No. 23-1239

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR CERTIORARI

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
legal@rutherford.org

PETER J. MCGINLEY
CHRISTOPHER J. MERKEN
STEVEN OBERLANDER
SHANE SANDERSON
LUKE D. YAMULLA
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

ANGELA M. LIU
Counsel of Record
DECHERT LLP
35 West Wacker Drive
Suite 3400
Chicago, IL 60601
(312) 646-5816
angela.liu@dechert.com

June 24, 2024

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Moment-of-Threat Doctrine Defies this Court's Command to Apply a Totality-of-the-Circumstances Test When Assessing a Seizure's Reasonableness. 3

A. The Moment-of-Threat Doctrine is Inconsistent with this Court's Fourth Amendment Jurisprudence. 6

B. Totality-of-the-Circumstances Analyses are Common in this Court's Jurisprudence. 9

C. Disregarding Circumstances Preceding an Officer's Use of Deadly Force Diverges from the Reciprocal Analysis Applied Across Areas of Law. 12

II. The Moment-of-Threat Doctrine's Requirement to Ignore Important Context Prejudices Both Law Enforcement and Citizens Suspected of Crimes 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Abraham v. Raso,
183 F.3d 279 (3d Cir. 1999)....................................8

Amador v. Vasquez,
961 F.3d 721 (5th Cir. 2020)..............................4, 7

Banks v. Hawkins,
999 F.3d 521 (8th Cir. 2021)................................18

Brower v. County of Inyo,
489 U.S. 593 (1989)..7, 8

Elliott v. Leavitt,
99 F.3d 640 (4th Cir. 1996)....................................4

Florida v. Harris,
568 U.S. (2013)..9

Gardner v. Buerger,
82 F.3d 248 (8th Cir. 1996)....................................4

Graham v. Connor,
490 U.S. 386 (1989)..6, 7, 8

Greycas, Inc. v. Proud,
826 F.2d 1560 (7th Cir. 1987)..............................14

Harris v. Serpas,
745 F.3d 767 (5th Cir. 2014)..................................7

Henderson v. United States,
575 U.S. 622 (2015) 13

Howes v. Fields,
565 U.S. 499 (2012) 11

Hupp v. Cook,
931 F.3d 307 (4th Cir. 2019) 6

Illinois v. Gates,
462 U.S. 213 (1983) 3, 9

Katz v. United States,
389 U.S. 347 (1967) 16

Kentucky v. King,
563 U.S. 452, 462 (2011) 12, 13

Manis v. Lawson,
585 F.3d 839 (5th Cir. 2009) 17, 19

Michigan v. Long,
463 U.S. 1032 (1983) 19

Nakahara v. NS 1991 Am. Tr.,
718 A.2d 518 (Del. Ch. 1998) 13

National Rifle Association of America v. Vullo,
144 S. Ct. 1316 (2024) 14, 15

Norfolk S. Ry. Co. v. Sorrell,
549 U.S. 158 (2007) 14

Olmstead v. United States,
277 U.S. 438 (1928) (Brandeis, J., dissenting), overruled by *Berger v. State of N.Y.*, 388 U.S. 41 (1967) 15

Pena v. City of Rio Grande City, Texas,
816 F. App'x 966 (5th Cir. 2020) 6

Rogoz v. City of Hartford,
796 F.3d 236 (2d Cir. 2015) 6

Salim v. Proulx,
93 F.3d 86 (2d Cir. 1996) 4

Schoettle v. Jefferson Cnty.,
788 F.3d 855 (8th Cir. 2015) 6

St. Hilaire v. City of Laconia,
71 F.3d 20 (1st Cir. 1995) 8

Tennessee v. Garner,
471 U.S. 1 (1985) 3, 6, 7, 8

Terry v. Ohio,
392 U.S. 1 (1968) 3, 9, 10, 19

Thomson v. Salt Lake County,
584 F.3d 1304 (10th Cir. 2009) 18, 19

United States v. Brown,
209 F. App'x 450 (5th Cir. 2006) 10

United States v. Kaczynski,
551 F.3d 1120 (9th Cir. 2009) 13

United States v. Rodriguez,
33 F.4th 807 (5th Cir. 2022) 10, 19

United States v. Watson,
953 F.2d 895 (5th Cir. 1992) 10

Constitutional Provisions

U.S. Const. amend. I 14

U.S. Const. amend. IV 2, 3, 4, 6, 9, 10, 12, 13, 19

U.S. Const. amend. V 11

Statutes

42 U.S.C. § 1983 4

Other Authorities

Dan B. Dobbs *et al.*, *The Law of Torts*, § 218 (2d ed. 2023) 14

Fed. R. Civ. P. 13(a)(1)(A) 12

INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party wrote this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of *amicus curiae*'s intention to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

By applying the moment-of-threat doctrine and considering only facts immediately preceding a police officer's use of deadly force, the decision below contravenes this Court's clear mandate to consider the totality of the circumstances to evaluate the reasonableness of a seizure under the Fourth Amendment. Indeed, eight courts of appeals have rejected the moment-of-threat doctrine, recognizing that they must consider all relevant facts and circumstances, including the officer's actions leading up to the use of force. That approach is consistent with this Court's jurisprudence, as well as reciprocal analysis principles that are fundamental to our adversarial legal system. It is also a neutral test that favors neither law enforcement nor citizens suspected of crimes.

The decision below exemplifies the unjust outcomes that result from applying the moment-of-threat doctrine. During a brief, uneventful traffic stop for toll violations, Ashtian Barnes's vehicle began slowly moving forward. Up to that point, Mr. Barnes had given the police officer no reason to suspect that he posed a threat to anyone. Nevertheless, the officer jumped onto the running board of the moving vehicle and, within two seconds, shot Mr. Barnes in the head. In eight circuits, courts would look to all the facts bearing on the officer's conduct and determine that the seizure-by-deadly-force was not reasonable. But in four circuits, including the Fifth Circuit below, courts blind themselves to the facts and consider only the moment immediately preceding the officer's use of

deadly force. In those circuits, the officer's use of deadly force was reasonable and Mr. Barnes's Fourth Amendment rights were not violated.

As petitioner argues persuasively, this circuit split is deep and well-established, and the question presented is critically important. The decision below is on the wrong side of the divide and illustrates the moment-of-threat doctrine's inherent shortcomings. The Court should grant certiorari to confirm that courts must evaluate the totality of the circumstances when analyzing the reasonableness of a seizure-by-deadly-force. The lower courts' division has profound consequences and warrants this Court's intervention.

ARGUMENT

I. The Moment-of-Threat Doctrine Defies this Court's Command to Apply a Totality-of-the-Circumstances Test When Assessing a Seizure's Reasonableness.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Many forms of police restraints constitute seizures under the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (a seizure occurs whenever an officer "accosts an individual and restrains his freedom to walk away"). This Court has long recognized that "there can be no question that apprehension by the use of deadly force is a seizure." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

In assessing the reasonableness of a Fourth Amendment seizure, courts must consider the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213,

238 (1983). Notwithstanding this clear mandate, four courts of appeals—including the Fifth Circuit below—disregard the totality of the circumstances when analyzing seizures involving police use of deadly force. Instead, they apply the so-called moment-of-threat doctrine, a judicial construct divorced from this Court's precedent that forces courts to blind themselves to relevant facts and consider only "the act that led the officers to discharge their weapons." *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020).[2]

In this case, Ashtian Barnes was stopped for driving a rental car with outstanding toll tag violations. *See* Pet.App.2a. After a short, uneventful exchange with Officer Roberto Felix, Jr., Mr. Barnes attempted to flee. *Id.* at 3a. Not content to let Mr. Barnes go, Officer Felix stepped onto the running board of the moving vehicle and, within two seconds, shot Mr. Barnes in the head. *Id.* at 3a–4a.

Mr. Barnes's parents sued Officer Felix and Harris County, Texas, under 42 U.S.C. § 1983, alleging that Officer Felix's use of deadly force was an unconstitutional seizure under the Fourth Amendment. *Id*. at 4a–5a. The district court held that the seizure-by-deadly-force was reasonable because Mr. Barnes "posed a threat of serious harm" to the officer when his car began to move. *Id.* at 6a. The Court of Appeals applied the moment-of-threat doctrine and affirmed because *at the moment*

[2] *See also Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (adopting the moment-of-threat doctrine); *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) (same); *Gardner v. Buerger*, 82 F.3d 248, 252 (8th Cir. 1996) (same).

immediately before he shot Mr. Barnes in the head, Officer Felix reasonably feared for his life. *Id.* at 8a.

One might wonder how the Court could reach such a conclusion given that Officer Felix stopped Mr. Barnes for outstanding toll violations, *id.* at 2a, Mr. Barnes made no threats and posed no immediate danger to Officer Felix at any point during the traffic stop, *see id.* at 16a (Higginbotham, J., concurring), and a threat to Officer Felix arose only after he stepped onto the running board of a moving vehicle, *id.* But that was the conclusion the moment-of-threat doctrine required. Constrained by this unconstitutional judge-made rule to consider only the exact moment before Officer Felix pulled the trigger, the lower court reached the conclusion that Officer Felix acted within his constitutional authority when he shot Mr. Barnes to prevent him from fleeing the scene of a benign traffic stop. *Id.* (finding that Officer Felix acted reasonably despite the totality of the circumstances revealing that "the use of lethal force against this unarmed man preceded any real threat to Officer Felix's safety").

Besides leading to unjust outcomes like this one, the moment-of-threat doctrine is inconsistent with this Court's jurisprudence regarding police use of force, as well as broader principles of our adversarial legal system. This Court should grant certiorari to resolve these inconsistencies and align the lower courts' approaches to assessing the constitutionality of police seizures-by-deadly-force.

A. The Moment-of-Threat Doctrine is Inconsistent with this Court's Fourth Amendment Jurisprudence.

The touchstone of Fourth Amendment analysis is reasonableness. In assessing reasonableness, this Court has instructed that "the question [is] whether the totality of the circumstances justified a particular sort of . . . seizure." *Garner*, 471 U.S. at 8–9. Applying a reasonableness analysis in the context of a police seizure "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Accordingly, when assessing an unconstitutional seizure claim for excessive use of force, courts must consider all facts and circumstances relevant to the seizure.

In less-than-deadly-force cases, the Second, Fourth, Fifth, and Eighth Circuits apply the totality-of-the-circumstances approach that *Graham* requires.[3] But when these same courts assess the

---

[3] *See, e.g., Rogoz v. City of Hartford*, 796 F.3d 236, 246–48 (2d Cir. 2015) (applying a *Graham* totality-of-the-circumstances analysis where an officer jumped on the back of a prone arrestee, fracturing his spine and a rib); *Hupp v. Cook*, 931 F.3d 307, 321–23 (4th Cir. 2019) (same where officer "grabb[ed] and thr[ew]" an unarmed woman to the ground); *Pena v. City of Rio Grande City, Texas*, 816 F. App'x 966, 969–74 (5th Cir. 2020) (same where officer used a stun gun on a fleeing woman); *Schoettle v. Jefferson Cnty.*, 788 F.3d 855, 859 (8th Cir. 2015) (same where officer pepper sprayed, struck, and pulled a man from his truck).

reasonableness of seizures-by-deadly-force, they discard the totality of the circumstances in favor of a constrained view of only the exact moment before an officer deploys lethal force. *Amador*, 961 F.3d at 728 (considering only "the act that led the officers to discharge their weapons"). And district courts in these circuits are prohibited from considering "any of the officers' actions leading up to" the use of force, even if the officers created the circumstances that produced the moment of threat motivating their use of deadly force. *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014). In doing so, these courts diverge from this Court's precedent, arbitrarily delineate the moment of threat—usually beginning only a few seconds before the use of force—and disregard all other relevant facts. Pet.App.12a–13a (Higginbotham, J., concurring).

In contrast, the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits correctly recognize that "totality of the circumstances" means what it says. These circuits consider all aspects of the seizure to determine whether police used unreasonably excessive force. In rejecting the moment-of-threat approach, they draw not only on *Garner* and *Graham* but also this Court's example in *Brower v. County of Inyo*, 489 U.S. 593 (1989).

Brower began as a high-speed pursuit. *Id.* at 594. Police, trying to stop a man in a stolen car, constructed a roadblock across both lanes of a highway. *Id.* at 594, 598. The fleeing driver crashed into the roadblock and died. *Id.* at 594. His heirs sued, alleging an unconstitutional seizure. *Id.* This Court concluded a seizure occurred and instructed the district court to

analyze the allegation that police "set[] up the roadblock in such manner as to be likely to kill" the fleeing driver (including by using headlights to blind him) to determine whether the seizure was reasonable. *Id.* at 599.

Most circuit courts draw this inescapable conclusion from *Brower*: the district court on remand would have to look beyond the mere seconds that make up the moment of threat to determine if the seizure was reasonable. *E.g.*, *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995). Otherwise, as one circuit explained, "remand . . . would have been pointless." *Abraham*, 183 F.3d at 292. Indeed, police "preseizure planning and conduct"—*i.e.*, constructing the roadblock minutes before the seizure—was "the only basis for saying the seizure was unreasonable." *Id.*

There is no other sensible reading of *Brower*. But the circuit split demonstrates that four circuits have strayed from this Court's guidance. Their moment-of-threat jurisprudence provides no "principled way of explaining when 'pre-seizure' events start and, consequently, [no] defensible justification for why conduct prior to that chosen moment should be excluded." *Abraham*, 183 F.3d at 291–92. By arbitrarily constricting their analysis to a mere moment in time and dismissing key facts, these four circuits ignore this Court's instructions in *Garner*, *Graham*, and *Brower* to analyze all relevant circumstances, including police conduct leading up to the use of force.

B. Totality-of-the-Circumstances Analyses are Common in this Court's Jurisprudence.

This Court's criminal procedure jurisprudence consistently instructs courts to consider the totality of the circumstances. In the Fourth Amendment context, this holistic analysis "traditionally has guided probable cause determinations" when a magistrate evaluates an affidavit for the purposes of issuing a search warrant. *Gates*, 462 U.S. at 233. When performing a probable cause determination, judges undertake "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* at 234. This "flexible, easily applied standard . . . better achieve[s] the accommodation of public and private interests that the Fourth Amendment requires" than more restrictive approaches. *Id.* at 239.

This Court has instructed lower courts to consider the totality of the circumstances in other probable cause determinations, such as when police use a drug-detection dog to sniff out illicit substances. In *Florida v. Harris*, this Court instructed lower courts to examine "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." 568 U.S. 237, 248 (2013). The Court unanimously "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Id.* at 244.

The same sort of analysis undergirds *Terry v. Ohio*, in which this Court held that an officer may stop a person if the officer has a reasonable suspicion that a crime has been committed. 392 U.S. at 30. The officer may then search that person if there is reasonable suspicion that they pose a danger to the officer or others.

The officer in *Terry* watched two men for about ten minutes and suspected they were likely "casing a job" and carrying a gun. *Id.* at 7. The Court found the officer's subsequent seizure reasonable even though, in the moments immediately preceding the stop, the men were merely wandering down a street and looking in a store window. *See id.* at 6–7, 30. It was the *cumulative* nature of their actions that created reasonable suspicion for the officer to act.

The Fifth Circuit itself has recognized in the *Terry* context that events leading up to a seizure are relevant. For example, in *United States v. Rodriguez*, the Fifth Circuit considered information that surely spanned more than a moment. 33 F.4th 807 (5th Cir. 2022).[4] The court's analysis included: a car's passenger and driver moving in their seats in apparent response to police; removing a jacket; pulling into an apartment complex associated with gang activity; hesitation before stopping; and opening of car doors as officers approached. *Id.* at 813. The court concluded that this evidence was sufficient to support reasonable suspicion and render the search reasonable. *Id.* at 813–14.

---

[4] *See also United States v. Brown*, 209 F. App'x 450, 453 (5th Cir. 2006); *United States v. Watson*, 953 F.2d 895, 897 (5th Cir. 1992).

Totality-of-the-circumstances analyses exist beyond the Fourth Amendment context, as well. To take one example, this Court has instructed that "courts must examine 'all of the circumstances surrounding [an] interrogation'" to determine whether a person is in custody for *Miranda* purposes under the Fifth Amendment. *Howes v. Fields*, 565 U.S. 499, 509 (2012) (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)). The Court listed five relevant, non-exhaustive factors to consider—"the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Howes*, 565 U.S. at 509 (internal citations omitted). These factors invite courts to consider not a single moment, but the entire set of facts and circumstances relevant to police conduct.

At bottom, this Court's criminal procedure jurisprudence directs courts to consider the full range of relevant facts when assessing the constitutionality of law enforcement conduct. The moment-of-threat doctrine is impossible to square with that jurisprudence. It is a "rigid rule" that artificially blinds courts to critical context inherent in every police encounter. Eight circuit courts recognize that fact. This Court should grant certiorari to align the lower courts' approaches to assessing the constitutionality of police seizures-by-deadly-force.

C. Disregarding Circumstances Preceding an Officer's Use of Deadly Force Diverges from the Reciprocal Analysis Applied Across Areas of Law.

Fundamental to our adversarial legal system is reciprocal analysis. Where a party's conduct bears on the matter disputed before the court, it is to be considered.[5] This principle ensures complete and considered adjudication of legal disputes and supports doctrinal acknowledgement of police-created exigencies, officer-created dangers, unclean hands, and comparative (or contributory) negligence. To arbitrarily ignore a party's actions—as the moment-of-threat doctrine requires—is to rig the game, undermining the credibility of the courts and the legitimacy of law enforcement, and thereby eroding the consent of the governed.

In other areas of its Fourth Amendment jurisprudence, this Court has similarly demonstrated the need for reciprocal analysis of the parties' conduct. In *Kentucky v. King*, the Court explained that police-created exigencies do not fall within the exigent-circumstances exception to the warrant requirement. 563 U.S. 452, 462 (2011). For law enforcement to access a dwelling without a warrant based on potential destruction of evidence, officers must not have "create[d] the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Id.*

---

[5] *See, e.g.*, Fed. R. Civ. P. 13(a)(1)(A) (requiring joinder of claims that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim").

The Court's reasoning demarcates the power of the judiciary in its approach to Fourth Amendment analysis. It is inappropriate for the judiciary to design doctrines that would overtake the executive's responsibility to determine appropriate and effective police procedure. *Id.* at 467–68. But this limitation is counterbalanced by an interest in ensuring "evenhanded law enforcement." *Id.* at 464 (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)). The boundary between this dichotomy is marked—and the resolution of an apparent tension is resolved—by a reasonableness analysis that prohibits interference with "*legitimate* law enforcement strategies." *See King*, 563 U.S. at 466 (emphasis added). Thus, where officers without a warrant "do no more than any private citizen might do," they act reasonably and are not to blame for any exigency that may arise. *Id.* at 469, 472. But if officers exceed the legitimate limits of their power, they could not then call on the response to their misdeed as an *ex post* justification cognizable under the Fourth Amendment. Thus, although there are certain limitations on the court imposed by separation of powers, it is still very much within the court's responsibility to conduct reciprocal analysis.

Similarly, the equitable doctrine of unclean hands ensures that courts do not deliberately disregard conduct relevant to the dispute before them. This "rule of public policy," *Nakahara v. NS 1991 Am. Tr.*, 718 A.2d 518, 522 (Del. Ch. 1998) (Chandler, C.) (cleaned up), applies when "an individual's misconduct has 'immediate and necessary relation to the equity that he seeks.'" *Henderson v. United States*, 575 U.S. 622, 625 n.1 (2015) (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933)).

Thus, for instance, when petitioned for the return of otherwise innocent materials, a court should consider whether the petitioner was a bombmaker attempting to access tainted tools. *United States v. Kaczynski*, 551 F.3d 1120, 1129–30 (9th Cir. 2009). The doctrine of unclean hands is an assurance that a court will inquire into the relevant conduct of all the parties before it.

Reciprocal analysis also appears in tort doctrines. Traditionally, contributory negligence served as a complete bar to a plaintiff's action sounding in negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 166 (2007). Recently, the rule has relaxed in favor of comparative negligence, which provides for a reduction in damages proportional to a plaintiff's responsibility. Dan B. Dobbs *et al.*, *The Law of Torts*, § 218 (2d ed. 2023); *see also Greycas, Inc. v. Proud*, 826 F.2d 1560, 1565–66 (7th Cir. 1987). Importantly, both the modern and traditional regime require analysis of all parties' relevant conduct.

This Court has recently alluded to the same necessity in the First Amendment context. In *National Rifle Association of America v. Vullo*, the petitioner alleged that a government regulator attempted to coerce insurers into dissociating from it to punish or suppress its views. 144 S. Ct. 1316, 1325 (2024). The NRA alleged that the regulator informed an insurer of regulatory violations but said she would be disinclined to bring enforcement action—on apparently unrelated infractions—if the insurer dissociated from the NRA. *Id.* at 1328. In finding a First Amendment violation, this Court held that "[o]ther allegations, viewed in context, reinforce" the

claim. *Id.* at 1329. The lower court had found for respondent only by "taking the allegations in isolation and failing to draw reasonable inferences" in favor of petitioner. *Id.* at 1330. The circuit's reasoning included a failure to analyze certain government actions "against the backdrop of other allegations in the complaint." *Id.* Ultimately, the lower court erroneously focused on doctrinal "guideposts" rather than the "'critical' question" at the heart of the case. *Id.* at 1333 (Gorsuch, J., concurring) (citation omitted).

That this concept appears across legal doctrines is unsurprising because it simply expresses the principle that—in deciding a controversy—courts must consider the conduct of the parties to the controversy. Ignoring this well-settled and broadly applied principle, the Second, Fourth, Fifth, and Eighth Circuits created the moment-of-threat doctrine. Below, the courts carved out from consideration that the defendant officer stopped Mr. Barnes for unpaid tolls; drew his firearm in response to no apparent threat; and then mounted Mr. Barnes's moving vehicle. It instead determined reasonableness with a "moment" in time and effectively discarded the conduct of one party to the controversy. The doctrine thus insulates unreasonable behavior by intentional judicial ignorance. This could embolden police officers to act recklessly and create unnecessary risks to their own safety in response to minor violations if their use of deadly force will be excused regardless of their actions, which contributed and led to the danger they faced. Such effective immunity for lawlessness "breeds contempt for law"; "invites every man to become a law unto himself"; and "invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J.,

dissenting), overruled by *Berger v. State of N.Y.*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967).

II. The Moment-of-Threat Doctrine's Requirement to Ignore Important Context Prejudices Both Law Enforcement and Citizens Suspected of Crimes.

Applying the moment-of-threat doctrine not only harms people subject to unreasonable uses of force; it can also harm officers who act reasonably based on facts that occur outside the moment of threat. In other words, the doctrine's limitation on courts' consideration of probative facts cuts both for and against law enforcement. It always, though, undermines a court's ability to accurately determine reasonableness.

Consider the following hypothetical: A police officer patrols a public park at night. From a distance, he sees a man point a gun at a woman before shoving her to the ground and running away. The officer goes to check on the woman and then looks for the man. The officer finds him several minutes later standing in a dimly lit area. The parties dispute what happened next, and there are no witnesses or security camera footage to verify what occurred. Ultimately, the officer shoots the man, paralyzing him. Is the fact that the man brandished a gun and shoved a woman relevant to the officer's assessment of danger?

Of course. But a court applying the moment-of-threat doctrine might disagree. The opinion below states the "'moment of threat' test means that 'the focus of the inquiry should be on the act that led the

officer to discharge his weapon.'" Pet.App.8a (quoting *Amador*, 961 F.3d at 728). In the Fifth Circuit, "'[a]ny of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry[.]'" *Id.* (quoting *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014)). In this case, the relevant "moment" spanned just the "two seconds before Barnes was shot." *Id.*

This extreme view leaves courts with little room to consider important facts relevant to evaluating the reasonableness of police use of force. For example, in *Manis v. Lawson*, the Fifth Circuit considered whether police acted reasonably in shooting a man when he reached under his car seat. 585 F.3d 839, 845 (5th Cir. 2009). There, the Fifth Circuit refused to consider pre-shooting conduct, and thus disregarded assertions that police did not believe Mr. Manis had a weapon. *Id.* The Court further disregarded testimony relating to an officer's claim that Mr. Manis cursed out officers, refused to comply with police orders, and acted erratically. *Id.* The Court reasoned that "the *only* fact material to whether [the officer] was justified in using deadly force [was] that [the suspect] reached under the seat of his vehicle and then moved as if he had obtained the object he sought." *Id.*[6] In other words, it did not matter if pre-shooting evidence demonstrated that officers knew there was no threat because only Mr. Manis's movements moments before the shooting may be considered in evaluating the reasonableness of the police use of force. *Id.*

---

[6] There was no weapon in the car. *Id.* at 842.

The moment-of-threat test as articulated in *Barnes* and *Manis* will not always favor the officer. Returning to the hypothetical, if a court looks only to the "act that led the officer to discharge his weapon," the court would not consider that the officer saw the suspect brandish a gun and shove a woman several minutes before the use of force. Instead, the court would consider only what happened in the few seconds before the use of force, ignoring critical evidence that would support a subsequent use of deadly force.

This tension is clear on opposite sides of the circuit split. In *Banks v. Hawkins*, the Eighth Circuit applied its version of the moment-of-threat doctrine and rejected a police officer's summary-judgment motion. 999 F.3d 521, 523 (8th Cir. 2021). In *Banks*, the officer was dispatched to a domestic abuse call, heard a woman screaming "no, no, no," followed by several loud noises, and was hit over the head when he entered the house. *Id.* at 523–24. Although the district court held that there were factual disputes, the Eighth Circuit concluded that "[i]n any event, we evaluate the reasonableness of [the officer]'s conduct by looking primarily at the threat present *at the time* he deployed the deadly force." *Id.* at 525–26. What was important was "'the seizure itself—here, the shooting—and not [] the events leading up to it.'" *Id.* (quoting *Gardner v. Buerger*, 82 F.3d 248, 253 (8th Cir. 1996)).

By contrast, in *Thomson v. Salt Lake County*, the Tenth Circuit applied its totality-of-the-circumstances test to evaluate a police officer's use of deadly force. 584 F.3d 1304 (10th Cir. 2009). Although the decedent was not threatening others when police used force

against him, he had a history of making violent threats. *Id.* at 1323. The Tenth Circuit concluded this tapestry of threats was relevant in evaluating police's use of force in a certain circumstance. *See id.*

In *Manis*, ignoring potentially relevant events favored the police. *Manis*, 585 F.3d at 845. However, this is not always the case. *Thomson*'s approach is fair to both parties. Prior events need not be determinative to be informative. In a fact-based assessment, ignoring relevant facts is counterproductive and potentially prejudicial. This is recognized in other areas of the Fourth Amendment.[7]

The moment-of-threat doctrine weakens a court's ability to consider facts probative of reasonableness. In this case, the doctrine favored a law enforcement officer acting unreasonably. In other instances, reasonable law enforcement activities may be disfavored. Regardless, the doctrine consistently harms courts' abilities to appropriately analyze Fourth Amendment reasonableness.

[7] In *Terry* cases, for example, federal courts often look to strings of events, each of which alone would be insufficient to justify an officer's reasonable suspicion of danger but together are sufficient. For example, in *Terry*, the Court considered an officer's observations of suspects over a long period of time to determine that the officer had a reasonable suspicion of danger sufficient for a search. 392 U.S. at 12; *see also Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (considering observations made by an officer from the moment he began tailing the suspect's car to find that the officer had a reasonable suspicion of danger); *United States v. Rodriguez*, 33 F.4th 807, 813 (5th Cir. 2022) (finding the same).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted,

ANGELA M. LIU
Counsel of Record
DECHERT LLP
35 West Wacker Drive
Suite 3400
Chicago, IL 60601
(312) 646-5816
angela.liu@dechert.com

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
legal@rutherford.org

PETER J. MCGINLEY
CHRISTOPHER J. MERKEN
STEVEN OBERLANDER
SHANE SANDERSON
LUKE D. YAMULLA
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104

June 24, 2024