

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 GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE AND BRADY
CENTER TO PREVENT GUN VIOLENCE AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

KRISTEN A. JOHNSON
AMANDA LIVERZANI
COOLEY LLP
55 Hudson Yards
New York, NY 10001
(212) 479-6000
kjohnson@cooley.com
aliverzani@cooley.com

ROBBY L.R. SALDAÑA
COOLEY LLP
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 842-7800
rsaldana@cooley.com

MAUREEN P. ALGER
Counsel of Record
COOLEY LLP
3175 Hanover Street
Palo Alto, CA 94304
(650) 843-5000
malger@cooley.com

KARA C. WILSON
EMILY J. BORN
ADITI ASTHANA
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111
kwilson@cooley.com
eborn@cooley.com
aasthana@cooley.com

Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

ESTHER SANCHEZ-GOMEZ
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
268 Bush St. #555
San Francisco, CA 94104
(415) 433-2062

DAVID M. PUCINO
LEIGH ROME
LEKHA MENON
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
244 Madison Ave., Ste. 147
New York, NY 10016
(415) 433-2062

DOUGLAS N. LETTER
SHIRA LAUREN FELDMAN
BRADY CENTER TO PREVENT
GUN VIOLENCE
840 First Street NE, Ste. 400
Washington, DC 20002
(202) 370-8100

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STATEMENT OF INTEREST¹

Amici curiae Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) and the Brady Center to Prevent Gun Violence (“Brady”) are nonprofit organizations dedicated to reducing and eliminating gun violence. Giffords Law Center and Brady are focused on preventing gun violence in all its forms, including the use of deadly armed force by law enforcement against civilians, particularly Black Americans who disproportionately experience the tragic effects of deadly and excessive force by the police.

Giffords Law Center is a nonprofit policy organization serving lawmakers, advocates, legal professionals, gun-violence survivors, and others who seek to reduce gun violence and improve the safety of their communities. The organization was founded more than 30 years ago following a gun massacre at a San Francisco law firm and was renamed as Giffords Law Center in 2017 after joining forces with the gun-safety organization founded by former Arizona Congresswoman Gabrielle Giffords. Today, through partnerships with gun violence researchers, public-health experts, and community organizations, Giffords Law Center researches, drafts, and defends laws, policies, and programs proven to effectively reduce gun violence. For years, Giffords Law Center has researched the connection between community trust in law enforcement and gun violence and advocated for policies to build trust and reduce violence. Giffords Law Center has contributed technical expertise and informed analysis as an *amicus curiae*

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief’s preparation and submission.

in numerous cases involving firearm regulations and constitutional principles affecting gun policy and policing.

In January 2020, Giffords Law Center published a report about how trust between a community and the police plays a critical role in combatting gun violence.² The report analyzed aggregated research on police practices and found that officers' unlawful use of force corrodes community trust and confidence in law enforcement, particularly in communities of color. The report demonstrated that law enforcement's use of unlawful force in policing communities ultimately causes increased violence.

Founded in 1974, Brady is the nation's most longstanding nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, legal advocacy, and political action. Brady works across Congress, courts, and communities, uniting gun owners and non-gun-owners alike, to take action to prevent gun violence. Brady has a substantial interest in ensuring that the Constitution is construed to protect Americans' fundamental right to live. Further, recognizing that gun violence is intersectional, Brady has a substantial interest in advocating for solutions that not only reduce gun violence but also advance equity.³ Brady has filed *amicus curiae* briefs in many cases involving the

² See Giffords Law Center, *In Pursuit Of Peace: Building Police-Community Trust to Break the Cycle of Violence* (2020), <https://files.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf>.

³ See, e.g., Brady United Against Gun Violence, *Preventing Police Violence With New Approaches To Policing*, <https://s3.amazonaws.com/brady-static/policingreform.pdf> (last visited Nov. 15, 2024).

regulation of firearms or constitutional questions that implicate gun violence prevention.

Amici submit this brief in support of the Petitioner to explain (1) how the use of deadly force by law enforcement undermines community trust, thereby threatening further gun violence and compromising public safety, and (2) why the “moment of the threat” doctrine adopted by multiple federal circuit courts of appeal undermines the Fourth Amendment’s protection against misconduct by law enforcement.

INTRODUCTION

Every year, Americans are killed during traffic stops by police gun violence. People of color, and particularly Black people, disproportionately bear the brunt of this violence, leaving behind communities in which many have understandably lost trust in law enforcement. Public safety is compromised as a result. Curbing gun violence requires clear rules for police officers’ legal use of force against civilians and mechanisms for civilians to hold accountable those police officers who act outside the boundaries of the law.

Community gun violence increases when police misconduct toward civilians ruptures the trust between police and the communities they serve. Communities in which civilians suffer deadly and injurious police force are less likely to report crimes to law enforcement and less likely to turn to law enforcement when they need it most. This breakdown in trust imperils civilians and police officers alike by undermining effective policing’s responsiveness to the safety needs of communities.

Deadly police shootings, like the one in this case, fuel the devastating breakdown in trust between police and the community. In this case, a traffic enforcement

officer shot and killed Mr. Barnes, a 24-year-old Black man, during a routine traffic stop concerning unpaid toll violations for which Mr. Barnes was not responsible. Throughout this traffic stop—over these non-arrestable offenses—the officer kept his hand on his gun holster. When Mr. Barnes’s vehicle began moving forward after the officer ordered Mr. Barnes to exit the car, the officer jumped onto the door sill of the car, shoved his gun into Mr. Barnes’s head, and shot Mr. Barnes.

The officer’s decision to jump onto the door sill created the very “threat” on which the district court and the Fifth Circuit relied to hold that the officer’s use of deadly force against Mr. Barnes did not violate the Fourth Amendment.⁴ This act of deadly force, and the subsequent determination that the officer committed no constitutional violation in using it, is exactly the kind of flagrant and unchecked misconduct by law enforcement officers that significantly erodes a community’s trust in them.

The Fourth Amendment provides a basic constitutional guarantee that law enforcement will not engage in unreasonable conduct. The “proper application” of the Fourth Amendment’s reasonableness standard “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). “[T]he question is ‘whether the totality of the circumstances justifie[s] a particular sort of ... seizure.’” *Id.* (quoting *Tennessee v. Garner*,

⁴ Brief of Petitioner-Appellant at 7 n.3.

471 U.S. 1, 8–9 (1985)). This reasonableness standard protects officer conduct that is reasonable under the circumstances, while holding officers accountable for conduct that is not. Both advance community trust, which is critical for effective law enforcement.

The Court’s totality of the circumstances framework for evaluating the use of force by law enforcement under the Fourth Amendment aligns with common sense. Everyday real world experience teaches that context matters to understanding events. Context can vindicate conduct that may seem unreasonable at first blush. It can also show the utter unreasonableness of conduct when considering all available information. But ignoring context can lead to avoidable misunderstandings and grossly mistaken decisions about whether conduct was reasonable.

The “moment of the threat” doctrine adopted by the Second, Fourth, Fifth, and Eighth Circuits is incompatible with the Fourth Amendment, the goals of its structural protections, and common sense. This doctrine immunizes police misconduct from accountability under the Fourth Amendment by isolating a single frame—*i.e.*, the “moment of the threat”—in the often much broader course of a police encounter with a civilian. By removing from consideration anything the officer did prior to that moment or anything the officer did after it, the doctrine can immunize even the most egregious and deadly police misconduct. Moreover, the interest of the civilian who was harmed or killed and the public interest in preventing and providing redress for police misconduct are seriously undermined.

The consequences of affirming the Fifth Circuit’s judgment and endorsing the “moment of the threat” doctrine would be grave. Effective policing depends on the trust a community has toward law enforcement. It

is common sense that individuals and communities will always understand the use of force by law enforcement in the full context of the encounter. An erroneous legal doctrine that imposes a highly artificial time constraint on the judicial understanding of whether an officer's use of deadly force was reasonable threatens to create a gulf between the judicial understanding and the community's understanding. These understandings must be aligned to ensure the legitimacy of judicial determinations and to foster the trust that is the foundation of effective policing and public safety.

Affirmance could leave individuals without redress for the harms suffered at the hands of police officers who unreasonably resort to lethal force. Upholding the "moment of the threat" doctrine would also place the interest of a single individual—the officer who used unlawful deadly armed force against a civilian—above the interest of the individual whose life has been taken and, importantly, the immense interest of the public at large. That result is incompatible with the balancing that this Court requires under the Fourth Amendment, and it deprives both individuals and the public of a means to hold police officers accountable for the unreasonable use of deadly force in circumstances where the interest in accountability is at its greatest.

This Court should reject the "moment of the threat" doctrine, reverse the Fifth Circuit's decision, and reaffirm the Fourth Amendment's guarantee.

BACKGROUND

Ashtian Barnes, a Black man, was 24 years old when Officer Roberto Felix, Jr. shot and killed him.

On April 28, 2016, Mr. Barnes drove a rental car along Sam Houston Tollway in Harris County, Texas.

Petitioner-Appellant’s Appendix (“Pet. App.”) at 2a. The rental car had outstanding toll violations incurred by a previous rental driver. *Id.* Informed by dispatch of a car with outstanding toll violations, the responding officer located the vehicle and signaled for Mr. Barnes to stop the car. *Id.* at 2a. Mr. Barnes stopped his car toward the left side of the tollway. *Id.* The officer approached the driver’s door of the car. *Id.* He asked for Mr. Barnes’s license and proof of insurance. *Id.* After being unable to locate the documents in the car, Mr. Barnes told the officer that the documents might be in the car trunk, and he popped open the trunk from the driver’s seat. *Id.* at 2a–3a.

Within seconds of the trunk opening, the officer, with his hand on his gun, asked Mr. Barnes to step out of the car. *Id.* at 26a–27a. At this point, the car’s taillights turned on. *Id.* About one second later, the officer drew his gun. *Id.* The car started to move forward. *Id.* The officer stepped onto the door sill of the car as the door began to close. *Id.* He shoved his gun into Mr. Barnes’s head, pushing his head “hard to the right.” *Id.* at 4a, 17a. While the car started to move forward, the officer—perched on the door sill and unable to see into the vehicle—blindly fired his gun into the car. *Id.* at 19a. A second later, the officer fired a second shot. *Id.* The car came to an abrupt stop. *Id.* For nearly two minutes, the officer held Mr. Barnes “at gunpoint until backup arrived while Barnes sat bleeding in the driver’s seat.” *Id.* Mr. Barnes was pronounced dead at the scene. *Id.*

ARGUMENT**I. POLICE USE OF DEADLY AND EXCESSIVE FORCE DIMINISHES ESSENTIAL COMMUNITY TRUST IN LAW ENFORCEMENT, ELEVATING THE RISK OF GUN VIOLENCE AND COMPROMISING PUBLIC SAFETY.**

Upholding the Fifth Circuit’s decision and embracing the “moment of the threat” standard would deepen community distrust in law enforcement, ultimately resulting in gun violence that harms public safety. Credible research shows that the use of excessive force by police—and a subsequent failure to hold police officers accountable for that conduct—breaks down the essential trust between communities and law enforcement. This breakdown in community trust is particularly acute in communities of color, where police disproportionately use deadly force and excessive force. Distrust in law enforcement dramatically decreases witness engagement and crime reporting rates, perpetuating a corrosive cycle of negative police encounters, increased community distrust and gun violence, and compromised public safety.

From the perspective of the public and communities that experience police violence, a judicial decision about the use of deadly force may not be seen as legitimate if the court does not consider the same context that the community will consider and understand. When the use of force is unjustified, it is essential that the courts adjudicate the conduct unlawful and hold the officer responsible to uphold community confidence in the legal system. If a legal doctrine artificially narrows the context and restrains the courts from considering facts that inform the public context, the community will view these critical

adjudications as illegitimate, straining trust in the legal system and law enforcement and undermining public safety.

A. The Use of Excessive Force by Police Compromises Public Safety by Breaking Community Trust.

Excessive force by police against civilians undermines community safety and deepens distrust in law enforcement.⁵ Respected studies show that police officers “must have active public cooperation, not simply political support and approval” to successfully protect the public.⁶ Community members who perceive police officers as engaging in unreasonable conduct are less likely to view police as legitimate.⁷ The breakdown in trust between communities and the police is exacerbated when police officers escape accountability for misconduct against the communities they serve,⁸ and the community

⁵ See Giffords Law Center, *supra* n.2.

⁶ Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 266–67 (2008) (finding that community members who view police as legitimate are more likely to cooperate with police officers and comply with the law).

⁷ Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 Criminology 2 (Mar. 7, 2006), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2004.tb00520.x>.

⁸ See Rebeccah L. Sokol, et al., *The Association Between Perceived Community Violence, Police Bias, Race, and Firearm Carriage Among Urban Adolescents and Young Adults*, Preventative Med. 154 (Jan. 2022), <https://pubmed.ncbi.nlm.nih.gov/34863814/> (individuals with higher levels of police distrust were more likely to acquire a firearm for protection).

will always judge these determinations in the totality of the circumstances.

Law enforcement officers use deadly force with alarming frequency. On average, approximately 1,100 civilians are killed annually by law enforcement.⁹ So far in 2024 alone, on-duty police officers have killed 1,045 people in 49 states and the District of Columbia.¹⁰ There have been only 11 days so far in 2024 when law enforcement has not killed an individual in the United States.¹¹

Police killings of civilians understandably impact the public's perception of law enforcement. In 2020, the American public's confidence in police officers fell below 50 percent for the first time.¹² This was due to a "widespread perception that bad officers are not held accountable when things go wrong."¹³ Unsurprisingly,

⁹ See David Hemenway, et al., *Variation in Rates of Fatal Police Shootings Across US States: The Role of Firearm Availability*, 96 *J. Urban Health* 63, 63–64 (2018), https://pmc.ncbi.nlm.nih.gov/articles/PMC6391295/pdf/11524_2018_Article_313.pdf.

¹⁰ Mapping Police Violence, <https://mappingpoliceviolence.squarespace.com/> (last accessed Nov. 15, 2024).

¹¹ *Id.* By contrast, there is an average of 10 documented fatal police shootings per year in Germany. In one survey, 88% of respondents expressed confidence in Germany's police force. Mike Gagnon, *Police Violence is a Real Thing in Germany*, Deutsche Welle (May 15, 2017), <https://www.dw.com/en/police-in-germany-kill-more-than-you-think/a-38822484>.

¹² James Crave, et al., *How Qualified Immunity Hurts Law Enforcement*, CATO Inst. (Feb. 15, 2022), <https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement>.

¹³ *Id.*

this perceived lack of accountability erodes the public’s trust in both the police and the justice system.¹⁴

Law enforcement’s use of excessive force causes significant physical and psychological damage to individuals directly harmed while also damaging the broader community.¹⁵ Evidence and experience demonstrate unequivocally that distrust in law enforcement triggered by community experience and awareness of police brutality dramatically decreases the likelihood that members of the community will report crimes, a phenomenon that expert literature refers to as the “Jude Effect,”¹⁶ leading to lower rates of solved homicides and other violent crimes.¹⁷ As the rate of

¹⁴ Cheryl Boudreau, et al., *Police Violence and Public Perceptions: An Experimental Study of How Information and Endorsements Affect Support for Law Enforcement* (June 2019).

¹⁵ See, e.g., Denise Herd, *Cycles of Threat: Graham v. Connor, Police Violence, and African American Health Inequities*, 100 Boston U. L. Rev. 1047 (2020), <https://www.bu.edu/bulawreview/files/2020/05/09-HERD.pdf> (police use of excessive force leads to increased physical injuries, lower resistance to diseases and increased levels of chronic stress and psychological harm, and exploring how these outcomes result in reduced opportunities for education and employment and increased incidents of crime); see generally Giffords Law Center, *supra* n.2.

¹⁶ Matthew Desmond, et al., *Police Violence and Citizen Crime Reporting in the Black Community*, 81 Am. Soc. Rev. 857, 870–73 (2016), https://scholar.harvard.edu/files/mdesmond/files/american_sociological_review-2016-desmond-857-76.pdf (reporting an estimated net loss of 20,000 emergency 911 calls in the year following the beating of Frank Jude).

¹⁷ Police Exec. Research Forum, *Review of the Chicago Police Dep’t’s Homicide Investigation Process*, 99 (2019), https://iapail.wpengine.com/wp-content/uploads/2023/04/Chicago-Homicide-Investigations-Assessment-Report_FINAL_to-CPD.pdf (“[L]ack of witness cooperation,” including because of police distrust, is “one of the primary reasons for uncleared homicides”); see also Wesley

unsolved murders climbs, faith in the fairness, skill, legitimacy, and honest commitment of police forces plummets further, while vigilante justice spreads.¹⁸

The Jude Effect occurs when a police force loses the trust and cooperation it needs to protect and serve effectively. This term describes the dramatic decline in 911 calls in a particular community after a highly publicized incident in which off-duty police brutally beat a man named Frank Jude.¹⁹ This same Jude Effect was observed in Chicago after the police killing of 17-year-old Laquan McDonald and in Baltimore after Freddie Gray died of a severe spinal cord injury inflicted in police custody. As explained in a U.S. Department of Justice (“DOJ”) investigative report regarding the Chicago Police Department, Laquan McDonald’s death—from being shot in the back 16 times by an officer—represented “a tipping point—igniting longstanding concerns about [the] officers’ use of force, and the City’s systems for detecting and

Lowery, et al., *Murder with Impunity: An Unequal Justice*, Washington Post (July 25, 2018), <https://www.washingtonpost.com/graphics/2018/investigations/black-homicides-arrests/> (last accessed Nov. 15, 2024) (discussing the “vicious cycle” where law enforcement continually fails to solve homicides involving Black Americans, distrust of law enforcement deepens, fewer arrests occur, and investigation cooperation declines).

¹⁸ See generally Jill Leovy, *Ghettoside: A True Story of Murder in America*, 8–12 (2015).

¹⁹ See Desmond, *supra* n.16 at 870–73; John Diedrich & Ashley Luthern, *911 calls fell in black Milwaukee neighborhoods after Jude beating, study finds*, Milwaukee J. Sentinel (Sept. 2016), <https://www.jsonline.com/story/news/investigations/2016/09/29/911-calls-fell-black-milwaukee-neighborhoods-after-jude-beating-study-finds/90907882/> (discussing how prosecutors created the term “the Jude [E]ffect” to describe the distrust they were witnessing among Black jurors during jury selection).

correcting the unlawful use of force.”²⁰ The report concluded that “trust has been broken” between police and the community, and that this “breach in trust has in turn eroded [the] ability to effectively prevent crime.”²¹ From 2014 to 2016, the rate of murders solved by police fell by nearly half (from 50% to 29%), while homicides in Chicago increased by 85%.²²

Police officers who use excessive force against civilians during routine traffic stops exacerbate the Jude Effect by further eroding trust between the police as a whole and the communities they serve. Here, Mr. Barnes was pulled over for a toll violation for which he was not even responsible and was shot twice and killed during that less-than-three-minute traffic stop. Consistent with the Jude Effect, other individuals in communities where such police conduct occurs would be more likely to fear and avoid future interactions with law enforcement, deterring cooperation with police and ultimately preventing crime-solving and compromising public safety.

The negative impact of excessive force on public safety is enduring. Misguided, especially unjustifiably violent, crime control efforts, coupled with poor service delivery, can drive a community’s collective belief that police are incapable of, or unconcerned with, making their community safer—regardless of whether that is

²⁰ U.S. Dep’t of Justice Civil Rights Div. & U.S. Attorney’s Office for the N.D. of Ill., Investigation of the Chicago Police Dep’t, 1 (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download>.

²¹ *Id.* at 1–2.

²² Police Exec. Research Forum, *supra* n.17, at 2–3.

true.²³ This lack of community trust makes it more difficult for police officers to carry out their responsibilities.²⁴ Community members “are less likely to cooperate with police when they feel unprotected by the law, and police are less able to protect people without cooperation.”²⁵ Community distrust in local police forces also contributes to increased rates of violence when people take justice into their own hands due to a belief that police cannot or will not provide effective assistance and safety.²⁶ This dangerous cycle foments even more violence and inevitably leads to further tragedy.

Even when excessive police force is not fatal, studies show that such force negatively affects the well-being of civilians and their communities.²⁷ One such study documented that “[r]eoccurring” and “persistent”

²³ Rod K. Brunson, “*Oh hell no, we don’t talk to police*” *Insights on the Lack of Cooperation in Police Investigations of Urban Gun Violence*, *Criminology & Public Policy*, 2019, 1–26.

²⁴ Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO Inst. (Sept. 14, 2020), <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure#exacerbates-crisis-accountability-law>.

²⁵ German Lopez, *There’s a nearly 40 percent chance you’ll get away with murder in America*, Vox (Sept. 24, 2018), <https://www.vox.com/2018/9/24/17896034/murder-crime-clearance-fbi-report>.

²⁶ David S. Kirk & Andrew Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 *Am. J. of Soc.* 1190, 1198, 1216–21 (2011), <https://www.scholars.northwestern.edu/en/publications/cultural-mechanisms-and-the-persistence-of-neighborhood-violence>; *see also* Desmond, *supra* n.16, at 870–73.

²⁷ Sirry Alang, et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 *Am. J. Pub. Health* 662, 662–65 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5388955/>.

violent police misconduct promotes physical wear and tear on the human body, including “diabetes, stroke, ulcers, cognitive impairment, autoimmune illnesses, accelerated aging, and death.”²⁸ It may also cause “emotions [that] might be damaging to individual mental health and might elevate distress at the population level.”²⁹ Further, not holding officers accountable for misconduct hampers the success of local governments, “including efforts to keep communities safe, [which] directly depend on the procedurally just behavior of police officers.”³⁰

Data trends in the concentration of violent crime illustrate the importance of community trust and participation in ensuring the common goal of public

²⁸ *Id.* at 663; see also Rahwa Haile, et al., “*We (still) charge genocide*”: A systematic review and synthesis of the direct and indirect health consequences of police violence in the United States, 322 *Social Science & Medicine*, at 5 (2023), accessible at: <https://www.sciencedirect.com/science/article/pii/S0277953623001417> (“[V]icarious exposures to police violence are also associated with multiple health-related harms. Having a loved one killed by police is terrorizing, as is the post-killing traumatization of families who have experienced the loss of a loved one, all of which are associated with lower levels of mental health. In addition, personally witnessing and viewing media reports about police violence is associated with mistrust and fear of police, as well as sadness, fear, anger and hypervigilance. Moreover, Black people and communities located in areas with greater numbers of police killings of Black people have higher risks of preterm birth, higher numbers of poor mental health days, elevated levels of cortisol, higher rates of sexually transmitted infections, and declines in emergency department visits, suggesting that police violence may operate as an ecological exposure.”).

²⁹ Alang, *supra* n.27 at 663.

³⁰ Andrea Silva, et al., *Perceived Police Performance, Racial Experiences, and Trust in Local Government*, at 344 (Oct. 2020)

safety. Researchers have found strong evidence that “[n]eighborhoods where the law and the police are seen as illegitimate and unresponsive have significantly higher homicide rates,” even after accounting for differences in race, age, poverty, and other structural factors.³¹ Many cities experience a similar and striking pattern of violence in which law enforcement employs practices of over-policing,³² which ultimately prove ineffective by reducing community trust.³³ Other systemic problems follow, including higher crime and more frequent vigilantism. Fewer crimes are reported.

Research funded by the National Institute of Justice confirmed this localized effect in Chicago, when rates of violence were falling in most areas of the city, but high murder rates persisted in certain neighborhoods where police were deeply mistrusted by significant

³¹ Kirk & Papachristos, *supra* n.26, at 1216–21.

³² Typically, crimes are carried out by an insular group of people who are often involved in cycles of retaliatory violence but comprise less than 1% of a city’s population. See Stephen Lurie, et al., *Presentation: The Less Than 1%: Groups and the Extreme Concentration of Urban Violence*, National Network For Safe Communities 13–17, 23 (Nov. 2018), https://cdn.theatlantic.com/assets/media/files/npsc_gmi_concentration_asc_v1.91.pdf (summarizing data collected from nearly two dozen United States cities that revealed that around 50% of the cities’ homicides and nonfatal shootings involved about 0.6% of the population, and law enforcement knew those victims and perpetrators had affiliations with groups involved in violence).

³³ See Giffords Law Center, *supra* n.2 (explaining that “many communities struggling with long-simmering crises of confidence in law enforcement witnessed spikes in violence after high-profile police misconduct further weakened community trust,” and explaining that these communities “have long felt brutally over-policed and under-protected,” making them “particularly susceptible to this trend”).

portions of the community.³⁴ In short, as common sense confirms, mistrust of law enforcement is a powerful contributor to violence.

B. The Racialized Dynamics of Police Violence Uniquely Threaten Community Trust in Law Enforcement and Public Safety.

The use of deadly and excessive force by law enforcement officers acutely erodes trust between communities of color and law enforcement. Studies show that communities of color are less likely to trust law enforcement officers, further undermining the safety and well-being of these communities and impairing the ability of law enforcement to serve them.

Overwhelming evidence demonstrates that police officers are more likely to use physical force in the most structurally disadvantaged neighborhoods of the United States³⁵ and are more likely to use force—including deadly force—against Black men like Mr. Barnes.³⁶ Black Americans experience the highest

³⁴ Kirk & Papachristos, *supra* n.26, at 1190.

³⁵ See Phillip Atiba Goff, et al., *The Science of Justice: Race, Arrests, And Police Use of Force*, Center For Policing Equity 4 (2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

³⁶ See Giffords Law Center, *supra* n.2; see also Rob Arthur, *New Data Shows Police Use More Force Against Black Citizens Even Though Whites Resist More*, SLATE (May 30, 2019), <https://slate.com/news-and-politics/2019/05/chicago-police-department-consent-decree-black-lives-matter-resistance.html>; Julie A. Ward, RN, PhD, MN, et al., *National Burden of Injury and Deaths From Shootings by Police in the United States, 2015–2020*, American Journal of Public Health (April 2024), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2023.307560>; Police Data, *Initial Findings*, <https://policedata.org/findings>.

rate of fatal police shootings compared to all other racial and ethnic groups.³⁷ More than 25% of fatal police shootings involve a Black individual, although Black individuals comprise only 14% of the United States population.³⁸ Recent DOJ investigations have identified pervasive patterns of unconstitutional policing practices, including excessive use of force that disproportionately affects Black individuals and leads to higher levels of distrust of the police in Black communities.³⁹

Fatal police violence toward Black Americans and racial disparities in the policing of Black communities foments distrust toward law enforcement.⁴⁰ DOJ's investigations into disparate policing of Black communities found higher levels of distrust of the police compared to white communities, regardless of socioeconomic status.⁴¹ This distrust resulted in less

³⁷ See Giffords Law Center, *Gun Violence in Black Communities* (Aug. 15, 2024), <https://giffords.org/lawcenter/report/gun-violence-in-black-communities/>.

³⁸ *Id.*

³⁹ For descriptions of the investigations, see Giffords Law Center, *supra* n.2, at 55–57. See also M.C. Brown II & Camille Lloyd, *Black Americans Less Confident, Satisfied with Local Police*, GALLUP (Sept. 18, 2023), <https://news.gallup.com/poll/511064/black-americans-less-confident-satisfied-local-police.aspx> (stating that Black Americans are less confident than white Americans and Hispanic Americans in their local police).

⁴⁰ See Desmond, *supra* n.16 at 870–73; see also Emily Ekins, *Policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey*, CATO Inst. (Dec. 7, 2016), <https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national>).

⁴¹ For descriptions of the investigations, see Giffords Law Center, *supra* n.2, at 55–57. See also Brown & Lloyd, *supra* n.39. (stating that Black Americans are less confident than white Americans and Hispanic Americans in their local police).

community engagement with police and ultimately undermined police officers' ability to solve and prevent violent crime.

Furthermore, police violence negatively impacts the well-being of Black communities that experience fatal police violence. In one community, the killing of an unarmed Black person by a police officer harmed the mental health of Black people living in proximity to the shooting for months after the killing.⁴²

Upholding the Fifth Circuit's decision in favor of the offending officer would force a divergence between the public and judicial understandings of uses of force, sanction the disproportionate violence that communities of color face in encounters with police, ignore the harms caused, and exacerbate community distrust in police officers. This resulting community distrust toward law enforcement and the criminal justice system would further compromise public safety and the ability of law enforcement to respond to the public safety needs of communities of color.

⁴² See Giffords Law Center, *Gun Violence in Black Communities*, *supra* n.37 at n.48 (citing Jacob Bor et al., *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, *The Lancet* 392, no. 10144 (2018): 302–310).

II. THE “MOMENT OF THE THREAT” DOCTRINE HARMS THE PUBLIC INTEREST BY IMMUNIZING POLICE OFFICERS FOR USING UNJUSTIFIABLE DEADLY FORCE.

The “moment of the threat” doctrine contravenes the Fourth Amendment and this Court’s totality of the circumstances framework by improperly elevating the interest of a single individual—that of the officer who used deadly armed force against a civilian—above both the perspective and interest of the individual whose life has been taken, the police as a public service institution, and ultimately the interest of the community the police officer is tasked with serving. Doing so is incompatible with the balancing that this Court requires under the Fourth Amendment. And it deprives both individuals and the public of a means to hold police officers accountable for the use of deadly force in circumstances where the interest in accountability is at its greatest.

“[T]he balancing of competing interests” is “the key principle of the Fourth Amendment.” *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981). The public interest is a fundamental component of this balancing process. *See Garner*, 471 U.S. at 9; *see also Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (“[I]n judging reasonableness, we look to ‘the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.’” (citation omitted)).

“[D]etermining whether the force used to effect a particular seizure is reasonable requires [a] balancing of the individual’s Fourth Amendment interests against the relevant government interests.” *Cnty. of L.A. v. Mendez*, 581 U.S. 420, 427 (2017) (cleaned up). “[I]t is plain that reasonableness depends on not only when a

seizure is made, but also how it is carried out,” *i.e.*, “the totality of the circumstances.” *Garner*, 471 U.S. at 8–9. Moreover, “[t]he use of deadly force . . . frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.” *Id.* at 9. “The use of deadly force” frustrates these interests in particular because it “is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion.” *Id.* at 10. A victim of lethal force is deprived of the constitutional right to be adjudicated guilty or innocent of the suspected offense, if any, that motivated the police encounter in the first place. And the victim can no longer serve as a source who could otherwise be critical in solving the specific crime and possibly other related crimes.

The “moment of the threat” doctrine eviscerates the balancing that this Court’s Fourth Amendment decisions require and guts the totality of the circumstances framework that the majority of federal courts apply when evaluating the use of deadly force. Under the “moment of the threat” doctrine, the use of deadly force by an officer is “presumptively reasonable when the officer has reason to believe that the suspect poses a threat of serious harm to the officer or to others.” *Ontiveros v. City of Rosenberg, Tex.*, 564 F.3d 379, 382 (5th Cir. 2009) (citing *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003)). In applying that presumption using this doctrine, the Fifth Circuit incorrectly focuses only “on the act that led the officer to discharge his weapon.” *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020). “Any of the officers’ actions leading up to the shooting are not relevant.” *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (cleaned up). In other words, a single moment in time determines whether a court applying this doctrine will find the use of deadly force reasonable and therefore constitutional.

Under this approach, the totality of the circumstances, including all of the following, would be irrelevant: that the officer used deadly force against Mr. Barnes during a routine traffic stop, that he had prepared to resort to gun violence during the encounter even before any alleged perceived threat, and that he jumped on the sill of the vehicle and instantaneously shot Mr. Barnes. *See Barnes v. Felix, Jr.*, 91 F.4th 393, 400 n.13 (5th Cir. 2024) (Higginbotham, J., concurring) (“[T]he moment of threat approach removes the consideration of the entire circumstances required by *Garner*, including the gravity of the offense at issue.”). Notably, the officer himself created the purported threat on which the Fifth Circuit relied to conclude that Officer Felix’s shooting into Mr. Barnes’s vehicle was reasonable.

The “moment of the threat” doctrine undermines the Fourth Amendment’s structural protection against unreasonable law enforcement conduct. “The Fourth Amendment is designed to prevent, not simply to redress unlawful police action.” *Steagald v. United States*, 451 U.S. 204, 215 (1981). However, the doctrine does not prevent or provide redress for unlawful police conduct. Instead, it immunizes unlawful—and deadly—police conduct by treating it as reasonable and therefore constitutional. That presumption removes incentives for law enforcement officers to avoid escalating encounters to the point of using deadly force because the law will consider only whether the officer perceived a threat in the moment or moments before the use of deadly force against a civilian and not whether the officer himself created that threat.

Focusing on the purported “moment of the threat” also requires courts to ignore assumptions that can lead to mistaken assessments of threat and undermine

other constitutional values. Empirical studies show some police officers may view Black Americans as threatening.⁴³ A failure to consider the totality of the circumstances—and therefore to recognize these mistaken assessments—can be particularly deadly when law enforcement is involved.

The “moment of the threat” doctrine also creates a constitutional contradiction. Actual or perceived gun possession or ownership becomes a justification for the use of deadly or excessive force by law enforcement officers against civilians. Anecdotal accounts describe law enforcement officers who used deadly or excessive force against civilians based on the belief that the individual possessed a gun, with no information about whether such possession was lawful.⁴⁴

As a result, the price of actual or perceived gun possession, particularly for Black Americans who are disproportionately killed by police officers, is deadly force by law enforcement officers. This is inconsistent not only with the Fourth Amendment’s protections against unreasonable seizure, but also this Court’s articulation of a Second Amendment “individual right to possess and carry weapons in case of confrontation.” See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *id.* at 614 (discussing that “Blacks were

⁴³ See, e.g., M.S. Sadler, et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. of Social Issues 286, 306–07 (2012) (discussing results of simulations showing that police officer participants were more likely to mistakenly shoot unarmed Blacks compared with unarmed whites, and mistakenly not shoot armed whites compared with armed Blacks).

⁴⁴ See Cynthia Lee, *‘But I Thought He Had a Gun’ – Race and Police Use of Deadly Force*, 2 Hastings Race & Poverty L.J. 1, 14 (2004) https://scholarship.law.gwu.edu/faculty_publications/785/.

routinely disarmed by Southern States after the Civil War” with “[t]hose who opposed these injustices frequently stat[ing] that they infringed blacks’ constitutional right to keep and bear arms.”). In the era of the post-*Heller* Second Amendment, it is simply untenable that a civilian’s actual or perceived gun possession or ownership could give law enforcement officers free range to use deadly gun violence.⁴⁵

The public interest embodied in the Fourth Amendment compels holding accountable an officer who killed a compliant civilian during a “routine” traffic stop. The officer’s conduct violates the Fourth Amendment in multiple federal circuits. *See, e.g., Johnson v. City of Miami Beach*, 18 F.4th 1267, 1272 (11th Cir. 2021) (holding that a police officer “violates the Fourth Amendment when he uses gratuitous force against an arrestee who is fully secured, not resisting arrest, and not posing a safety threat to the officer”); *Bryan v. MacPherson*, 630 F.3d 805, 828 (9th Cir. 2010) (“Traffic violations generally will not support the use of a significant level of force”); *Est. of Starks v. Enyart*, 5 F.3d 230, 233–34 (7th Cir. 1993) (denying qualified

⁴⁵ *See, e.g.,* Alexander Butwin, “Armed and Dangerous” A Half Century Later: Today’s Gun Rights Should Impact Terry’s Framework, 88 Fordham L. Rev. 1033, 1053 (2019) (“[I]ndividuals exercising their Second Amendment and state given rights, via *Heller* and *McDonald*, are at risk of having their Fourth Amendment rights to be free from unreasonable searches and seizures restricted. Therefore, *Terry*’s ‘armed and dangerous’ standard should not be interpreted as ‘armed and therefore dangerous’ in states that permit citizens to carry firearms, whether concealed or openly, in public. While *Terry* controls Fourth Amendment investigatory stop inquiries, its standard needs to be interpreted and applied in light of evolving understandings of the Second Amendment and state gun laws, which have drastically changed since the 1968 *Terry* opinion.”).

immunity over excessive force claim where officer stepped into the path of accelerating car and thus “unreasonably created the encounter that ostensibly permitted the use of deadly force to protect him”); *see also Barnes*, 91 F.4th at 400 n.13 (Higginbotham, J., concurring) (collecting circuit cases taking into account the totality of the circumstances).

There is no principled reason why this Court should conclude otherwise, in defiance of this Court’s own Fourth Amendment precedents and of the public interest in safety.

CONCLUSION

Unjustified police gun violence against civilians breaks the trust between police and communities and thereby threatens to compromise public safety. This distrust is acute in communities of color, which are disproportionately harmed by the use of deadly force by law enforcement. The Fourth Amendment’s structural protection against unreasonable law enforcement conduct provides a means to prevent the erosion of trust by providing accountability for police misconduct and unjustified use of force. The “moment of the threat” doctrine eviscerates this protection and threatens to entrench distrust by treating as reasonable the use of deadly force by officers, and by defying a common sense approach to evaluating an officer’s conduct. This Court should reject the doctrine, reaffirm the “totality of the circumstances” test, and reverse the Fifth Circuit’s judgment.

Respectfully submitted,

KRISTEN A. JOHNSON
 AMANDA LIVERZANI
 COOLEY LLP
 55 Hudson Yards
 New York, NY 10001
 (212) 479-6000
 kjohnson@cooley.com
 aliverzani@cooley.com

ROBBY L.R. SALDAÑA
 COOLEY LLP
 1299 Pennsylvania Ave. NW
 Washington, DC 20004
 (202) 842-7800
 rsaldana@cooley.com

ESTHER SANCHEZ-GOMEZ
 GIFFORDS LAW CENTER TO
 PREVENT GUN VIOLENCE
 268 Bush St. #555
 San Francisco, CA 94104
 (415) 433-2062

DAVID M. PUCINO
 LEIGH ROME
 LEKHA MENON
 GIFFORDS LAW CENTER TO
 PREVENT GUN VIOLENCE
 244 Madison Ave., Ste. 147
 New York, NY 10016
 (415) 433-2062

MAUREEN P. ALGER
Counsel of Record
 COOLEY LLP
 3175 Hanover Street
 Palo Alto, CA 94304
 (650) 843-5000
 malger@cooley.com

KARA C. WILSON
 EMILY J. BORN
 ADITI ASTHANA
 COOLEY LLP
 3 Embarcadero Center
 San Francisco, CA 94111
 kwilson@cooley.com
 eborn@cooley.com
 aasthana@cooley.com

DOUGLAS N. LETTER
 SHIRA LAUREN FELDMAN
 BRADY CENTER TO PREVENT
 GUN VIOLENCE
 840 First Street NE, Ste. 400
 Washington, DC 20002
 (202) 370-8100

Counsel for Amici Curiae

November 20, 2024



E-Mail Address:
briefs@wilsonepes.com

1115 H Street, N.E.
Washington, D.C. 20002

Web Site:
www.wilsonepes.com

Tel (202) 789-0096
Fax (202) 842-4896

No. 23-1239

JANICE HUGHES BARNES, Individually and as
Representative of the Estate of Ashtian Barnes,
Deceased,

Petitioner,

v.

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

Respondents.

AFFIDAVIT OF SERVICE

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HOGAN LOVELLS US LLP
125 High St., Suite 2010
Boston, MA 02110
(617) 371-1037

*Party name: Janice Hughes Barnes,
Individually and as Representative of the
Estate of Ashtian Barnes, Deceased*

LISA SCHIAVO BLATT
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5050

Party name: Roberto Felix, Jr.

SETH BARRETT HOPKINS
HARRIS COUNTY ATTORNEY'S OFFICE
1019 Congress Avenue, 15th Floor
Houston, TX 77002
(337) 540-9120


Party name: Harris County, Texas

JUDITH RAMSEY SALDANA
THOMPSON COE COUSINS & IRONS
4400 Post Oak Parkway, Suite 1000
Houston, TX 77027
(713) 403-8210

Party name: Roberto Felix, Jr.

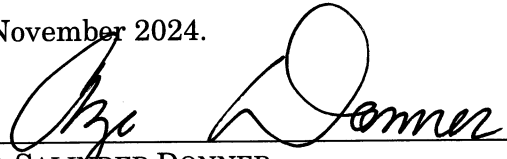
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kjohnson@cooley.com
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rsaldana@cooley.com
katherine.wellington@hoganlovells.com
lblatt@wc.com
Seth.Hopkins@harriscountytexas.gov
jramsey@thompsoncoe.com

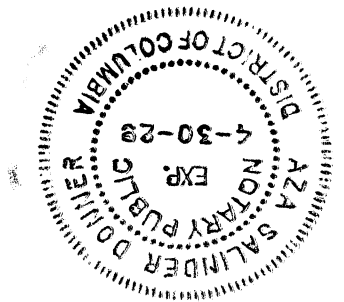


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IN THE
Supreme Court of the United States

JANICE HUGHES BARNES, Individually and as
Representative of the Estate of Ashtian Barnes,
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ROBERTO FELIX, JR.; COUNTY OF HARRIS, TEXAS,

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

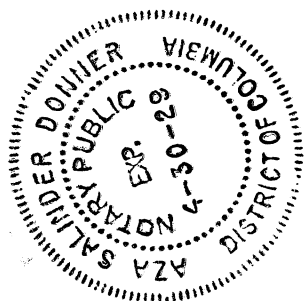
**BRIEF OF GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE AND BRADY
CENTER TO PREVENT GUN VIOLENCE AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

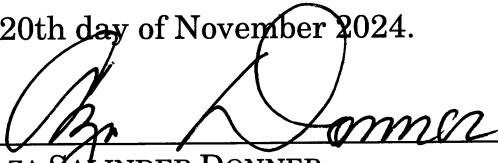
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 6,482 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to and subscribed before me this 20th day of November 2024.





AZA SALINDER DONNER
NOTARY PUBLIC
District of Columbia

My commission expires April 30, 2029.