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., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KRISTEN M. CLARKE
Assistant Attorney General
NICOLE M. ARGENTIERI
BRIAN M. BOYNTON
Principal Deputy Assistant Attorneys General
ERIC J. FEIGIN
Deputy Solicitor General
ZOE A. JACOBY
Assistant to the Solicitor General
THOMAS BOOTH
TERESA KWONG
CAROLINE W. TAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether and to what extent circumstances leading up to an officer's use of force are relevant to determining whether that use of force was reasonable under the Fourth Amendment.

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INTEREST OF THE UNITED STATES

This case concerns the set of circumstances that may be considered in evaluating an excessive-force claim under the Fourth Amendment. The Fourth Amendment standard applies to both federal and state law-enforcement officers. The United States often defends federal law-enforcement officers who face personal liability for alleged Fourth Amendment violations. The United States also prosecutes excessive-force cases under 18 U.S.C. 242 and brings civil actions to address systemic Fourth Amendment violations by law enforcement under 34 U.S.C. 12601. The United States therefore has a substantial interest in the Court's resolution of this case.

STATEMENT

1. Respondent Roberto Felix, Jr., a traffic-enforcement officer for Harris County, Texas, was patrolling the Sam Houston Tollway on the afternoon of April 28, 2016, when he received a radio broadcast about a vehicle on the road with outstanding toll violations. Pet. App. 2a, 18a. Respondent subsequently spotted a Toyota Corolla whose license plate matched the plate number provided over the radio, and he initiated a traffic stop by activating his emergency lights. *Id.* at 18a. The Corolla was being driven by Ashtian Barnes, who pulled over to the left shoulder of the Tollway. *Ibid.* Respondent parked behind him. *Ibid.*

Respondent stepped out of his patrol vehicle, approached the driver's side of the Corolla, and asked Barnes for his driver's license and proof of insurance. Pet. App. 18a, 26a. Barnes responded that he did not have his license and that the car was a rental in his girlfriend's name. *Id.* at 18a. As Barnes spoke, and throughout his discussion with respondent, Barnes was rummaging through papers inside the vehicle, causing respondent to warn Barnes several times to stop "digging around." *Ibid.*

Respondent told Barnes that he smelled marijuana and asked Barnes if there was anything in the vehicle that respondent should know about. Pet. App. 2a-3a, 18a. Barnes responded that he might have the requested documents in the trunk. *Id.* at 3a, 26a. Respondent asked Barnes to open the trunk, and Barnes popped it open from the driver's seat. *Id.* at 3a. The car's taillights then stopped blinking, indicating that Barnes had turned off the vehicle. *Id.* at 3a, 18a-19a.

About three minutes into the stop, respondent, with his right hand on his holster, asked Barnes to step out

of the car. Pet. App. 3a, 19a, 26a. Barnes opened the door, but he did not step out. *Id.* at 3a. Instead, Barnes turned the car back on. *Id.* at 19a, 27a.

Respondent drew his weapon as the car started to move forward. Pet. App. 27a. Respondent twice shouted "don't fucking move!" as the car began to accelerate. *Ibid.* Either shortly before or shortly after the car started accelerating, respondent jumped onto the vehicle's door sill (the flat base of the car door). See *id.* at 3a-4a (stating that respondent stepped onto the sill before the car started accelerating); *id.* at 19a (stating that it was "unclear" from the dash camera footage whether respondent stepped onto the sill before or after acceleration).

With no visibility as to where he was aiming, respondent fired one shot inside the car. Pet. App. 4a, 27a. The car continued to move forward, and respondent fired a second shot. *Id.* at 4a. Barnes was struck, and two seconds later, the car came to a full stop. *Id.* at 4a, 27a. Respondent jumped off the car, yelled "shots fired!" into his radio, and held Barnes at gunpoint until backup arrived. *Id.* at 4a. Barnes was pronounced dead at the scene. *Ibid.*

2. Petitioner, who is Barnes's mother, sued respondent and Harris County in state court under 42 U.S.C. 1983, alleging that respondent violated Barnes's Fourth Amendment rights by using excessive force against him. Pet. App. 4a. Respondent and Harris County removed the action to the United States District Court for the Southern District of Texas. *Id.* at 20a.

The district court granted summary judgment to respondent and Harris County, reasoning that respondent did not violate Barnes's constitutional rights. Pet. App. 17a-32a. The court stated that under circuit

precedent, if an "'officer has reason to believe that the suspect poses a threat of serious harm,'" then "the constitutional inquiry ends there." *Id.* at 24a (citation omitted). Accordingly, the district court focused solely on "whether the officer or another person was in danger *at the moment of the threat* that resulted in the officer's use of deadly force." *Id.* at 25a (quoting *Rockwell* v. *Brown*, 664 F.3d 985, 991 (5th Cir. 2011), cert. denied, 566 U.S. 1009 (2012)).

The district court identified the "moment of the threat" in this case as the "two seconds before [respondent] fired his first shot," when respondent was standing on the Corolla's door sill and the car was accelerating. Pet. App. 29a. The court concluded that at that moment, an officer in respondent's position would reasonably believe that Barnes's continued operation of the car put respondent in danger. *Id.* at 31a.

The district court rejected petitioner's argument that "any danger perceived by [respondent] was created solely by himself" by stepping onto the car's door sill. Pet. App. 29a (citation and internal quotation marks omitted). The court stated that "the Fifth Circuit does not consider 'what had transpired up until the shooting itself' in assessing the reasonableness of an officer's use of deadly force." *Ibid.* (quoting *Fraire* v. *City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), cert. denied, 506 U.S. 973 (1992)).

3. The court of appeals affirmed. Pet. App. 1a-9a. The court stated that under circuit precedent, "the excessive-force inquiry is confined to whether the officers or other persons were in danger at the moment of the threat that resulted in the officers' use of deadly force." *Id.* at 7a-8a (quoting *Amador* v. *Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020), cert. denied, 141 S. Ct. 1513

(2021)). The court therefore deemed "[a]ny of the officers' actions leading up to the shooting" to be "not relevant for the purposes of an excessive force inquiry in this Circuit." *Id.* at 8a (quoting *Harris* v. *Serpas*, 745 F.3d 767, 772 (5th Cir.), cert. denied, 574 U.S. 823 (2014)). And here, the court concluded that respondent's use of force was reasonable under the Fourth Amendment because during the "moment of the threat"—the two seconds when respondent "was still hanging on to the moving vehicle"—respondent reasonably believed that he was in serious danger. *Ibid.*

In a concurring opinion, Judge Higginbotham (the author of the panel opinion) expressed his concern with the Fifth Circuit's approach to deadly-force cases. Pet. App. 10a-16a. In Judge Higginbotham's view, categorically disregarding "what has transpired up until the moment of the shooting itself" is inconsistent with this Court's directive that reasonableness should be analyzed in light of the "totality of [the] circumstances." *Id.* at 12a-13a (quoting *Fraire*, 957 F.2d at 1276, and *Tennessee* v. *Garner*, 471 U.S. 1, 9 (1985)). Rather than focus only on the "moment of the threat," Judge Higginbotham would have also considered circumstances leading to the use of force, including respondent's decision to "jump onto the sill of the vehicle with his gun already drawn." *Id.* at 15a. And under that approach, Judge Higginbotham would have found that respondent's use of force was unreasonable under the Fourth Amendment. *Id.* at 16a.

SUMMARY OF ARGUMENT

The court of appeals erred in declaring that an officer's conduct prior to using force is categorially irrelevant to whether the use of force was reasonable under the Fourth Amendment. The reasonableness inquiry

examines the use of force through the lens of the totality of the circumstances known to a reasonable officer, which naturally and logically includes his own past conduct. Although the circumstances during the "moment of the threat," Pet. App. 8a, will often have prime importance, both this Court's precedents and common sense illustrate that those circumstances can be contextualized by the ones that preceded them. Because the court of appeals indicated otherwise, this Court should vacate the decision below and remand for application of the proper framework.

A. The question in a Fourth Amendment excessive-force case is whether the officer's use of force was objectively reasonable "in light of the facts and circumstances confronting" him. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). That inquiry requires analyzing the "'totality of the circumstances'" "from the perspective of a reasonable officer on the scene." *Id.* at 396 (citation omitted). A reasonable officer on the scene is aware of not only the circumstances in the precise moment when force is used, but also historical facts leading up to that moment. The officer's decision to resort to force may be informed by, for example, the "severity of the crime" that precipitated his encounter with the suspect, *ibid.*, or behavior by the suspect earlier in the encounter indicating that the suspect would likely "resum[e]" dangerous behavior unless the officer used force, *Plumhoff* v. *Rickard*, 572 U.S. 765, 777 (2014).

The relevant circumstances known to an officer at the moment when force was used also naturally include the officer's own conduct leading up to that moment. For example, an officer's prior efforts to warn the suspect, deescalate the situation, or temper the degree of force used may all be relevant to the reasonableness of

his subsequent use of force. Considering an officer's conduct leading up to the moment of force accords with this Court's consideration of prior officer conduct when applying the "same standard of reasonableness at the moment" to other types of searches and seizures. *Graham*, 490 U.S. at 396.

To be sure, the circumstances at the moment that force is used will generally have primary significance in the analysis. Officers often must make split-second judgments in defending themselves and the public from danger, and an officer's reasonable perception of a threat in the moment generally should be respected. But the circumstances in the moment of force cannot be completely divorced from the context in which they arose. An officer's prior engagement with the suspect may illuminate why escalation to force was necessary; conversely, even a moment of apparent danger may not reasonably call for deadly force if the officer previously "acted so far outside the bounds of reasonable behavior that the deadly force was almost entirely a result of [his] actions." *Estate of Biegert ex rel. Biegert* v. *Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (Barrett, J.). Although the latter type of situation will be rare, the reasonableness analysis must allow for the entire totality of the circumstances known to a reasonable officer, not just a single, context-independent slice.

B. Respondent has contended that when an officer experiences a "moment of threat" during which he reasonably believes that he is in danger, the reasonableness inquiry ends and no other prior conduct may be considered. Br. in Opp. 24; see Pet. App. 7a-8a. That rigid rubric is not supported by this Court's precedents, which demand a more context-sensitive and nuanced approach. Respondent relies on *County of Los Angeles*

v. *Mendez*, 581 U.S. 420 (2017), and *City of Tahlequah* v. *Bond*, 595 U.S. 9 (2021) (per curiam), but both of those decisions expressly declined to decide the question presented in this case. Respondent also invokes this Court's decisions addressing mistakes in policing, but those decisions simply show that the use of force can be reasonable notwithstanding poor law-enforcement tactics; they do not completely preclude consideration of prior events and officer conduct.

Indeed, a rule requiring exclusive focus on a "moment of threat" would make little sense in practice and would be difficult to administer. An officer's perception of what a suspect might do next is necessarily informed by the suspect's prior behavior, as well as the officer's own actions toward the suspect. Especially when the officer and the suspect have been interacting with one another such that their prior actions are inextricably intertwined, their prior conduct can be useful in understanding what followed. And in practice, excluding all circumstances preceding the "moment of threat" will create line-drawing problems, as it can be difficult in a rapidly evolving and fluid policing encounter to pinpoint precisely when the moment of threat began.

C. Instead of examining all the circumstances known to a reasonable officer in respondent's position at the moment of force, the lower courts in this case focused exclusively on whether respondent reasonably perceived danger during the two seconds when he was clinging to an accelerating vehicle. Pet. App. 8a. Because the lower courts erred in doing so, this Court should vacate the decision below and remand to allow them to consider the reasonableness of respondent's use of force under the proper standard in the first instance.

ARGUMENT

A claim that law enforcement used excessive force during an investigation or arrest is "analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). The analysis considers the "totality of the circumstances" known to the officer, *Tennessee* v. *Garner*, 471 U.S. 1, 9 (1985), and should not categorically exclude circumstances leading up to the moment force was used, such as an officer's prior conduct. While the situation at the moment force is used will have paramount importance in many cases, categorically ignoring actions leading up to that moment would conflict with this Court's precedents, common sense, and sound principles of judicial administrability. The decision below, which applied such an unsound approach, should accordingly be vacated and the case remanded for further proceedings.

A. Assessment Of The Reasonableness Of An Officer's Use Of Force Under The Fourth Amendment Should Not Categorically Disregard Prior Officer Conduct

1. The excessive-force inquiry examines reasonableness from the perspective of a reasonable officer, which may include his knowledge of past events

The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. Undertaking that inquiry requires analyzing the "totality of the circumstances," *Garner*, 471 U.S. at 9, "from the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, to determine the

force's "reasonableness at the moment" it was used, *ibid.*

The reasonableness inquiry accordingly examines "the information the officers had when the conduct occurred." *County of Los Angeles* v. *Mendez*, 581 U.S. 420, 428 (2017) (citation omitted); see *Garner*, 471 U.S. at 9. That information is not limited to a snapshot of what an officer saw in that moment, but instead "includ[es] what the officer knew at the time." *Kingsley* v. *Hendrickson*, 576 U.S. 389, 397 (2015) (citing *Graham*, 490 U.S. at 396). And such knowledge will naturally include events leading up to the use of force, as well as other relevant facts.

Factors to which this Court has looked include "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*, 576 U.S. at 397 (citing *Graham*, 490 U.S. at 396); see *Lombardo* v. *City of St. Louis*, 594 U.S. 464, 466 n.2 (2021) (explaining that *Kingsley*'s standard for excessive force under the Due Process Clause mirrors the Fourth Amendment objective-reasonableness standard). Those factors—which are neither rigid nor exhaustive, see *Kingsley*, 576 U.S. at 397; *Graham*, 490 U.S. at 396—necessarily encompass historical facts of which the officer is aware.

For example, the Court has made clear that an officer's knowledge of the "severity of the crime at issue"—which could plainly be a past event that may not be evident at the moment of the threat—can carry significant weight in the reasonableness analysis. *Graham*,

490 U.S. at 396. An officer may well perceive a greater threat from a wanted murderer on the lam than from a jaywalker. And there is no logical reason to differentiate between that type of historical fact and other types that would inform a reasonable officer's evaluation of the situation that he faces.

The relevance of historical facts is well-illustrated by this Court's decision in *Plumhoff* v. *Rickard*, 572 U.S. 765 (2014), which concluded that officers acted reasonably in shooting a driver who had led them on a high-speed car chase, *id.* at 768. That conclusion was based in large part on the driver's "outrageously reckless" behavior during the preceding "five minutes" and his attempts to keep driving even after a prior collision. *Id.* at 776. The Court did not cabin its analysis to the precise moment when the officers used force. Instead, past events within the officers' knowledge informed the reasonableness analysis: "[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard 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." *Id.* at 777 (emphases added).

2. The past events relevant to the reasonableness of an officer's use of force can include the officer's own past actions

The circumstances known to an officer at the moment he uses force naturally include his own conduct—most obviously, his interactions with the suspect—leading up to that moment. Indeed, the Court has expressly identified at least one such conduct-based factor—namely, the "effort made by the officer to temper or to limit the amount of force"—as potentially relevant to the inquiry. *Kingsley*, 576 U.S. at 397. An effort to deescalate the

threat typically precedes the use of force, and can inform the reasonableness of its application.

As the Court has recognized, the use of force may be more reasonable when (if feasible) "some warning has been given" by law enforcement beforehand. *Garner*, 471 U.S. at 11-12. Thus, the reasonableness inquiry in *Scott* v. *Harris*, 550 U.S. 372 (2007), looked to the "[s]ix minutes" that preceded the ultimate seizure, during which time "[m]ultiple police cars, with blue lights flashing and sirens blaring, had been chasing [the driver] for nearly 10 miles, but he ignored their warning to stop." *Id.* at 375, 384. And in light of that law-enforcement conduct, the driver's response, and other factors, the Court held that an officer acted reasonably when he ended a high-speed car chase by ramming the speeding driver off the road. *Id.* at 385.

The consideration of such past officer conduct coheres with the framework in other Fourth Amendment contexts. The reasonableness analysis for Fourth Amendment excessive-force claims is not an island unto itself, but instead applies the "same standard of reasonableness at the moment" as other Fourth Amendment search and seizure inquiries. *Graham*, 490 U.S. at 396; see, *e.g.*, *Scott*, 550 U.S. at 382. And in those contexts as well, the Court has often considered police conduct leading up to the moment of the search or seizure.

The Court has explained, for example, that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Wilson* v. *Arkansas*, 514 U.S. 927, 931 (1995). And the Court has stated that whether a particular "exigency" justifies a warrantless search depends on whether "the conduct of the police preceding the exigency is reasonable" under

the Fourth Amendment. *Kentucky* v. *King*, 563 U.S. 452, 462 (2011). Disregarding prior police conduct in the excessive-force context alone would thus create needless and unjustified incongruities in this Court's Fourth Amendment jurisprudence.

3. An officer's knowledge of his past conduct can contextualize whether a threat existed at the moment force was used

Although an officer's past conduct can often be relevant to the assessment of whether his use of force was reasonable, it does not resolve the ultimate inquiry of whether "a particular use of force" was reasonable "from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. That inquiry must account for officers' need to make "split-second judgments" in "circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 396-397. The in-the-moment facts thus may have preeminent—but not isolated—importance in assessing the reasonableness of a use of force, with the officer's past conduct and other factors providing necessary context in appropriate cases.

Law-enforcement officers must be able to use force to protect the public from threats. See *Plumhoff*, 572 U.S. at 777 (approving use of deadly force to neutralize "a grave public safety risk"). Regardless of what may have transpired beforehand, officers are extraordinarily unlikely to act unreasonably in defending a group of innocent bystanders who are in the path of a fleeing suspect's speeding car. Similarly, officers are entitled to defend themselves from danger. See *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600, 613 (2015) ("Nothing in the Fourth Amendment bar[s] [officers] from protecting themselves."). The driver of a car barreling right toward an officer will in most cases present

a threat to the officer's safety to which the officer may reasonably respond by using force, whatever the officer's prior conduct may have been.

But the in-the-moment facts will not always be dispositive, and they cannot be hermetically sealed off from the context in which they arose. As previously discussed, an officer's attempts to deescalate the situation or provide warnings before he resorts to the use of force may bear on the force's reasonableness. See *Puskas* v. *Delaware County*, 56 F.4th 1088, 1094-1095 (6th Cir. 2023) (finding use of police dog reasonable after considering prior efforts to deescalate); *Palacios* v. *Fortuna*, 61 F.4th 1248, 1258-1262 (10th Cir. 2023) (finding use of force reasonable in light of officers' prior warnings). Prior conduct can also demonstrate why seemingly innocuous conduct by a suspect could reasonably be interpreted by an officer as threatening. For example, an officer who sees a suspect reach into his pocket may have more reason to perceive a threat in that moment if he earlier saw the suspect place a gun in that same pocket. Countless other factors, like knowledge that the suspect has long been a fugitive from the law, would likewise bear on the analysis.

Such factors are not a one-way ratchet. There may be some cases in which the prior context—including the officer's own previous conduct—could undercut the apparent in-the-moment reasonableness of an officer's use of force. Courts have reasoned that even if an officer faces a moment of apparent danger, the use of force may still be unreasonable if leading up to that moment the officer "acted so far outside the bounds of reasonable behavior that the deadly force was almost entirely a result of [his] actions." *Estate of Biegert ex rel. Biegert* v. *Molitor*, 968 F.3d 693, 698 (7th Cir. 2020) (Barrett, J.).

For example, an officer who needlessly leaps directly in front of an accelerating car may reasonably fear for his safety as the car barrels toward him, but it may be unreasonable for him to use deadly force to stop the oncoming driver. See *Estate of Starks* v. *Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (stating that use of deadly force is unreasonable if the officer unjustifiably "stepped in front of [the suspect's] rapidly moving cab, leaving [him] no time to brake").

To be sure, factors tending to suggest that an officer's actions are unreasonable may have limited weight. An officer's use of force is not automatically unreasonable just because the officer played a role in creating or escalating the dangerous situation, or made a policing mistake. This Court has recognized, for example, that it is reasonable for an officer to use deadly force to end a dangerous car chase, even if the officer contributed to the danger by continuing the chase rather than letting the suspect go. See *Plumhoff*, 572 U.S. at 776 n.3; *Scott*, 550 U.S. at 385-386. And even if an officer's negligent actions are a but-for cause of the dangerous situation, a suspect's intervening misconduct may justify the use of force. See *Biegert*, 968 F.3d at 698.

Furthermore, as this Court observed in *City & County of San Francisco* v. *Sheehan*, a plaintiff "cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided." 575 U.S. at 615 (citation and internal quotation marks omitted). Similarly, "seizures based on mistakes of fact" or law "can be reasonable." *Heien* v. *North Carolina*, 574 U.S. 54, 61 (2014) (mistakes of fact); see *id.* at 57 (mistakes of law). "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of

government officials, giving them fair leeway for enforcing the law in the community's protection." *Id.* at 60-61 (citation and internal quotation marks omitted). An officer's actions in the field do not need to conform to the training video to be reasonable. And even when a Fourth Amendment violation occurs, an officer's reasonable mistakes may be further protected from civil liability by the doctrine of qualified immunity. *Sheehan*, 575 U.S. at 617.

But at bottom, the "standard of reasonableness at the moment," *Graham*, 490 U.S. at 396, merely frames how to look at all the relevant circumstances. It does not prescribe a single-factor, context-independent test out of step with the "general Fourth Amendment approach" to reasonableness. *United States* v. *Knights*, 534 U.S. 112, 118 (2001). Instead, prior circumstances known to a reasonable officer—including his own conduct—may provide relevant context for the reasonableness inquiry in either direction.

B. Respondent's Sole And Exclusive Focus On The Moment Of The Threat Is Unsound

Respondent has nonetheless defended the decision below on the theory that the reasonableness inquiry should look only to "the moment of threat," "as opposed to prior conduct." Br. in Opp. 24. Under that approach, concluding that the officer reasonably believed that he was "in danger at the moment of the threat that resulted in the officers' use of deadly force" ends the inquiry, and no other facts or circumstances are considered. Pet. App. 7a-8a (citation omitted). This Court has previously rejected efforts to replace the "reasonableness" standard for excessive-force claims with a more wooden analytical framework. See *Scott*, 550 U.S. at 383 ("Although respondent's attempt to craft an easy-

to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"). The Court should reject respondent's effort as well.

1. This Court's precedents do not support a blinkered focus on the moment of the threat alone

Respondent errs in contending (Br. in Opp. 23-24) that this Court's decisions foreclose any consideration of officer conduct preceding the "moment of threat." To the contrary, as just discussed, the Court's precedents do the opposite.

a. Respondent draws the wrong lesson from the Court's emphasis in *Graham* v. *Connor*, on how the reasonableness assessment must account for officers' need to make "split-second judgments" in "circumstances that are tense, uncertain, and rapidly evolving." Br. in Opp. 23 (quoting *Graham*, 490 U.S. at 397); *id.* at 31. While that emphasis on split-second decision-making highlights the importance of the moment of the threat, it does not suggest that all other facts and circumstances should be categorically ignored. Indeed, *Graham* itself identified "the severity of the crime at issue"—often a historical fact—as one factor in a non-exhaustive list of "facts and circumstances" that can bear on reasonableness. 490 U.S. at 396; see *Kingsley*, 576 U.S. at 397 (citing *Graham*, 490 U.S. at 396).

Respondent likewise errs (Br. in Opp. 23, 31) in his interpretation of the Court's decision in *Tennessee* v. *Garner*. There, a Memphis police officer used deadly force pursuant to a Tennessee statute that authorized officers to use "all the necessary means" to stop any suspected felon who was fleeing or forcibly resisting arrest. *Garner*, 471 U.S. at 4-5 & n.5 (citation omitted). The Court held that the statute swept too broadly

because it authorized deadly force in certain situations where such force would be "constitutionally unreasonable." *Id.* at 11.

Respondent highlights *Garner*'s further holding that the Tennessee statute was not facially unconstitutional, because "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Respondent reads that language to mean that if an officer's safety is in immediate danger, it is automatically reasonable as a matter of law to use force regardless of any preceding facts or circumstances. Br. in Opp. 23, 31.

But nothing in the language supports such a crabbed interpretation. Instead, consistent with the general concept of "probable cause," an officer's "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," *Garner*, 471 U.S. at 11, is a "fluid concept[] that take[s] [its] substantive content from the particular context[] in which [it is] being assessed," *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996); see *Garner*, 471 U.S. at 9. And that context may include historical events like an officer's preceding actions.

b. Respondent also relies (Br. in Opp. 25-28) on this Court's decisions in *County of Los Angeles* v. *Mendez*, *supra*, and *City of Tahlequah* v. *Bond*, 595 U.S. 9 (2021) (per curiam). But both of those decisions expressly declined to answer the question presented here.

In *Mendez*, police officers entered a shack on private property without a warrant, saw a man inside the shack holding what appeared to be a gun, and fired at two people in the shack. 581 U.S. at 424. The Ninth Circuit

determined that the "shooting was reasonable under *Graham*." *Id.* at 426. But it nevertheless held the officers liable for excessive force based on an idiosyncratic "provocation rule," under which a seizure "judged to be reasonable based on a consideration the circumstances relevant to that determination" nevertheless could result in liability "on the ground that [officers] committed a separate Fourth Amendment violation" (there, a warrantless entry) "that contributed to their need to use force." *Id.* at 422-423.

This Court rejected the Ninth Circuit's provocation rule, explaining that it "mistakenly conflates distinct Fourth Amendment claims." *Mendez*, 581 U.S. at 428. In doing so, however, the Court made clear that it was "declin[ing] to address" whether the inquiry into the reasonableness of an officer's use of force itself requires "taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it." *Id.* at 429 n.*; see *ibid.* ("All we hold today is that *once* a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation."). And *Mendez*'s rejection of the Ninth Circuit's provocation rule does not implicitly suggest an answer to that separate question. *Mendez* rejected the provocation rule because it allowed a "distinct violation" of the Fourth Amendment, "rather than the forceful seizure itself," to "serve as the foundation of the plaintiff's excessive force claim." *Id.* at 428. That problem does not exist when the officer's prior conduct is evaluated as part of the reasonableness analysis from the outset in an excessive-force claim.

Bond likewise sheds no light on the question presented here. The petitioner in *Bond* did "*ask[]* this

Court to clarify whether" the excessive-force inquiry "may take into account" certain "police conduct prior to the use of force." Br. in Opp. 27 (emphasis added; brackets and internal quotation marks omitted). But in *Bond*, as in *Mendez*, the Court expressly declined to answer that question. 595 U.S. at 12 ("We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment."). Instead, the Court held that the officers in *Bond* were entitled to qualified immunity because they had not violated any "clearly established law." *Id.* at 12-14.

c. Finally, respondent relies on several decisions that discuss policing mistakes. None meaningfully supports his theory.

As noted above (see p. 13, *supra*), this Court's decision in *Sheehan* makes clear that even if police officers "misjudge[] the situation," a plaintiff "cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'" 575 U.S. at 615 (citation omitted). Respondent overreads (Br. in Opp. 24-25) that statement. As explained above, while poor law-enforcement tactics do not alone carry dispositive weight in the reasonableness inquiry, that does not categorically preclude any possible consideration of police conduct prior to the moment of a threat.

Respondent similarly misinterprets (Br. in Opp. 30) *Scott* when he contends that it "discounted the officer's prior actions" when assessing his use of force. As discussed above (see p. 12, *supra*), *Scott* in fact did the opposite, expressly *relying* on police actions preceding the use of force, and the driver's response, in the

reasonableness analysis. *Scott* thus refutes, rather than supports, respondent's theory about the relevance of prior officer conduct.

Plumhoff, which respondent also cites (Br. in Opp. 31), reiterates *Scott*'s rejection of "a rule requiring the police to allow fleeing suspects to get away *whenever* they drive so recklessly that they put other people's lives in danger." 572 U.S. at 776 n.3 (emphasis added; citation omitted). The Court's recognition that officers can reasonably decide "to continue the chase" of a recklessly fleeing suspect, *ibid.*, does not suggest that an officer's prior conduct is entirely off the table in assessing the reasonableness of a use of force.

2. Focusing only on the moment of the threat makes little sense and would create administrability problems

Such a blinkered approach has little to recommend it. It flouts common sense, because a reasonable officer's perception of what a suspect might do next could naturally be informed by the officer's prior actions toward the suspect. Indeed, when the officer and the suspect have been interacting with one another, the two parties' prior actions are necessarily intertwined. And focusing exclusively on the moment of the threat does not even provide the advantage of a bright-line rule because it would be difficult to administer in practice.

Focusing only on the "moment of the threat" creates serious problems of line drawing. In a "rapidly evolving" encounter between officer and suspect, it can be difficult to pinpoint when the precise moment of the threat began. See *Abraham* v. *Raso*, 183 F.3d 279, 289, 291-292 (3d Cir. 1999) ("[C]ourts are left without any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible

justification for why conduct prior to that chosen moment should be excluded."). The facts of this case illustrate the point.

Only about five seconds elapsed between Barnes turning his car back on and respondent firing the first shot. See Pet. App. 27a. The courts below identified the "moment of the threat" as the final two seconds of those five. *Id.* at 8a, 29a. But the courts could have just as easily identified the threat as commencing one or two seconds earlier, when the car started to move forward. If that were the appropriate "moment of the threat," then the court would be free to consider additional circumstances, including more conduct by both parties. The approach that this Court's cases have employed, which focuses on the officer's perspective at the time force was applied (not the "moment of the threat"), as informed by all the relevant circumstances that preceded that moment, avoids such an arbitrary line-drawing exercise.

C. The Court Of Appeals Misapplied The Fourth Amendment

The court of appeals in this case applied the wrong standard in assessing the reasonableness of respondent's use of force. Following circuit precedent, the court focused its reasonableness analysis solely on the "moment of the threat," which it deemed to be the two seconds before respondent shot Barnes. Pet. App. 7a. It thus based its analysis solely on a two-second, context-free snippet of the encounter, during which respondent was "clinging to the accelerating" vehicle. *Id.* at 7a-8a (citation omitted).

The court of appeals insisted that "[a]ny of the officer['s] actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry."

Pet. App. 7a-8a (quoting *Harris* v. *Serpas*, 745 F.3d 767, 772 (5th Cir.), cert. denied, 574 U.S. 823 (2014)). And the court did not appear to consider any other circumstances leading up to the shooting either, which might have shed further light on the reasonableness of respondent's actions in one way or another.

That was error. Under a proper analysis, the court should have assessed the excessive-force claim based on what would have been known to a reasonable officer at the moment force was used, including preceding events. *Graham*, 490 U.S. at 396. Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the appropriate course is to vacate the decision below and remand to allow the lower courts to apply the correct framework in the first instance. See *Graham*, 490 U.S. at 399 (vacating and remanding for "reconsideration * * * under the proper Fourth Amendment standard").

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KRISTEN M. CLARKE
Assistant Attorney General
NICOLE M. ARGENTIERI
BRIAN M. BOYNTON
Principal Deputy Assistant Attorneys General
ERIC J. FEIGIN
Deputy Solicitor General
ZOE A. JACOBY
Assistant to the Solicitor General
THOMAS BOOTH
TERESA KWONG
CAROLINE W. TAN
Attorneys

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