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

# BRIEF OF THE DUE PROCESS INSTITUTE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. This Court's Fourth Amendment Excessive-Force Jurisprudence Is Not Limited to the Mere "Moment of the Threat." ..... 3

A. This Court Examines the Totality of the Circumstances in Analyzing Excessive Force Claims. ..... 4

B. The Totality of the Circumstances Approach Requires Analyzing Events Prior to the "Moment of the Threat." ..... 6

1. Cases Involving Police Shootings and Physical Restraint ..... 7

2. Cases Involving Vehicular Flight ..... 10

II. The "Moment of the Threat" Doctrine Contravenes the Fourth and Fourteenth Amendments as Enforced by Section 1983. ..... 14

A. The Fourth and Fourteenth Amendments Guarantee Protection from Excessive Force by Police. ..... 15

B. Section 1983 Enforces the Fourth and Fourteenth Amendments by Giving Derivatively Harmed Individuals like Petitioner a Mechanism to Vindicate Their Loved Ones' Constitutional Rights. ..... 17

C. The "Moment of the Threat" Doctrine Closes the Courthouse Doors to Victims of Police Misconduct. ..... 18

1. The "Moment of the Threat" Doctrine Negatively Impacts Direct Victims of Excessive Force by Police. ..... 19

2. The "Moment of the Threat" Doctrine Denies Equal Access to the Courts for Would-Be Section 1983 Plaintiffs ..... 21

CONCLUSION ..... 24

# TABLE OF AUTHORITIES

## CASES

*Arizona v. Gant*, 556 U.S. 332 (2009) ..... 16

*County of Los Angeles v. Mendez*, 581 U.S. 420 (2017) ..... 5

*Graham v. Connor*, 490 U.S. 386 (1989) ..... 5, 6

*Harris v. Serpas*, 745 F.3d 767 (5th Cir. 2014) ..... 20

*Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023) ..... 17

*Kingsley v. Hendrickson*, 576 U.S. 389 (2015) ..... 6

*Lombardo v. City of St. Louis*, 594 U.S. 464 (2021) (per curiam) ..... 8

*Malbrough v. Stelly*, 814 F. App'x 798 (5th Cir. 2020) ..... 20

*Mapp v. Ohio*, 367 U.S. 643 (1961) ..... 14

*Mitchum v. Foster*, 407 U.S. 225 (1972) ..... 18

*Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) ..... 15, 17, 18

*Mullenix v. Luna*, 577 U.S. 7 (2015) ..... 12, 13, 14

*Plumhoff v. Rickard*, 572 U.S. 765 (2014) ..... 5, 11, 12

*Rockwell v. Brown*, 664 F.3d 985 (5th Cir. 2011) ..... 20

*Scott v. Harris*, 550 U.S. 372 (2007) ..... 3, 10, 11

*Tennessee v. Garner*, 471 U.S. 1 (1985) ..... 2, 4, 5

*Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam) ..... 7, 8, 9

*Torres v. Madrid*, 592 U.S. 306 (2021) ..... 16

*White v. Pauly*, 580 U.S. 73 (2017) (per curiam) ..... 8, 9

*Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985) ..... 21

**STATUTES**

Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) ..... 18

**LEGISLATIVE MATERIALS**

Cong. Globe, 42nd Cong., 1st Sess. 376 (1871) ..... 15

Report of the Joint Committee on Reconstruction, H.R. Rep. 39-30, pt. II (1866) ..... 16

**OTHER AUTHORITIES**

*1,164 People Have Been Shot and Killed by Police in the Past 12 Months*, Wash. Post (updated Nov. 6, 2024), https://bit.ly/3Vw2tE9 ..... 19

Kallie Cox & William H. Freivogel, *Police Misconduct Records Secret, Difficult to Access*, Assoc. Press (May 12, 2021), https://bit.ly/3VxeLfH ..... 22

Justin M. Feldman, *et al.*, *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015–2016*, 109 Am. J. Public Health 458 (2019) ..... 22

David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 239 (2021) ..... 15, 16, 17, 18, 23

Leon F. Litwack, *Been In The Storm So Long: The Aftermath Of Slavery* (1979) ..... 21, 23

Rita Omokha, *They Were Sons*, Vanity Fair (May 6, 2021), https://bit.ly/3XoNjDj ..... 22

Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014) ..... 23

Emily Washburn, *America Less Confident In Police Than Ever Before: A Look At The Numbers*, Forbes (Feb. 3, 2023), https://bit.ly/3VLdbIk ..... 21

Tiffany R. Wright, Ciarra N. Carr, & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 Dick. L. Rev. 685 (2022) ..... 17, 18

## INTEREST OF *AMICI CURIAE*[1]

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. Founded in 2018, it is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Due Process Institute is weighing in on this matter as part of its work in support of increasing police accountability as well as to ensure that the American people have access to the courts to vindicate their constitutional rights.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public

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[1] This amicus brief is filed with timely notice to all parties. S. Ct. R. 37.2(a). Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has consistently applied the "totality of the circumstances" test when considering Fourth Amendment claims of excessive force. Rather than narrowing its focus on a specific moment during a seizure, the Court asks whether a seizure was objectively reasonable, an inquiry that necessitates review of the totality of the circumstances surrounding the seizure. This approach serves as "the key principle of the Fourth Amendment," namely "balancing" "the nature and quality of the intrusion … against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quotation marks omitted).

The Fifth Circuit's "moment of the threat" doctrine abandons this Court's precedent by circumscribing its review of excessive force claims, as exemplified by this case. This brief will not discuss these arguments in detail as they are addressed at length by Petitioner. *See* Pet. Br. 24-29. Instead, this brief highlights the inconsistency of the Fifth Circuit's approach with this

Court's "totality of the circumstances" precedent in Fourth Amendment excessive force cases that repeatedly considered the events and facts prior to the moment of seizure when analyzing the reasonableness of an officer's actions. Thus, the Fifth Circuit's "moment of the threat" doctrine contravenes relevant decisions of this Court and ignores this Court's instruction that there is no "easy-to-apply legal test in the Fourth Amendment [excessive force] context" and therefore courts "must still slosh [their] way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 383 (2007). Further, this brief provides critical historical context of the Fourteenth Amendment and 42 U.S.C. § 1983 to demonstrate how far the Fifth Circuit's approach to excessive force claims has veered from the Congressional purpose of addressing police abuses of force.

The rule applied below is not supported by this Court's jurisprudence or the history of the Constitutional amendments and statute that afford Petitioner a cause of action. This Court should reverse the Fifth Circuit and ensure uniformity and predictability to the Court's Fourth Amendment jurisprudence.

## ARGUMENT

### I. This Court's Fourth Amendment Excessive-Force Jurisprudence Is Not Limited to the Mere "Moment of the Threat."

This Court has expressed that the reasonableness of a Fourth Amendment seizure is determined by examining the totality of the circumstances. Contrary

to the Fifth Circuit and other minority courts of appeals, however, the analysis is not limited to the moment that an officer perceives a threat. Cases involving police shootings, physical restraint, and vehicular flight all demonstrate that this Court consistently examines facts leading up to a seizure within the totality of the circumstances analysis. There does not appear to be any case in which this Court has held that pre-seizure facts are categorically excluded from the objective reasonableness inquiry.

### A. This Court Examines the Totality of the Circumstances in Analyzing Excessive Force Claims.

Since *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court has consistently applied the "totality of the circumstances" test when reviewing claims of excessive force. *Id.* at 9. *Garner* relied on prior holdings to explain that "the key principle of the Fourth Amendment" is "the balancing of" "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* at 8 (quotation marks omitted). This Court further emphasized that reasonableness "plain[ly]" "depends on not only *when* a seizure is made, but also *how* it is carried out." *Id.* (emphasis added). "Applying these principles to particular facts," *Garner* emphasized that "the question" is "whether the totality of the circumstances justified a particular" "search or seizure." *Id.* at 8-9.

Analyzing the totality of the circumstances, this Court held that deadly force is not permitted "unless" "necessary to prevent" "escape" and there is "probable

cause to believe that the suspect" is dangerous. 471 U.S. at 3. Edward Garner, a suspected burglar, was fatally shot in the back of the head by a police officer while attempting to flee by climbing a fence. Before the shooting, the officer used a flashlight to "see [his] face and hands," and thus was "reasonably sure" that he was unarmed, and believed Garner was 17 or 18 years old. *Id.* at 3-4 (internal quotation marks omitted). These facts, which lead up to the shooting, supported this Court's holding that the officer had no "authority to act as he did." *Id.* at 20-22 (explaining that it was unreasonable for the shooting officer to perceive Garner as threat when Garner was "young, slight, and unarmed" and suspected burglary is not "so dangerous as automatically to justify the use of deadly force").

This Court has since consistently articulated that all excessive force claims are analyzed under the Fourth Amendment objective reasonableness test, which examines the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (same); *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 429 n.* (2017).

*Graham* is instructive. This Court explained that reasonableness "is not capable of precise definition or mechanical application" and "requires careful attention to the facts and circumstances of each particular case," including factors such as "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*, 490 U.S. at 396 (internal quotation

marks omitted).[2] It also stated that reasonableness "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. Accordingly, recognition of the "particular situation" and "evolving" circumstances are necessary factors in a court's consideration of whether an officer used excessive force.

### B. The Totality of the Circumstances Approach Requires Analyzing Events Prior to the "Moment of the Threat."

This Court has looked to events before the "moment of the threat" to examine the totality of the circumstances. This Court has never held that this approach in excessive force cases is restricted to the "moment of the threat" or otherwise excludes events leading up to an officer's perceived threat. In fact, its caselaw consistently considers pre-seizure events and circumstances. Accordingly, the Fifth Circuit, and the minority of circuits that limit the reasonableness analysis to the "moment of the threat," are applying a

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[2] Almost three decades later, this Court provided another non-exclusive list of considerations that reflect "objective circumstances potentially relevant to a determination of excessive force," including "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015).

doctrine wholly in conflict with this Court's Fourth Amendment jurisprudence.

### *1. Cases Involving Police Shootings and Physical Restraint.*

In *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam), this Court vacated and remanded the Fifth Circuit's opinion affirming the grant of qualified immunity to a police sergeant for failure to properly view evidence "in the light most favorable to [the plaintiff] with respect to the central facts." *Id.* at 657. There, a police sergeant fired three shots at Robert Tolan during a police encounter on his parents' front porch, "punctur[ing] his right lung" and "disrupt[ing] his budding professional baseball career and caus[ing] him to experience pain on a daily basis." *Id.* at 651-54.

*Tolan* pinpointed several factual issues, including facts related to events *before* the time of the shooting, that it concluded the Fifth Circuit failed to consider in determining qualified immunity. 572 U.S. at 657-59 (analyzing, among other things, whether Tolan's mother had acted "agitated[ly]" after "repeatedly inform[ing] officers that Tolan was her son, that she lived in the home in front of which he had parked, and that the vehicle he had been driving belonged to her and her husband" and whether Tolan had verbally threatened the sergeant). Although this Court did not resolve these factual disputes, it noted that the "facts lead to the inescapable conclusion that the court below" excluded "*key* evidence offered by the party opposing summary judgment." *Id.* at 659 (emphasis added). This Court further added that the relevant facts from before the shooting, including "his mother's demeanor" and

"whether [Tolan] shouted words that were an overt threat" were, not "the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law." *Id.* at 660.

In *Lombardo v. City of St. Louis*, 594 U.S. 464 (2021) (per curiam), this Court vacated a summary judgment decision from the Eighth Circuit ruling in favor of an officer where Nicholas Gilbert died after struggling for 15 minutes while being held by multiple officers in a "prone position"—"face down on the floor"—while placing pressure on his back and torso. *Id.* at 465-66. During the encounter, "Gilbert tried to raise his chest" and said, "It hurts. Stop." *Id.* at 466. The Court vacated based on, among other things, facts leading up to the seizure. *Lombardo* noted the Eighth Circuit had improperly rejected as "insignificant" that Gilbert "was already handcuffed and leg shackled when officers moved him to the prone position" and "kept him in that position for 15 minutes." *Id.* at 467 (internal quotation marks omitted). The Court emphasized that "[s]uch details could matter when deciding whether to grant summary judgment on an excessive force claim" where the record contained evidence that the officer had failed to follow training procedures. *Id.* at 467-68. It added that this evidence, "alongside the duration of the restraint and the fact that Gilbert was handcuffed and leg shackled at the time, may be pertinent to" several of the *Kinsley* factors. *Id.* at 468.

Finally, in *White v. Pauly*, 580 U.S. 73 (2017) (per curiam), this Court held that "an officer who—having arrived late at an ongoing police action and having

witnessed shots being fired by one of several individuals in a house surrounded by other officers—shoots and kills an armed occupant of the house without first giving a warning" does not violate clearly established law. *Id.* at 74, 80. It vacated a qualified immunity denial, writing that the lower court had failed to consider certain facts, including events leading up to the shooting. *Id.* at 80 (officer's conduct "such as" "failure to shout a warning" "in light of [his] late arrival on the scene" was not clearly established because "[n]o settled Fourth Amendment principle require[d] th[e] officer to second-guess the earlier steps already taken by his" "fellow officer"). This Court, however, left open whether the officers were entitled to qualified immunity. It explained that the shooting officer had "arrived on the scene only two minutes after" the other officers and "more than three minutes before the [plaintiff]'s shots were fired." *Id.* And it further reasoned that the two other officers could be denied qualified immunity where "a reasonable jury could infer that [the shooting officer] witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force." *Id.* at 80-81.

These three cases, two involving police shootings and the other a physical restraint technique gone horribly wrong, demonstrate that both in determining whether a seizure constitutes a Fourth Amendment violation or whether an officers' conduct contravenes clearly established law, this Court has considered events that occur prior to the "moment of the threat." Prior Fourth Amendment precedent has not explicitly, or even implicitly, held that examining a seizure under the

totality of the circumstances would categorically exclude events prior to the "moment of the threat" either. Accordingly, the Fifth Circuit is misapplying the objective reasonableness inquiry.

### *2. Cases Involving Vehicular Flight.*

This Court considers events before the "moment of the threat" in excessive force cases involving vehicular flight. Because pursuit can span many minutes and miles before seizure of the suspect by terminating the chase, this Court typically analyzes events prior to the "moment of the threat."

In *Scott v. Harris*, 550 U.S. 372 (2007), six minutes and nearly 10 miles after a car chase had begun, the pursuing officer requested permission from a supervisor to terminate the chase by using a technique that would "cause[] the fleeing vehicle to spin to a stop," which was approved. *Id.* at 375 (quotation marks to authority omitted). The officer rammed his push bumper into the rear of the fleeing vehicle, causing the driver to lose control, run off the roadway, overturn, and crash. *Id.* The driver was rendered quadriplegic. *Id. Scott* noted that the "first step" in determining the constitutionality of the seizure was "to determine the relevant facts," and looked specifically to "a videotape capturing the events in question." *Id.* at 378. The Court described the video in grave detail, analyzing events prior to the moment of the seizure—*i.e.*, when the officer rammed his vehicle. *Id.* at 378-79.

> There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast.

> We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.

*Id.* at 379–80 (footnotes omitted). The Court also examined that the officer had "*waited* for the road to be clear before executing his maneuver." *Id.* at 380 n.7 (emphasis in original).

In ruling that the officer acted reasonably, this Court relied on events as depicted in the videotape, including facts and circumstances prior to the seizure. *Scott*, 550 U.S. at 384. Accounting for "the number of lives at risk" and the "relative culpability" of respondent and the officer, the Court concluded that it was respondent who had engaged in the high-speed chase for nearly 10 miles and ignored multiple warnings to stop. *Id.*

Relying on its reasoning in *Scott*, the Court in *Plumhoff v. Rickard*, concluded that the firing of 15 gunshots to terminate a high-speed chase was reasonable under the circumstances. 572 U.S. at 781. The Court relied in part on events before the officers fired any shots—specifically the fact that the chase was not over when law enforcement began shooting. The Court, much like in *Scott*, relied upon a detailed account of the events leading up to the seizure:

> [T]he chase in this case exceeded 100 miles per hour and lasted over five minutes. During that chase, Rickard passed more than two dozen other vehicles, several of which were forced to alter course . . . . And while it is true that Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car. Just before the shots were fired, when the front bumper of his car was flush with that of one of the police cruisers, Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse in an attempt to escape.

*Id.* at 776.

Based on these circumstances, the Court concluded that it was reasonable for the officers to fire shots to stop plaintiff from fleeing because the chase was ongoing, and plaintiff showed no signs of yielding. *Id.* at 777-78. In other words, pre-seizure facts showed the plaintiff "was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road" and, thus, the Court ruled that the officers' conduct was justified. *Id.* at 777.

In *Mullenix v. Luna*, 577 U.S. 7 (2015), Israel Leija, Jr. sped off from officers after being told he was under arrest, leading to "an 18-minute chase at speeds between 85 and 110 miles per hour" where, "[t]wice during the

chase, Leija called the … [p]olice dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit." *Id.* at 8. Both the threats and the dispatcher's report that Leija "might be intoxicated" were relayed to officers. *Id.* While some officers continued pursuit, others set up tire spikes at different locations along the interstate. *Id.* One officer, rather than setting up tire spikes, considered "shooting at Leija's car in order to disable it," despite his lack of training in doing so. *Id.* at 9. Before obtaining approval, the officer "exited his vehicle and, armed with his service rifle, took a shooting position on [an] overpass, 20 feet above" the interstate. *Id.* About three minutes after that, "he spotted Leija's vehicle, with [another officer] in pursuit" and "[a]s Leija approached the overpass, [the defendant-officer] fired six shots" and Leija's car, after "engag[ing] the spike strip, hit the median, and rolled two and a half times." *Id.*

In determining whether the shooting officer acted objectively reasonably under the circumstances based on clearly established law, the Court compared *Luna* to *Scott* and *Plumhoff*. *Luna* examined, among other things, events prior to the shooting. This Court discussed that prior to the six shots fired, "Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location." *Luna*, 577 U.S. at 14. Comparing *Luna* to *Scott* and *Plumhoff*, the Court ruled that it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity." *Id.* at 15. *Luna*

then referenced events prior to the seizure, such as the fact that Leija "did not pass as many cars as the drivers in *Scott* and *Plumhoff*," that "traffic was light on" the interstate, that "the fleeing fugitives in *Scott* and *Plumhoff* had not verbally threatened to kill any officers in their path," "nor were they about to come upon such officers." *Id.*

Given the nature of seizures carried out to end vehicular flight, these cases show that courts must consider conduct before a seizure occurs to analyze whether an officer acted reasonably. *Scott*, *Plumhoff*, and *Luna* each examined whether a fleeing vehicle presented a danger to civilians in assessing whether use of force is justified under the totality of the circumstances. And in each case, this Court consistently considered events prior to the termination of the chase, such as the duration and speed of the chase, and the number of lives at risk, to assess reasonableness. Accordingly, the "moment of the threat" doctrine is wholly inconsistent with this Court's Fourth Amendment caselaw analyzing the reasonableness of seizures carried out to terminate vehicular flight.

## II. The "Moment of the Threat" Doctrine Contravenes the Fourth and Fourteenth Amendments as Enforced by Section 1983.

Under the Due Process Clause of the Fourteenth Amendment, the Fourth Amendment's protections against unreasonable searches and seizures are applicable to the States. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Congress enacted Section 1983 with the express goal of "throw[ing] open the doors of the United States courts to those whose rights under the Constitution are

denied or impaired." Cong. Globe, 42nd Cong., 1st Sess. 376 (1871). Therefore, Section 1983 permits individuals to pursue violations of the Fourth Amendment's guarantee of protection from unlawful searches and seizures by law enforcement, including unlawful uses of force by police.

The Fifth Circuit's "moment of the threat" doctrine disgraces this critical feature of our constitutional system by circumscribing the reviewing court's analysis, with real world consequences for victims of police misconduct and their families. Rather than "throw[ing] open the doors," the "moment of the threat" doctrine shuts out the very individuals Congress enacted the Fourth Amendment, Fourteenth Amendment, and Section 1983 to support.

### A. The Fourth and Fourteenth Amendments Guarantee Protection from Excessive Force by Police.

In the aftermath of the Civil War, those who sought to redeem the system of racial subjugation of Black Americans led a brutal campaign of violence and terror across the Southern states. *Monroe v. Pape*, 365 U.S. 167, 175–76 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). The Joint Committee on Reconstruction, a bipartisan Congressional committee formed in 1866 "to investigate conditions in the South," took testimony and gathered evidence of significant abuse across the region. David H. Gans, "*We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 239, 275 (2021). The evidence detailed a

pattern of maltreatment and cruelty inflicted upon Black Americans, ranging from "flogging" and indiscriminate fatal shootings to other forms of torture. Report of the Joint Committee on Reconstruction, H.R. Rep. 39-30, pt. II, at 202, 222 (1866) ["Joint Committee Report"].

Law enforcement played a central role in propagating this Reconstruction-era violence. The Joint Committee heard testimony about police who "declined to interfere" when white men "cruelly" beat a Black man and "left him on the ground in such a state that he died before morning," allowing the men to return home unfettered. Joint Committee Report, pt. II, at 184-85. "Another witness told the Joint Committee about how a 'policeman felled [a] woman senseless to the ground with his baton' and about another incident in which a 'negro man was so beaten by … policemen that [they] had to take him to our hospital for treatment.'" Gans, *supra*, at 280 (first alteration in original) (quoting Joint Committee Report, pt. II, at 271).

The Joint Committee's findings made clear that the Fourth Amendment's promise of "preserv[ing] personal security," *Torres v. Madrid*, 592 U.S. 306, 317 (2021), and addressing "the central concern … [of] giving police officers unbridled discretion" to violate an individual's privacy was unfulfilled for recently emancipated Black Americans, *Arizona v. Gant*, 556 U.S. 332, 345 (2009). "The committee drafted the Fourteenth Amendment," as a result of "learning firsthand of the gruesome violence and systemic violation of fundamental rights" and "against the backdrop of horrific instances of police beatings and murder." Gans, *supra*, at 275, 291. Critically, "the guarantee against unreasonable searches

and seizures contained in the Fourth Amendment [was] made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." *Monroe*, 365 U.S. at 171.

Through the Fourteenth Amendment, the Framers fundamentally altered the constitutional framework governing policing. Abuse by state police, a critical tool in the effort to reestablish the system of subjugation of Black Americans, was no longer allowed to continue unchecked. "Fourth Amendment rights were basic and inherent rights that could no longer be abridged by state and local governments." Gans, *supra*, at 287.

### B. Section 1983 Enforces the Fourth and Fourteenth Amendments by Giving Derivatively Harmed Individuals Like Petitioner a Mechanism to Vindicate Their Loved Ones' Constitutional Rights.

Despite delivering a sea change in the country's constitutional system, the passage and ratification of the Fourteenth Amendment was insufficient to address the "violent terror campaign aimed at thwarting Reconstruction efforts in the Southern United States." Tiffany R. Wright, Ciarra N. Carr, & Jade W.P. Gasek, *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 Dick. L. Rev. 685, 699 (2022). A separate Congressional committee "produced and distributed a Report that ran hundreds of pages and recounted pervasive state-sanctioned lawlessness and violence against the freedmen and their White Republican allies" in 1871. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 176 (2023). Congress enacted the Ku Klux Klan Act of 1871 "for the

express purpose of enforcing the Provisions of the Fourteenth Amendment." *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (alterations and internal quotation marks omitted). The Congressional record highlights "the lawless conditions existing in the South in 1871," recognizing that something had to be done to counter local state actors who had either turned a blind eye to the injustices or were active participants. *Monroe*, 365 U.S. at 174.

Section 1 of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), the predecessor to Section 1983, was enacted with the express purpose of "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum*, 407 U.S. at 242. The act "explicitly created a federal civil remedy that allowed those victimized by governmental abuse of power to go to court to seek redress." Gans, *supra*, at 295. Private citizens could now use the Fourth Amendment as bolstered by the Fourteenth in federal court to curb the kinds of police misconduct that stifled the Reconstruction era's promise of "a new birth of freedom." Wright *et al.*, *supra*, at 696 (quoting Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863)).

### C. The "Moment of the Threat" Doctrine Closes the Courthouse Doors to Victims of Police Misconduct.

The Fifth Circuit jurisprudence eschewing the "totality of the circumstances" test for the "moment of the threat" doctrine contravenes the Fourth and

Fourteenth Amendments and Section 1983, the statute enacted to enforce these Amendments. As noted above, this Court's jurisprudence has consistently applied the "totality of the circumstances" test in determining whether a Fourth Amendment violation has occurred. The majority of Circuits have followed this precedent, as Petitioner highlights, an approach that would have led to an alternate ruling on appeal "that Officer Felix violated Ashtian Barnes's Fourth Amendment right[s]." Pet. Br. 3 (quoting Pet. App. 16a). The Fifth Circuit's flawed adherence to the "moment of the threat" doctrine undermines not only the Fourth Amendment's prohibition on unlawful seizures but the efficacy of the remedies available through Section 1983 by circumscribing the Court's analysis of an officer's misconduct and effectively closing the doors to the courthouse for those harmed by State actors.

### *1. The "Moment of the Threat" Doctrine Negatively Impacts Direct Victims of Excessive Force by Police.*

This doctrine has real consequences for those individuals the Fourth and Fourteenth Amendments were created to protect. While accurate numbers are hard to come by, sources identify well over 1,000 people killed by police each year, primarily from shooting deaths. *See 1,164 People Have Been Shot and Killed by Police in the Past 12 Months*, Wash. Post (updated Nov. 6, 2024), https://bit.ly/3Vw2tE9. The "moment of the threat" doctrine encourages law enforcement to engage in the kind of policing that leads to unnecessary civilian

deaths, all while endangering the lives of police officers and their colleagues.

Here, Officer Felix jumped on a car and shot an unarmed Ashtian Barnes within two seconds. This was a use of lethal force which, as Judge Higginbotham remarked below, "preceded any real threat to Officer Felix's safety." Pet. App. 16a (Higginbotham, J., concurring). In other cases in the Fifth Circuit, courts have employed the "moment of the threat" doctrine to grant qualified immunity to officers who (i) shot and killed a young man who "suffered from mental-health problems" after busting down his locked door, *Rockwell v. Brown*, 664 F.3d 985, 992 (5th Cir. 2011), (ii) shot and killed a man who they initially found "lying on his back in his bed under a blanket" after they forced his locked bedroom door open for a wellness check, *Harris v. Serpas*, 745 F.3d 767, 770 (5th Cir. 2014), and (iii) shot and killed a man purportedly after "arriving out of uniform, in mostly unmarked cars, and in approaching his vehicle unannounced," such that the man thought he was being robbed, *Malbrough v. Stelly*, 814 F. App'x 798, 803 (5th Cir. 2020). In each case, the Fifth Circuit refused to consider the totality of the circumstances, including those leading up to the moment the officer asserted he was threatened. Had these courts considered the totality of the circumstances, plaintiffs may have had the opportunity to make their case to a factfinder that the officers' acts prior to the seizure led to the inappropriate use of excessive force such that a Fourth Amendment violation should be found.

These precedents encourage officers to "negligently execute[] [a] stop or arrest," resting assured that they

will escape liability given the Fifth Circuit precedent that though "[t]here is no question about the fundamental interest in a person's own life, … it does not follow that a negligent taking of life is a constitutional deprivation." *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985). This precedent flies in the face of Congress's express goal of ensuring that those harmed by abuses of state power would have a forum to vindicate their rights. Where the number of deaths each year by police has remained constant, despite increasing scrutiny and decreasing public trust in law enforcement,[3] the "moment of the threat" doctrine only provides another avenue for police misconduct and unnecessary uses of force.

### *2. The "Moment of the Threat" Doctrine Denies Equal Access to the Courts for Would-Be Section 1983 Plaintiffs.*

In the early years after emancipation, many Black Americans "found little reason to place any confidence in [the judicial system]." Leon F. Litwack, *Been In The Storm So Long: The Aftermath Of Slavery* 284 (1979). The "crux of the[] problem" was the appearance in state courts that Black plaintiffs "ha[d] less of a chance for legal redress than the defendant[s]" who had violated their rights, demonstrating the lack of "equal protection under the law" for Black Americans. *Id.* at 288. The "moment of the threat" doctrine operates much the

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[3] Emily Washburn, *America Less Confident In Police Than Ever Before: A Look At The Numbers*, Forbes (Feb. 3, 2023), https://bit.ly/3VLdbIk.

same, ensuring that surviving families of those killed or incapacitated by excessive force have little opportunity for redress even if they can surpass the significant procedural and structural challenges to reaching the courthouse doors.

The challenges facing would-be Section 1983 plaintiffs in excessive force cases such as this one (*i.e.*, family members of those killed or seriously injured by police) are extensive. The most obvious is the harsh and unexpected loss of a loved one, a reality the mother of Amadou Diallo once described as having an "always … empty seat at [the] dining table." Rita Omokha, *They Were Sons*, Vanity Fair (May 6, 2021), https://bit.ly/3XoNjDj. Simply securing access to documentation of the death to uncover the circumstances of a loved one's death can be challenging, because "[p]olice misconduct records are either secret or difficult to access in a majority of states." Kallie Cox & William H. Freivogel, *Police Misconduct Records Secret, Difficult to Access*, Assoc. Press (May 12, 2021), https://bit.ly/3VxeLfH. In addition, studies have shown that low-income neighborhoods are the most likely to experience deadly encounters with law enforcement. *See* Justin M. Feldman, *et al.*, *Police-Related Deaths and Neighborhood Economic and Racial/Ethnic Polarization, United States, 2015–2016*, 109 Am. J. Pub. Health 458, 461 (2019). Accordingly, many would-be plaintiffs are likely dependent on contingency-fee arrangements with attorneys who must also be open to the preliminary investigative work of uncovering the circumstances of a use of force incident—reliant on documentation, such as body or dash camera footage,

that is generally in the possession of law enforcement to even determine whether there is a viable claim under the law. In the backdrop, judicial doctrines like qualified immunity create further barriers for Section 1983 plaintiffs' recovery. Such barriers impede any monetary recovery in civil suits against police even though "officers almost never contribute anything to settlements and judgments in police misconduct suits." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 960 (2014).

For those few who can overcome these hurdles, the "moment of the threat" doctrine slams shut the doors of the courthouse. This conflicts with Congress's vision who, in applying the Fourth Amendment to the states through the Fourteenth Amendment, sought to provide protection from the "gratuitous, violent seizures by police officers" recounted by numerous witnesses who testified before the Joint Committee in 1866. Gans, *supra*, at 279. Nor could the 42nd Congress have imagined that under the banner of Section 1983, courts would eschew a fulsome review of an officer's actions in determining whether a constitutional violation had occurred. The Fifth Circuit's adherence to the "moment of the threat" doctrine harkens back to a time when vulnerable freedmen could not turn to the courts for redress and were instead "dismissed with the advice to avoid contact with individuals who were apt to harm them." *Litwack*, *supra*, at 288.

This Court should reject the "moment of the threat" doctrine and reverse the Fifth Circuit's decision to address this serious departure from its precedent and ensure that future plaintiffs in Petitioner's position have

access to the courts to vindicate their constitutional rights as the Framers intended.

## CONCLUSION

For the foregoing reasons and those in Petitioner's brief, the Court should make clear that the "moment of the threat" contravenes its Fourth Amendment precedent and reverse the decision below.

Respectfully submitted,

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