficult  
5 question, and what -- what would you say to  
6 that?

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

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

20 JUSTICE ALITO: Well, would it be --  
21 would a court hearing this case be obligated to  
22 admit expert testimony by various individuals  
23 who have a view about what are good police  
24 practices and what are not good police  
25 practices? Would the -- would that be what the

1 jury's determination would boil down to?

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

6 The jury could be making factual  
7 determinations about what actually happened, you  
8 know, when the officer jumped and -- and all the  
9 rest.

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

17 JUSTICE ALITO: Well, there are  
18 federal -- there are some federal law  
19 enforcement officers who make vehicle stops. So  
20 what is the -- the teaching? Do you know?  
21 What -- what are they taught about placing  
22 themselves in front of the car or in a position  
23 where they could be killed or injured if the  
24 driver decides to try to drive away?

25 MS. JACOBY: I don't know across the

1 board a rule for stepping in front of cars. I  
2 know that federal officers are trained to use  
3 force to respond to danger but not to enter into  
4 situations where the use of force becomes sort  
5 of inevitable. That's like the DHS manual that  
6 my friend points to at page 41 of her brief.

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

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 JUSTICE SOTOMAYOR: No. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?  
23 Justice Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: I just am curious,

1 after this case gets resolved on remand, if it  
2 goes back on remand, what the rule will be for  
3 officers and what those training manuals will  
4 say. You know, put aside the abducted child  
5 example.

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

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

21           MS. JACOBY: That's not the rule the  
22 United States thinks is appropriate. I do think  
23 that it is sometimes appropriate to use force to  
24 stop a car from -- from pulling away from a  
25 stop. I think Brosseau is good guidance on

1 that.

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

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

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

15 JUSTICE KAVANAUGH: Well, an  
16 individual officer too would be --

17 MS. JACOBY: -- there is at a point  
18 until they can't --

19 JUSTICE KAVANAUGH: -- an individual  
20 officer would be -- who would -- would be --  
21 who's risk-averse on being held liable for  
22 something like this is just not going to do it.

23 But anyway, I'll -- I'll stop there.  
24 Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

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

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

19 And we don't think that's correct, and  
20 we do think that would be bad guidance for  
21 officers and would lead them to police less  
22 aggressively than they need to be able to.

23 But I think, in a -- in a court that  
24 appropriately takes into account the totality of  
25 the circumstances, officers will have good

1 guidance to use force when necessary, when --  
2 when there's a danger and they need to protect  
3 themselves or the public, but to avoid  
4 situations, as I said, where, you know -- to  
5 avoid manufacturing a situation where the use of  
6 force effectively becomes inevitable. That's,  
7 you know, jumping in front of the car, that type  
8 of thing.

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

16           JUSTICE BARRETT: So you say -- you  
17 said it's a three-sided split and you're kind of  
18 saying Fifth Circuit on one side and then these,  
19 you know, officer-fabricated or officer-caused  
20 dangers on the other side. What about those  
21 circuits in the middle and this concern that,  
22 you know, Justice Kavanaugh is correctly  
23 expressing about what cops do in the moment?  
24 And in that -- in those circuits that take the  
25 more middle approach, I take it that's what the



1 United States is supporting?

2 MS. JACOBY: Correct. Correct.

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

5 MS. JACOBY: I don't think so. I  
6 mean, we have amicus briefs on the other side  
7 from, for example, the law enforcement officers  
8 from Wisconsin, which is in the Seventh Circuit,  
9 which does take this kind of more  
10 middle-of-the-road approach, and I don't see in  
11 their brief something saying that they have a  
12 uniquely difficult time policing. I think they  
13 are, of course, going to have to make  
14 split-second decisions, and very often, in the  
15 cases where a court sort of ultimately decides  
16 that the decision they made was on the wrong  
17 side of the line, they'll still be protected by  
18 qualified immunity.

19 So, of course, we are definitely very  
20 concerned as the United States about officers  
21 not being able to engage in aggressive-enough  
22 policing. They need to be able to. But -- but  
23 we don't think that a "totality of the  
24 circumstances" approach, which is what Graham  
25 cautions, what Scott cautions, what this Court

1 has endorsed over and over again, would lead  
2 down that path.

3 JUSTICE BARRETT: And last question.  
4 What's the deal -- you know, in Respondents'  
5 brief at Footnote 3, it says, "United States  
6 questions whether Sergeant Felix jumped onto the  
7 door sill shortly before or shortly after. But  
8 the parties agree it was after." What's the  
9 deal with that factual dispute?

10 MS. JACOBY: I think it's a dispute  
11 about where -- the way the district court  
12 phrased its opinion. It seems to suggest a  
13 distinction between the moment that the car  
14 started moving forward and a moment of  
15 acceleration. So it seems now everyone agrees  
16 that the officer stepped on the car after it  
17 started moving forward.

18 There is that passage that we quoted  
19 from the district court opinion that says it's  
20 not clear if it's before or after the  
21 acceleration. I think that may be where the  
22 confusion comes from. The fact that there is  
23 some confusion about this matter of timing,  
24 which could go to the -- to the question whether  
25 the decision to jump on the sill was -- was

1 reasonable or not, to me seems like further  
2 reason to -- to vacate and remand and send it  
3 back to the Fifth Circuit.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

6 JUSTICE JACKSON: Yeah. Just to  
7 follow up on Justice Barrett's questions, it --  
8 it's the majority of circuits that use a  
9 totality test, is that correct?

10 MS. JACOBY: Yes, I think that's  
11 correct.

12 JUSTICE JACKSON: And is there any  
13 indication in those circuits that there is  
14 confusion or concern about the application of  
15 that test either on the part of the courts or on  
16 the part of the officers who do their jobs in  
17 that context?

18 MS. JACOBY: Not to my knowledge. I  
19 do think that, again, a feature of the sort of  
20 "totality of the circumstances" approach that  
21 applies to the Fourth Amendment across the board  
22 is that it doesn't always provide perfect  
23 guidance to officers. That's why we do have the  
24 backstop of the "clearly established" prong of  
25 the qualified immunity analysis, to make sure

1 that officers are not held liable for things  
2 that they sort of weren't on notice were on the  
3 wrong side of the line.

4 But I'm not aware of a problem in the  
5 circuits that are correctly applying a "totality  
6 of the circumstances" approach.

7 JUSTICE JACKSON: And is it the case  
8 that in those circuits that are correctly  
9 applying the test, officers are regularly found  
10 to have engaged in using reasonable force?  
11 We're not talking about the application of a  
12 test that necessarily results in officer  
13 liability, right?

14 MS. JACOBY: Absolutely. Obviously,  
15 the United States would not endorse such a test.  
16 Of course.

17 JUSTICE JACKSON: And can I just  
18 clarify that the United States is not taking a  
19 position on the facts of this case and whether  
20 or not Officer Felix used reasonable force, and,  
21 in fact, you would be satisfied with just a  
22 clarification that "moment of the threat"  
23 doctrine is not what courts should be using, and  
24 then sending it back to the Fifth Circuit for  
25 the Fourth Amendment analysis in this situation?

1 MS. JACOBY: That's absolutely  
2 correct. Our interest in this dispute is a  
3 narrow one. We're really just interested in  
4 correcting the Fifth Circuit's legal error.  
5 And -- and we have no position on the facts of  
6 this case.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. McCloud.

11 ORAL ARGUMENT OF CHARLES L. McCLOUD

12 ON BEHALF OF THE RESPONDENTS

13 MR. McCLOUD: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 When an officer doing his duty  
16 confronts a threat to his safety or the safety  
17 of others, it is reasonable for that officer to  
18 use force to end that threat. That's the  
19 conclusion this Court has consistently reached,  
20 and that's what the Fifth Circuit correctly held  
21 below.

22 At the moment Sergeant Felix used  
23 force, he was clinging to the side of a fleeing  
24 suspect's car, and Felix reasonably believed  
25 that his life was in imminent danger. That

1 conclusion should end this case.

2           Petitioner's contrary argument attacks  
3 a strawman. Let me be very clear. We are  
4 defending the decision below and the "moment of  
5 threat" doctrine as it actually exists. The  
6 core premise of that doctrine is that an officer  
7 doesn't lose his right to defend himself just  
8 because he made a mistake at an earlier point in  
9 time.

10           But applying that rule does not  
11 require courts to ignore everything that  
12 occurred prior to the use of force. Like other  
13 circuits, the Fifth Circuit has repeatedly held  
14 that preceding events are relevant to the extent  
15 they inform the officer's perception of the  
16 danger that he faced. The panel decision below  
17 repeatedly cited to and quoted from those very  
18 precedents. The panel did not and could not  
19 overrule them sub silentio.

20           Petitioner asked the Court to create a  
21 new breed of constitutional tort under which an  
22 officer facing the barrel of a gun loses his  
23 right to defend himself if he previously used  
24 bad tactics or poor planning.

25           That's contrary to precedent and

1 common sense. Graham asks only whether an  
2 officer's use of force was reasonable in the  
3 particular circumstances he faced. It requires  
4 courts to put themselves in the shoes of the  
5 officer who used force, not to second-guess  
6 every decision the officer made in some of the  
7 most stressful circumstances imaginable.

8           And Plumhoff and Mendez rejected  
9 similar officer-created danger theories as  
10 illogical, unwarranted, and inconsistent with  
11 precedent. The Court should reject the theory  
12 again in this case and affirm the judgment of  
13 the court of appeals.

14           I welcome the Court's questions.

15           JUSTICE THOMAS: How would you assess  
16 the difference between the Fifth Circuit's  
17 approach, what you -- as you see it, and the  
18 "totality of the circumstances" approach, as we  
19 heard it this morning?

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

23           JUSTICE THOMAS: No, I mean, as --  
24 what the Solicitor General and Petitioner, as  
25 they see the totality of the circumstances, not

1 so much Graham.

2 MR. McCLOUD: So the difference, I  
3 think, between our position and -- and somewhat  
4 the government's position is they want to  
5 include within the totality of the circumstances  
6 arguments that the officer escalated the danger  
7 or created the danger.

8 And we think that that is not a  
9 relevant consideration under Graham and under  
10 the Fourth Amendment. In those cases, the  
11 question is: Was there a legitimate threat that  
12 the officer is responding to?

13 JUSTICE THOMAS: Were they arguing  
14 that this morning?

15 MR. McCLOUD: That was exactly their  
16 argument that I heard this morning. He -- he  
17 said that -- Mr. Zelinsky said that Sergeant  
18 Felix created a dangerous situation by jumping  
19 onto the car.

20 JUSTICE THOMAS: But I thought he said  
21 he wants to argue that later, when he -- when it  
22 goes back.

23 MR. McCLOUD: Well, that was the  
24 argument that they tried to advance in the Fifth  
25 Circuit. And this is, I think, the one thing I



1 agree with in Judge Higginbotham's solo  
2 concurrence. At 15a of the Petition Appendix,  
3 he says that argument is foreclosed under Fifth  
4 Circuit law.

5           And that is the actual issue that  
6 divides the circuits. There is no split on the  
7 question of whether you can consider preceding  
8 events. Every court in the country considers  
9 preceding events. The question is whether you  
10 can use those preceding events as a basis for  
11 making an argument that the officer made a  
12 mistake or used poor planning --

13           JUSTICE JACKSON: But, Mr. McCloud,  
14 that's not what you argued before, and I'm very,  
15 very confused now. I mean, it -- it seems as  
16 though the "moment of the threat" doctrine, as  
17 it exists and as everybody has understood it, is  
18 about evidence essentially. It's what can you  
19 look at to prove the alleged Fourth Amendment  
20 excessive force claim. Can you look at anything  
21 that occurred outside of the moment of the  
22 threat, anything that occurred previously?

23           You seem to be now suggesting that it  
24 is about liability. You said that they are  
25 creating a new breed of constitutional tort and

1 this is about, you know, whether or not the  
2 police officer can be held liable for his own  
3 negligence in the time preceding.

4 I haven't seen that concept anywhere.

5 MR. McCLOUD: That -- that was the  
6 argument that was made below. Issue Number 1 in  
7 Petitioner's Fifth Circuit brief was that  
8 Sergeant Felix escalated the danger and was  
9 negligent in jumping onto the car, and that is  
10 the issue that actually divides the circuits.

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

14 JUSTICE JACKSON: Did -- is it true  
15 that --

16 MR. McCLOUD: -- and the best example  
17 I can give --

18 JUSTICE JACKSON: -- isn't it true  
19 that in your bio, you stated the Fifth Circuit's  
20 approach involves reviewing only the events  
21 immediately prior to the use of deadly force as  
22 opposed to other prior conduct?

23 MR. McCLOUD: The other prior conduct  
24 that was being referred to there is conduct that  
25 is alleged to have created the danger.

1                   JUSTICE JACKSON: That might be what  
2 you're saying is referred to now. I -- the  
3 sentence suggests that the dividing line is  
4 between looking only at the events immediately  
5 prior to the use of deadly force as opposed to  
6 other prior conduct.

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

11                   JUSTICE KAGAN: Whatever you said or  
12 you didn't say, Mr. McCloud, I think it's pretty  
13 clear that if you look at the court below, the  
14 court below said: We're only looking at the  
15 prior two seconds and we're not going to look at  
16 anything before that.

17                   And -- and so, again, even if there's  
18 some kind of intra-circuit confusion going on in  
19 the Fifth Circuit -- there might be. It  
20 wouldn't be surprising if, on an issue like  
21 this, there were some -- but we have two  
22 opinions below, actually, both the circuit court  
23 and the district court, who expressed a desire  
24 to look beyond two seconds but said: We can  
25 only look at the prior two seconds.

1                   And -- and you seem to be saying:

2                   Well, that is wrong. I mean, you -- you can  
3                   look back beyond the prior two seconds.

4                   So that suggests to me that there's an  
5                   easy way of just, you know, vacating and  
6                   remanding and giving it back to the courts below  
7                   to address, okay, once we look behind -- beyond  
8                   the two seconds and we have a fuller scope of  
9                   evidence, then we'll make our reasonableness  
10                  inquiry, hopefully without our putting a thumb  
11                  on the scales either way.

12                  MR. McCLOUD: So I have a couple of  
13                  responses on that.

14                  First, I don't think that that's the  
15                  best reading of the panel decision. I  
16                  understand that that's what Judge Higginbotham  
17                  asserted in his solo concurrence, but that is  
18                  not the law, and he doesn't get to make the law  
19                  for the Fifth Circuit by just asserting things  
20                  in a solo opinion.

21                  JUSTICE GORSUCH: Okay. Fair enough.  
22                  I understand you read the opinion differently  
23                  than Justice Kagan does or maybe Justice --  
24                  Judge Higginbotham did, but what's wrong with  
25                  proceeding on that understanding?

1           MR. McCLOUD: Well, I think there are  
2 a number of things wrong.

3           The first thing I would say is, to the  
4 extent you are concerned about the breadth of  
5 the statements in the panel decision, I think  
6 the better course of action is to affirm the  
7 judgment, which is clearly correct.

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

13           MR. McCLOUD: Yes, because then you  
14 would be sending it back for a remand that is  
15 going to be pointless.

16           As I said before, the argument that  
17 Petitioner wants to make on remand --

18           JUSTICE GORSUCH: Mr. McCloud, the  
19 number of remands from this Court that lawyers  
20 tell us are pointless --

21           (Laughter.)

22           JUSTICE GORSUCH: -- could fill  
23 volumes.

24           MR. McCLOUD: Well, in this case, it's  
25 not --

1 JUSTICE GORSUCH: Any other -- any  
2 other -- any other objection besides your view  
3 that it would be pointless?

4 MR. McCLOUD: Yes. My other objection  
5 is it would be creating, I think, a dangerous  
6 precedent because it could be seen as endorsing  
7 the sort of officer-created danger argument that  
8 Petitioner wants to make.

9 And, as Justice Barrett alluded to in  
10 some of her questioning earlier --

11 JUSTICE GORSUCH: If we -- fine.  
12 That -- that's a --

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

14 JUSTICE GORSUCH: -- that's --  
15 Mr. McCloud, that's a fair concern. But we've  
16 also talked about putting that aside and  
17 bracketing that and making clear, as we did in  
18 Men -- Mendez, I believe?

19 MR. McCLOUD: Mendez.

20 JUSTICE GORSUCH: -- Mendez, that  
21 footnote in Mendez reserved the question, we'd  
22 reserve it again, possibly, possibly. Any -- if  
23 we do that, any other objections?

24 MR. McCLOUD: So I guess, if I -- if I  
25 could ask, if you do that, to do one additional

1 thing, which is to make clear that the standard  
2 would have to be high, and mere negligence alone  
3 would not be enough to satisfy this  
4 officer-created --

5 JUSTICE GORSUCH: Well, now negligence  
6 involves mens rea, and that's subjective. And  
7 we've said in the Fourth Amendment it's an  
8 objective test. So I -- I -- that one, I -- up  
9 until then, you had me. But now you -- now I'm  
10 afraid I'm getting off the train.

11 MR. McCLOUD: Well, I -- I think the  
12 problem is -- I completely agree that negligence  
13 is not a relevant consideration, and that's why  
14 we object to that test.

15 JUSTICE GORSUCH: Okay. Good. All  
16 right. Thank you.

17 MR. McCLOUD: But that is the test  
18 that courts of appeals are applying in the  
19 country right now. I don't think there's any  
20 question about --

21 JUSTICE GORSUCH: Do you want a  
22 negligence test or do you not want a negligence  
23 test?

24 MR. McCLOUD: I do not want a  
25 negligence test.

1 JUSTICE GORSUCH: Okay. All right.

2 All right.

3 MR. McCLOUD: I want a test that says:

4 You only look at conduct that actually is --

5 JUSTICE GORSUCH: You look at the --

6 MR. McCLOUD: -- regulated by the  
7 Fourth Amendment. That's searches and seizures.

8 And so --

9 JUSTICE GORSUCH: Yes. And it's an  
10 objective inquiry looking at the totality of the  
11 circumstances, right?

12 MR. McCLOUD: It is an objective  
13 inquiry that looks at the totality of the  
14 circumstances to determine whether the officer  
15 genuinely believed there was a threat.

16 You do not look at the totality to  
17 determine, well, did the officer make a mistake  
18 and should he have gotten himself in that  
19 circumstance.

20 JUSTICE GORSUCH: No, whether he  
21 genuinely believes or whether there was an  
22 excessive use of force. I thought -- I thought  
23 the latter was the question.

24 MR. McCLOUD: And this Court has  
25 consistently said that when an officer confronts



1 a genuine threat, it is not excessive to use  
2 force. And I would be very concerned about an  
3 opinion --

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

6 MR. McCLOUD: That is an objective  
7 inquiry, yes, sir.

8 JUSTICE GORSUCH: Okay. All right.  
9 Thank you.

10 CHIEF JUSTICE ROBERTS: How broad is  
11 the totality of circumstances under your view?  
12 Do you get to put in: This is the training  
13 record of the officer, and, look, he got D  
14 minuses in all the -- the excessive force parts  
15 of it?

16 MR. McCLOUD: No.

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

19 MR. McCLOUD: No, Your Honor. We  
20 don't view that as relevant. I think Whren says  
21 that very clearly. Those sorts of policies  
22 and -- and procedures do not inform the  
23 reasonableness question that is being asked by  
24 the Fourth Amendment.

25 And Justice Alito's questioning

1 alluded to this before. The Fourth Amendment is  
2 not a regulation on the reasonableness in a  
3 general sense of everything that officers do.  
4 It is a regulation of very specific conduct,  
5 searches and seizures. And this Court has  
6 established clear guidelines for determining  
7 when searches and seizures are reasonable.

8           The problem with the other side's  
9 position is they want to take literally anything  
10 that an officer does and say: If a jury,  
11 through the lens of hindsight, could say that  
12 was a bad call, or if an expert could come in  
13 and say I wouldn't have done that if I were in  
14 the officer's shoes, that could be the basis for  
15 a Fourth Amendment claim.

16           JUSTICE SOTOMAYOR: So it could be  
17 that when this goes down below, the Fifth  
18 Circuit will actually address that question.  
19 But it didn't. It repeatedly said: We can't  
20 look at any event ever.

21           You concede in your own brief that  
22 there could be situations in which an officer is  
23 the aggressor. Page 34, I think, is the page of  
24 your brief. You admit that an officer could be  
25 an aggressor and act unlawfully in doing so,

1 correct?

2 MR. McCLOUD: Yes. If an officer  
3 comes up to mug someone --

4 JUSTICE SOTOMAYOR: But your  
5 articulation of this rule is just trying to get  
6 us to draw lines that haven't even been  
7 addressed by the court below.

8 MR. McCLOUD: I think they have been,  
9 Your Honor, respectfully. If you look at the  
10 cases --

11 JUSTICE SOTOMAYOR: No, the --  
12 respectfully, Mr. McCloud, the court repeatedly  
13 said: We can only look at the actions in the  
14 two minutes before the moment of threat.

15 If your answer had been -- if he had  
16 walked up in an unmarked car, in plain clothes,  
17 with a gun drawn, and this person -- and he  
18 walked up to the car and this person took off  
19 and/or accelerated slightly, and he jumped on  
20 and shot blindly, do you think that's  
21 reasonable?

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

24 JUSTICE SOTOMAYOR: All right. So  
25 you've given the game away because, at that

1 point, you have to look at what the officer did.

2 MR. McCLOUD: And, Your Honor, we  
3 agree that you can look at what the officer did.  
4 And the Fifth Circuit does look at what the  
5 officer did. The best example I can give you --

6 JUSTICE SOTOMAYOR: It didn't in this  
7 case.

8 MR. McCLOUD: In this case, that's  
9 because the only argument that Petitioner made  
10 below, the only action she said you should look  
11 at, was an action based on officer-created  
12 danger.

13 JUSTICE SOTOMAYOR: And we have three  
14 judges who said we shouldn't be limited in this  
15 way in the mine-run of cases, and we -- and so  
16 we're stuck with this. We think the -- the  
17 judgment is right, but it wasn't addressed at  
18 all. Officer-created danger wasn't addressed.

19 And the other side says clearly it's  
20 not raising it here.

21 MR. McCLOUD: It is going to raise it  
22 on remand. And I think it was addressed --

23 JUSTICE SOTOMAYOR: Then you want  
24 an -- and you want an intense -- an anticipatory  
25 ruling from us.

1                   MR. McCLOUD: No, Your Honor. I think  
2 it was addressed, and the best evidence I can  
3 give you of that are the cases that the Fifth  
4 Circuit itself cited for the proposition that we  
5 don't look at the action of the officer.

6                   All of those are cases in which the  
7 argument that was being made was the argument  
8 that they made below, that the officer created a  
9 dangerous situation and that was the basis for  
10 liability.

11                   So that is the argument the Fifth  
12 Circuit said it's not considering. And that's  
13 what Judge Higginbotham said he wanted to  
14 consider. He said --

15                   JUSTICE JACKSON: Mr. McCloud, did the  
16 plaintiff argue that the court should be looking  
17 at the totality of the circumstances?

18                   MR. McCLOUD: Yes.

19                   JUSTICE JACKSON: And did you object  
20 to that as being the test that the court should  
21 apply when it decided what it was going to look  
22 at to make this determination?

23                   MR. McCLOUD: No. Our objection was  
24 that you should not be adopting this  
25 officer-created danger theory in considering

1 whether Sergeant Felix escalated the situation.

2 That was our --

3 JUSTICE JACKSON: So you did not say  
4 the "moment of the threat" doctrine is the --  
5 the test in the Fifth Circuit, and that's only  
6 what you should be looking at, you should not be  
7 looking at circumstances and facts and things  
8 that happened before the moment of the threat?

9 MR. McCLOUD: In --

10 JUSTICE JACKSON: If I look at the  
11 record, I'll find that you're arguing that  
12 below?

13 MR. McCLOUD: So, in the Fifth Circuit  
14 briefing, I don't believe we did because the  
15 labeled "moment of the threat" doctrine didn't  
16 come up until Judge Higginbotham's opinion in  
17 this case. That was not a label that had been  
18 recognized prior to that.

19 If you look in Westlaw for "moment of  
20 the threat doctrine," I think there are four  
21 hits for that, and this is the -- the one that  
22 really originated that term.

23 So that was not our argument below.  
24 Our argument below was whether Sergeant Felix  
25 escalated the danger was irrelevant. And that's

1 consistent with Fifth Circuit precedent. That's  
2 what Judge Higginbotham objected to.

3 JUSTICE JACKSON: All right. But do  
4 you concede that that's not what the Fifth  
5 Circuit held in this case, that it was  
6 irrelevant whether or not he accelerated the  
7 danger or he contributed to it? That's not  
8 their holding in this case --

9 MR. McCLOUD: That is -- I believe  
10 that is their holding. And that is what Judge  
11 Higginbotham objected to.

12 So, if you look at page 15a of the  
13 Petition Appendix, Judge Higginbotham says: I  
14 would come out differently because I believe we  
15 should consider the fact that Sergeant Felix  
16 escalated the danger of the situation.

17 That was the argument that they made,  
18 that he wanted them to consider, and that is the  
19 whole basis for the disagreement between us and  
20 the court of appeals and the disagreement that  
21 actually divides the circuit courts on this  
22 question.

23 JUSTICE SOTOMAYOR: Counsel, can I  
24 read you three sentences from this opinion?

25 MR. McCLOUD: Certainly.

1 JUSTICE SOTOMAYOR: This is the  
2 majority: We may only ask whether Officer Felix  
3 was in danger at the moment of the threat that  
4 caused him to use deadly force against Barnes.

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

9 And it stated: Any of the officer's  
10 actions leading up to the shooting are not  
11 relevant for the purposes of an excessive force  
12 inquiry in this circuit. So Higginbotham did  
13 not make up the "moment of the threat" doctrine.  
14 It's been used, it's been cited repeatedly by  
15 other circuits. It's well-known by that name.  
16 This is not a made-up theory.

17 MR. McCLOUD: Well, Your Honor --

18 JUSTICE SOTOMAYOR: Now -- let me  
19 finish. If you concede in page 34 that if  
20 the -- that if the officer was the aggressor,  
21 then there are circumstances -- you don't think  
22 this is one of them -- but there are  
23 circumstances in which the officer's actions are  
24 relevant, correct?

25 MR. McCLOUD: We agree that the



1 officer's actions are relevant. And the Fifth  
2 Circuit considers officer actions. Cole versus  
3 Carson is an en banc decision --

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

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

10 JUSTICE SOTOMAYOR: Again, they didn't  
11 say they're not relevant in this case. They  
12 said they're never relevant.

13 MR. McCLOUD: And, Your Honor, I think  
14 you have to read the opinion that's being cited  
15 there. That's Harris versus Serpas. And that  
16 is a case that says we apply totality of the  
17 circumstances. And then, when it makes the  
18 statement that we don't consider the officer's  
19 actions, it's referring to --

20 JUSTICE SOTOMAYOR: Totality of the  
21 circumstances were not used by this court,  
22 correct, in this opinion?

23 MR. McCLOUD: It was. They considered  
24 the totality of the circumstances. What they  
25 did not consider was Petitioner's argument that

1 Sergeant Felix created the danger.

2 JUSTICE SOTOMAYOR: Can you point me  
3 to a place in the opinion where it used the  
4 words "totality of the circumstances?"

5 MR. McCLOUD: I -- I cannot, but that  
6 was the argument that was made below.

7 JUSTICE JACKSON: Can you explain  
8 Judge Higginbotham's concurrence sentence, "I  
9 write separately to express my concern with this  
10 Circuit's 'moment of the threat' doctrine as it  
11 counters the Supreme Court's instruction to look  
12 to the totality of the circumstances when  
13 assessing the reasonableness of an officer's use  
14 of deadly force?"

15 MR. McCLOUD: Yes. He is wrong about  
16 that, and the best evidence I can give you of  
17 that is Cole versus Carson.

18 JUSTICE JACKSON: I'm asking you, did  
19 he believe that there was such a thing as the  
20 "moment of threat" doctrine and that it was in  
21 opposition to the "totality of the  
22 circumstances" test, which is what he was hoping  
23 that the court would be able to apply?

24 MR. McCLOUD: I don't know how he  
25 could reasonably believe that given that he

1 wrote Cole versus Carson, which is an en banc  
2 decision of the Fifth Circuit that is all about  
3 pre-shooting facts. In that case, the entire --

4 JUSTICE KAGAN: But, I mean, he did  
5 believe it, and that belief produced the  
6 decision below.

7 MR. McCLOUD: Well, I don't think that  
8 you should attribute his statements in a solo  
9 concurrence that others didn't join to the other  
10 members of the panel. I -- I think you should  
11 read the cases that they cited.

12 JUSTICE KAGAN: Well, he wrote both  
13 and he was telling you exactly why he wrote the  
14 majority opinion the way he did, because he felt  
15 constrained to. And I understand that you think  
16 he was not so constrained, but we're supposed to  
17 be reviewing this decision, and he was telling  
18 us: I, the majority opinion writer, felt that I  
19 was constrained to do nothing more than look at  
20 the prior two seconds.

21 And you don't say that that's the  
22 right rule, so it seems as though we should kick  
23 it back and let you guys fight it out as to the  
24 relevance of anything that happened beyond the  
25 prior two seconds.

1                   MR. McCLOUD: So I guess I would  
2 encourage the Court, if it does end up  
3 remanding, to say a little more than simply do  
4 it again, Fifth Circuit. I think it is  
5 important to say something about this issue of  
6 officer-created danger because it has divided  
7 the circuits for a number of years.

8                   And the Court has gotten a number of  
9 cases that present that issue. Mendez is one.  
10 The Bond versus City of Talequah case from a few  
11 term ago that was summarily reversed was  
12 another. And so it is lurking in the background  
13 of many of these excessive force cases, and it  
14 is doing real harm in the circuits that apply  
15 that, the -- the Ninth Circuit, the Tenth  
16 Circuit. That is the reason we have amici from  
17 California that say this standard makes it  
18 impossible for us to train officers and give  
19 them clear guidance.

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

23                   JUSTICE BARRETT: And you want to --  
24 just to make sure I have it, what -- what  
25 clarity would you want us to give?

1                   MR. McCLOUD: So, if the Court is  
2 going to offer or accept some version of  
3 officer-created danger perhaps along the lines  
4 that Your Honor's Biegert opinion suggested, I  
5 think you would want to make clear that  
6 something like negligence alone is not going to  
7 be enough. It's going to be an extraordinary  
8 case in which an officer's creation of the  
9 danger is the basis for a Fourth Amendment  
10 claim.

11                   CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13                   Justice Thomas?

14                   JUSTICE THOMAS: As I understand you,  
15 you're saying that it isn't so much that the --  
16 a difference between whether to use the totality  
17 of the circumstances but, rather, what evidence  
18 would be available or could be used in that  
19 analysis. And, here, you say the  
20 officer-created danger should -- that the Fifth  
21 Circuit said it could not -- it would not permit  
22 that assessment --

23                   MR. McCLOUD: That's correct.

24                   JUSTICE THOMAS: -- within the context  
25 of totality of circumstances?

1 MR. McCLOUD: Exactly.

2 JUSTICE THOMAS: So it's a subcategory  
3 of the totality of circumstance as I hear you.

4 MR. McCLOUD: It is a particular  
5 argument that is off limits in the Fifth Circuit  
6 and in the majority of the circuits when you're  
7 considering the totality of the circumstances.  
8 So you can still look to things that the officer  
9 did prior to using force, but you cannot blame  
10 the officer for creating a bad situation and --  
11 and second-guess all of the decisions he made.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Alito?  
14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: I go back, you do  
16 believe there are situations -- you admitted it  
17 to me earlier -- where an officer's actions can  
18 be considered to have created a danger  
19 unreasonably?

20 MR. McCLOUD: I don't agree with that  
21 framing. I agree that you can consider an  
22 officer's actions, and I agree that an officer's  
23 actions can make the use of force less  
24 reasonable.

25 Again, the Cole versus Carson example

1 is -- is one that's instructive on that. That  
2 is a case where the majority of the Fifth  
3 Circuit en banc said things that the officers  
4 did prior to using force made it unreasonable  
5 for them to use force at a later point.

6 But what they did not do is say, well,  
7 did they violate policies or could I have made a  
8 better decision? And that is the fundamental  
9 difference between my approach and Petitioner's  
10 approach.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: So the question  
13 presented that we took certiorari on is whether  
14 courts should apply the "moment of the threat"  
15 doctrine when evaluating an excessive force  
16 claim. So, to me, what that means is "moment of  
17 the threat" doctrine, do you just look at the  
18 second or two before, or do you widen the --  
19 your scope to look at other things beyond that.

20 What we did not take cert on is the  
21 question that you're raising, a very important  
22 question, probably one on which there is some  
23 confusion, wouldn't be a surprise to me, but  
24 definitely not the question in this case, the  
25 question of what weight to give the fact that or

1 the possibility that the officer created the  
2 danger in the reasonableness inquiry.

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

7 MR. McCLOUD: So, if I can just  
8 respectfully push back on that, I think, in  
9 order to answer the question presented as  
10 Petitioner framed it, you have to understand  
11 what the "moment of threat" doctrine is.

12 And for all of the reasons we explain  
13 in our brief, it is absolutely not a doctrine  
14 that says prior events are off limits. There is  
15 no court in the country that is applying that  
16 version of the standard.

17 The dispute between the courts and --  
18 and what divides us in this case is whether,  
19 when looking at those prior events, you can  
20 identify something the officers did that was  
21 unreasonable in a sort of general cosmic sense  
22 and say that contributed to the danger. And  
23 even though that is not itself a violation of  
24 the Fourth Amendment, it is the basis for your  
25 Fourth Amendment excessive force claim.



1 That's -- that's the nub of the issue.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice

4 Gorsuch?

5 Justice Kavanaugh?

6 Justice Barrett?

7 Justice Jackson?

8 Thank you, counsel.

9 MR. McCLOUD: Thank you.

10 CHIEF JUSTICE ROBERTS: Ms. Pettit.

11 ORAL ARGUMENT OF LANORA PETTIT

12 FOR TEXAS, ET AL., AS AMICUS CURIAE,

13 SUPPORTING RESPONDENT FELIX

14 MS. PETTIT: Thank you, Mr. Chief

15 Justice, and may it please the Court:

16 In the last 15 years, this Court has  
17 rejected at least three times that an officer's  
18 otherwise liable conduct violates the Fourth  
19 Amendment because an earlier split-second  
20 decision made a confrontation more likely.

21 Properly understood, what Judge  
22 Higginbotham dubbed the "moment of threat"  
23 doctrine merely applies that rule. As this  
24 Court recognized in cases like Mendez and  
25 Sheehan, it is necessary because the Fourth

1 Amendment must be applied by thousands of real  
2 cops in the real world without, in the words of  
3 Kentucky against King, an unacceptable degree of  
4 unpredictability.

5           The moment -- the officer-created risk  
6 theory which Petitioners have continuously  
7 pressed at least until the reply brief in this  
8 Court is antithetical to that proposition  
9 because it invites an open-ended subjective  
10 inquiry into the officer's intent that cannot be  
11 conducted without the benefit of hindsight. It  
12 also, as Mendez recognized, involves tricky  
13 questions and fuzzy standards of causation that  
14 cannot be easily be applied.

15           Because the Fifth Circuit has properly  
16 rejected that proposition, its judgment should  
17 be affirmed.

18           And I welcome the Court's questions.

19           JUSTICE THOMAS: Would you articulate  
20 for us what you think the district court and the  
21 court of appeals held?

22           MS. PETTIT: I think that the district  
23 court held -- and I would point Your Honor to  
24 Pet. App. page 17a and 24a, Footnote 2 -- under  
25 the Fifth Circuit precedent that prior actions

1 that created a risk were not relevant under the  
2 Fifth Circuit's test because that is the  
3 argument that Petitioner was pursuing at that  
4 time.

5 And to Justice Sotomayor's questions  
6 earlier, the statements that she is referring to  
7 have to be read in light of those arguments  
8 because that is what the Fifth Circuit was  
9 rejecting when it said the prior actions were  
10 irrelevant.

11 JUSTICE JACKSON: I'm sorry, you're  
12 saying the statements that the Fifth Circuit  
13 made in its opinion regarding what its holding  
14 was have to be read in light of the arguments  
15 that were before it?

16 MS. PETTIT: I believe that's what  
17 they're referring to when they say these actions  
18 that you're talking to are irrelevant.

19 JUSTICE JACKSON: Well, what is --  
20 what is Judge Higginbotham saying when he says  
21 in his concurrence: I write separately to  
22 express my concern with the circuit's "moment of  
23 the threat" doctrine. And then he doesn't  
24 define it in the way that you have. He says:  
25 This doctrine counters the Supreme Court's

1 instructions to look at the totality of the  
2 circumstances.

3 MS. PETTIT: Your Honor, I would point  
4 your -- to -- you to page 15a of his opinion,  
5 where he also says that: In our reasonableness  
6 analysis, references to our supposed obligation  
7 to consider the totality of circumstances are  
8 merely performative.

9 So the dispute here appears to be not  
10 the formulation of the rule as I articulated it  
11 but its application.

12 JUSTICE JACKSON: No, he says it's  
13 performative -- you didn't read the first part  
14 of the sentence -- if the moment of the threat  
15 is the sole determinative factor in our  
16 reasonableness analysis.

17 So he says: We have a "moment of the  
18 threat" doctrine that tells us we only look at  
19 this moment. And what that does is it makes any  
20 references to totality merely performative  
21 because we're not looking at the totality, we're  
22 just looking at the moment of the threat.

23 So do you dispute that at least he  
24 conceptualized the doc -- the doctrine in the  
25 way that I'm describing and the way that

1 Petitioners have put it forward?

2 MS. PETTIT: There are certainly  
3 statements to that effect. He has, for --  
4 however, created a very similar concurrence in a  
5 case called Mason against Lafayette City from  
6 2015 --

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

11 It seems as though the question  
12 presented here is asking us to decide which test  
13 the courts should apply, and it sees the "moment  
14 of the threat" doctrine as different, distinct,  
15 from the totality of the circumstances.

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

18 It seems now that you are arguing  
19 which circumstances, assuming totality, is it  
20 okay to include or consider the circumstance of  
21 the officer's own conduct. You know, if courts  
22 are doing that, is that a problem?

23 That is a separate question that is  
24 not, I think, properly within the scope of the  
25 question presented, which just asks us which

1 test.

2 So can you help me to understand why  
3 we would get into whether or not the particular  
4 circumstance you've identified is one that  
5 courts should be looking at or not?

6 MS. PETTIT: Because I agree with  
7 my -- my colleague that it is difficult to  
8 answer the question -- the question presented  
9 without getting into that.

10 And I would point this Court to pages  
11 15, 23, 28, 32, and 41 to 42 of the Petitioner's  
12 opening brief in which they are discussing  
13 precisely this type of question.

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

20 I also heard from the United States  
21 multiple times manufacturing the risk.

22 That is conflating the two questions  
23 because they are quite related. In fact, they  
24 are -- that is the source of the dispute between  
25 the -- amongst the circuit courts. The Ninth

1 and the Tenth Circuit say: Intentional and  
2 deliberate conduct can -- creating the risk can  
3 obviate the officer's ability to defend himself.  
4 The Fifth Circuit says that's not the rule.

5 That's the nature of the dispute. And  
6 so trying to take it out of that context and say  
7 just are you considering two seconds or are you  
8 considering 30 gets into the point where there's  
9 not a circuit split, as my colleague mentioned.  
10 They -- the Fifth Circuit is looking at those  
11 issues.

12 In fact, I would point this Court to  
13 Singleton against Casanova, in which Judge  
14 Higginbotham joined an opinion six months after  
15 this one and which -- like Cole v. Carson, which  
16 he wrote three years earlier. The Fifth Circuit  
17 was describing all pre-force conduct.

18 So the Fifth Circuit is not applying  
19 the "moment of the threat" doctrine,  
20 notwithstanding some of the comments in Judge  
21 Higginbotham's opinion.

22 And this Court ultimately reviews  
23 judgments, not -- not statements and opinions.

24 JUSTICE GORSUCH: Counsel, I -- I  
25 appreciate that -- that what happened below may

1 be different than what's happening here. At  
2 least that's your view.

3 But we did take a question presented  
4 about the "moment of threat" doctrine. I  
5 understand you think it's not a thing. But  
6 what's wrong with resolving just the question  
7 presented? And putting aside your -- your  
8 record-based concerns, it is a question. We  
9 granted cert on it. I think everybody agrees  
10 it's wrong.

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

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

17 JUSTICE GORSUCH: Okay.

18 MS. PETTIT: I agree with my colleague  
19 that it is unnecessary, and the reason I say  
20 that is I point the Court to page 5a of the Pet.  
21 App, which the district court -- the -- sorry,  
22 the Fifth Circuit quoted at length a district  
23 court opinion that looked at those earlier  
24 circumstances.

25 So I don't think it's necessary. As



1 long as the Court is clear that we are not  
2 adopting the creation-of-the-risk theory, we  
3 have no quarrel with such an action.

4 JUSTICE GORSUCH: Thank you.

5 MS. PETTIT: Going to the nature of  
6 the questions here for just a minute, I would  
7 point out that the inquiry here is -- I heard a  
8 lot of concerns about line-drawing, and I find  
9 that interesting because the Petitioner's  
10 argument here was that they just wanted to  
11 consider the jump as well as the shoot.

12 That itself is a line-drawing  
13 question, and it -- and it's very deliberate  
14 because they have actually litigated whether  
15 everything up until the jump was reasonable, and  
16 the district court concluded that it was,  
17 because, again, courts below are not considering  
18 just the two seconds. Instead, they are  
19 considering the totality of the circumstances.

20 And to the question from the United  
21 States about the subjective nature of the test,  
22 this goes, again, to the arguments that had been  
23 raised up until the -- the reply brief, which  
24 was after our argument, in which -- or our  
25 brief, in which the Petitioner was endorsing the

1 view of the Ninth and Tenth Circuit, which this  
2 Court in Mendez expressly acknowledged was  
3 subjective and therefore inconsistent with the  
4 Fourth Amendment, which, again, is why we think  
5 this Court, if it is going to remand, which,  
6 again, is unnecessary, makes very clear that it  
7 is not adopting that view because it would be a  
8 fundamental shift in the Fourth Amendment.

9 And it also is a shift that, going to  
10 Justice Kavanaugh's questions earlier, would  
11 create an impossibility for -- for law  
12 enforcement agencies to train their officers for  
13 the reasons described in the California  
14 Sheriffs' Association's brief.

15 If there are no further questions,  
16 we -- I request that you affirm.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas?

20 Justice Sotomayor?

21 Justice Kagan?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1           Okay. Thank you, counsel.

2           Rebuttal, Mr. Zelinsky.

3           REBUTTAL ARGUMENT OF NATHANIEL A.G.

4           ZELINSKY ON BEHALF OF THE PETITIONER

5           MR. ZELINSKY: I have five very brief  
6 points.

7           First, Justice Jackson, you asked my  
8 friend on the other side when they argued for  
9 the test that was applied below. Listen to  
10 minutes 28 and 29 of oral argument. Then you'll  
11 hear that there.

12           Justice Sotomayor, you noted that my  
13 friends on the other side agree in many cases  
14 that the jump-in-front-of-car case, you need to  
15 look at the whole picture of what the officer  
16 did, the jump and the shoot. It is -- there is  
17 no rule that -- they can't distinguish that case  
18 from this case.

19           Third, Justice Kavanaugh, you had some  
20 practical questions about how this is going to  
21 impact effective policing. Officers receive  
22 qualified immunity. As the Cato brief  
23 discusses, 99-plus percent of the time they are  
24 also indemnified by the municipality.

25           You have a brief of 22 former

1 high-ranking police chiefs who are in front of  
2 you saying that you should rule for Petitioner  
3 and it will not hamper but promote good  
4 policing.

5 And then, third, the DHS rule is a  
6 great example of why this is not going to harm  
7 effective policing.

8 Fourth, Justice Alito, I want to be  
9 very clear, we are not saying that every single  
10 mistake is going to result in liability. What  
11 we are saying is you have to look at the whole  
12 picture, and, here, that's more than just two  
13 seconds.

14 Finally, Justice Gorsuch, we agree  
15 wholeheartedly this rule is inconsistent with  
16 the common law. If you rule and adopt the  
17 "moment of the threat" doctrine, you will  
18 essentially enact a hereto unprecedented rule  
19 permitting the killing of fleeing misdemeanants.  
20 You should not do that. You should vacate and  
21 remand.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 The case is submitted.

1                   (Whereupon, at 11:21 a.m., the case in  
2 was submitted.)  
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## Official - Subject to Final Review

<b>1</b>	<b>acknowledged</b> <sup>[1]</sup> 89:2	<b>allow</b> <sup>[1]</sup> 30:2	<b>argue</b> <sup>[4]</sup> 5:12 18:20 55:21 68:16	<b>79:8</b>
<b>1</b> <sup>[1]</sup> 57:6	<b>across</b> <sup>[3]</sup> 37:15 42:25 50:21	<b>alluded</b> <sup>[2]</sup> 61:9 65:1	<b>argued</b> <sup>[2]</sup> 56:14 90:8	<b>background</b> <sup>[1]</sup> 75:12
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<b>11:21</b> <sup>[1]</sup> 92:1	<b>acted</b> <sup>[4]</sup> 5:21 34:8 41:14 42:4	<b>alone</b> <sup>[3]</sup> 23:8 62:2 76:6	<b>arguing</b> <sup>[3]</sup> 55:13 69:11 84:18	<b>bad</b> <sup>[8]</sup> 34:20 35:25 38:15, 16 46:20 53:24 65:12 77:10
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<b>23-1239</b> <sup>[1]</sup> 4:4	<b>admit</b> <sup>[2]</sup> 41:22 65:24	<b>and/or</b> <sup>[1]</sup> 66:19	<b>Ashtian's</b> <sup>[1]</sup> 4:15	<b>Basically</b> <sup>[1]</sup> 32:4
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<b>28</b> <sup>[3]</sup> 3:8 85:11 90:10	<b>adopt</b> <sup>[1]</sup> 91:16	<b>announce</b> <sup>[1]</sup> 26:11	<b>asks</b> <sup>[2]</sup> 54:1 84:25	<b>became</b> <sup>[1]</sup> 17:20
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