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.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND THE CENTER FOR POLICING EQUITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Constitutional Provisions

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 200 criminal justice professionals advising on police community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than Amici funded its preparation or submission.

support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

The Center for Policing Equity (CPE) is a racial justice non-profit that provides leaders with data, stories, and relationships to facilitate change that's bold, innovative, and lasting. CPE gathers and analyzes data on behaviors within public safety systems and uses those data to help communities achieve safer policing outcomes. This work is also the basis of CPE's National Justice Database, the nation's first database tracking national statistics on police behavior. This database allows CPE to provide others with a clearer picture of the approaches, measures, and methods that work best in redesigning public safety to better keep vulnerable communities safe.

SUMMARY OF ARGUMENT

The Fifth Circuit's moment of threat test truncates the evidence a court can use to assess the reasonableness of an arrest in ways incompatible with the common law. By blocking accountability for officers who use excessive force, it also helps undermine public confidence in law enforcement.

ARGUMENT

I. THE FIFTH CIRCUIT'S APPROACH CONFLICTS WITH THE ORIGINAL MEANING OF "UNREASONABLE SEIZURE."

"A routine traffic stop has again ended in the death of an unarmed black man, and again" the Fifth Circuit has shielded an officer from liability.[2] That court did so due to its moment of threat test, which ahistorically and erroneously curtails judicial inquiry into the reasonableness of a seizure.

The Fourth Amendment protects the right of Americans to be free from unreasonable seizures.[3] That right's scope is determined with reference to the common law.[4] Common law seizures included arrests, defined in relevant part as the intentional "application of physical force" to subdue the arrestee.[5] This definition of arrest includes killing a person by shooting him,[6] as Respondent Roberto Felix did to Petitioner's decedent Ashtian Barnes here.

Whether an arrest was reasonable at common law depended on the totality of the circumstances—a holistic approach that the Fifth Circuit has mistakenly truncated. The common law considered the life of arrestees to hold great worth. Even a "poor, friendless

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[2] *Barnes v. Felix*, 91 F.4th 393, 398 (5th Cir. 2024) (Higginbotham, J., concurring).

[3] U.S. CONST. amend. IV.

[4] *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

[5] *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

[6] *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

prisoner" could not be killed "simply to prevent an escape."[7] This rule ensured that the "thorough and solemn scrutiny" of the law, not an officer acting as an "arbitrary judge," decided their fate.[8]

The common law distinguished arrestees accused of felonies from those accused of misdemeanors. An officer could use deadly force to subdue a fleeing accused felon.[9] However, an officer could use deadly force against an accused misdemeanant only if the arrestee was forcefully resisting.[10] Otherwise, the officer was guilty of murder.[11] The rule concerning accused felons in flight has now been limited by this Court; an officer can use deadly force only with probable cause to believe that the fleeing suspected felon poses a significant risk to another's life or limb.[12]

The ancient rationales for respecting the right to life of non-violent, low-level offenders like Mr. Barnes still hold true.[13] Historically, "[t]he dictates of humanity" forbade killing a fleeing petty offender; the officer had "no more right to kill him than he would

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[7] *Caldwell v. State*, 41 Tex. 86, 98 (1874).

[8] *State v. Smith*, 127 Iowa 534, 537 (1905), cited approvingly by *Garner*, 471 U.S. at 12; *State v. Campbell*, 107 N.C. 948, 956 (1890); *accord Garner*, 471 U.S. at 9–10.

[9] *Holloway v. Moser*, 193 N.C. 185, 187 (1927), cited approvingly by *Garner*, 471 U.S. at 12.

[10] *Id.*

[11] *Id.* (quoting 2 BISHOP ON CRIMINAL LAW §§ 662–63).

[12] *Garner*, 471 U.S. at 3.

[13] *See id.* at 14 (holding that a bright-line felon-misdemeanant distinction no longer makes sense due to changing classifications of offenses).

have if the offender were to lie down and refuse to go."[14] It was better for such a person to escape "than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days' imprisonment."[15] The offense for which Constable Felix killed Mr. Barnes just barely met that low bar: driving a car with unpaid toll violations was not even an arrestable infraction.[16] Now, as a century ago, "[t]he law values human life too highly to give an officer the right to proceed to the extremity of shooting one whom he is attempting to arrest for a violation of" a petty law.[17]

Further, several courts held that an arrestee's resistance authorized the use of deadly force only because it made such force necessary, as assessed based on the facts of the specific case. Officers had the right to be "properly protected."[18] However, if an officer used "any greater force than is reasonably and apparently necessary for his protection," then he violated the law.[19] Officers could "forfeit" their

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[14] *Head v. Martin*, 85 Ky. 480, 483 (1887)

[15] *Smith*, 127 Iowa at 537; *see also Holloway*, 193 N.C. at 189.

[16] *Barnes*, 91 F.4th at 395, 399 (majority op. and Higginbotham, J., concurring).

[17] *Holmes v. State*, 5 Ga. App. 166, 170 (1908).

[18] *Head*, 85 Ky. at 483.

[19] *Id.* at 485, cited approvingly by *Holloway*, 193 N.C. at 188; *cf. State v. Pugh*, 101 N.C. 737, 739–40 (1888) (criticizing overly technical scrutiny but allowing for liability if an officer "arbitrarily and grossly abused the power confided to him, and whether he did or not was an inquiry to be submitted to the jury").

authority to use deadly force if they "misbehave[d] themselves in the discharge of their duty."[20]

An officer was liable for using unnecessary force even if an arrestee committed neglect contributing to the arrestee's injury, because the arrestee could not expect that an officer "would go beyond the limit of the law" in response.[21] The law impressed upon officers "their duty to use such means to secure" people "as will enable them to hold them in custody without resorting to the use of fire-arms or dangerous weapons."[22] When officers took human life that could have been preserved through their "diligence and caution," they could be culpable.[23]

These restrictions applied even if an arrestee first threatened an officer's life.[24] In the 1908 case *Holmes*

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[20] *Holloway*, 193 N.C. at 189 (citation omitted).

[21] *Head*, 85 Ky. at 486; *see also Brower v. County of Inyo*, 489 U.S. 593, 595 (1989) ("Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.").

[22] *Reneau v. State*, 70 Tenn. 720, 722 (1879), cited approvingly by *Garner*, 471 U.S. at 12.

[23] *Id.*; *see also Smith*, 127 Iowa at 539–40 (holding that killing someone engaged in the felony of helping another escape had to be "the only reasonably apparent method" available and done "for the honest and non-negligent purpose of preventing the felony, and not for some other reason").

[24] *Head*, 85 Ky. at 485 ("If the offender puts the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection.").

v. State, the Georgia Court of Appeals noted that when an officer used "more force than is necessary," the officer was guilty of assault and battery.[25] If the underlying arrest was unlawful, then *the arrestee* could even use deadly force to resist.[26]

The common law, then, looked at much more than the Fifth Circuit deems relevant under its unduly parsimonious moment of threat test. The common law required a more searching inquiry into the nature of the arrestee's suspected infraction, consideration of whether the officer had options other than deadly force, and a determination of whether the amount of force used by the officer was appropriate under the totality of those circumstances. If the officer's use of force failed at any point as a matter of law, then the seizure was unreasonable.

Thus, it would certainly have been relevant at common law that Mr. Barnes was stopped for unpaid toll violations related to a car his girlfriend had rented. A common-law analysis would certainly take into account the fact that Constable Felix chose to step onto the rolling car when he did not have to do so. At common law, it would also have mattered that Constable Felix fired repeatedly into Mr. Barnes's car—starting before he could even see inside it.[27]

Finally, the common law would tasked a jury, not a judge, with determining the significance of these considerations.[28] At common law, as under this Court's

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[25] 5 Ga. App. at 169.

[26] *Id.* at 170 (citing *Miers v. State*, 34 Tex. Crim. 161 (1895)).

[27] *Barnes*, 91 F.4th at 395–96 & n.2, 401.

[28] *Smith*, 127 Iowa at 539; *Pugh*, 101 N.C. at 740.

precedents and that of the majority of federal courts, the jury would have considered the totality of the circumstances.[29] As *Graham v. Connor* reiterated, it would have weighed "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."[30] It would have given "careful attention to the facts and circumstances."[31]

But none of this happens in the Fifth Circuit. As Judge Higginbotham wrote, the Fifth Circuit's moment of threat rule "starves the reasonableness analysis by ignoring relevant facts to the expense of life."[32] The Fifth Circuit pays this Court's precedent "merely performative" respect.[33] It completely removes "the gravity of the offense at issue" from consideration.[34]

This Court should reject the Fifth Circuit's idiosyncratic and ahistorical "moment of threat test"

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[29] *Barnes*, 91 F.4th at 399–400 & n.13 (Higginbotham, J., concurring); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citing *Garner*, 471 U.S. at 8–9); *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) ("[I]f preceding conduct could not be considered, remand in *Brower* would have been pointless, for the only basis for saying the seizure was unreasonable was the police's pre-seizure planning and conduct.").

[30] *Graham*, 490 U.S. at 396.

[31] *Id.* at 396; *see also Brower*, 489 U.S. at 599–600 (remanding for further consideration of the facts leading up to a driver striking a roadblock).

[32] *Barnes*, 91 F.4th at 400 (Higginbotham, J., concurring).

[33] *Id.* at 401.

[34] *Id.*

and confirm the continued vitality of the common law approach that better respects and implements core constitutional values of due process, limited government, and the sanctity of human life.

II. FAILING TO HOLD OFFICERS ACCOUNTABLE FOR EXCESSIVE FORCE HARMS LAW ENFORCEMENT BY ERODING PUBLIC TRUST AND UNDERMINING THE RULE OF LAW.

Police misconduct undermines the public's trust in government, particularly when it causes unnecessary loss of life without subsequent accountability. Though only a small proportion of law-enforcement officers each year are involved in a lethal confrontation, even those few generate a shocking number of fatalities. From 2015 to 2017, law-enforcement officers fatally shot, on average, nearly a thousand Americans each year.[35] Tens of thousands more were wounded or injured, to say nothing of those harmed without obvious physical effects.[36] As CBS News recently reported, Americans are killed by law enforcement officers throughout the country: "More people were killed by U.S. law enforcement in 2023 than any other year in the past decade, outpacing population growth eightfold. But despite a focus on urban areas, fatal

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[35] *See* Julie Tate et al., *Fatal Force*, WASH. POST DATABASE, available at https://tinyurl.com/59v6mt2k.

[36] *See* Nathan DiCamillo, *About 51,000 People Injured Annually By Police, Study Shows*, NEWSWEEK (Apr. 19, 2017), available at https://tinyurl.com/38dt9x97.

police violence is increasingly happening in small town America at the hands of sheriffs . . . ."[37]

Both civilians and officers face danger in just about any interaction, not merely those that involve stopping in-progress crimes, serving warrants on armed suspects, or other higher-risk police activity. Part of this danger is because officers are "trained to presume danger" in virtually any encounter, and they react accordingly in ways that increase the likelihood of "anticipatory killings."[38] Police responses to non-emergency situations, then, impose real dangers on individuals, communities, and police themselves. This contention is borne out by research from the Center for Policing Equity showing that "when police pull people over for non-safety violations and search them for evidence of crimes, there is a greater likelihood of police use of force."[39] The Center concluded that "limiting routine stops for non-safety offenses has the potential to reduce the likelihood of police use of force"[40]—thereby promoting safety for officers and drivers alike.

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[37] E.D. Cauchi & Scott Pham, *County Sheriffs Wield Lethal Power, Face Little Accountability: "A Failure of Democracy,"* CBS NEWS (May 20, 2024), available at https://tinyurl.com/bdep5a9z.

[38] David Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Oct. 31, 2021), available at: https://tinyurl.com/mr3yvm63. From 2016–2021, that manifested in more than 400 killings of unarmed people by law enforcement during vehicle stops. *Id.*

[39] MATTHEW A. GRAHAM ET AL., RACIAL DISPARITIES IN USE OF FORCE AT TRAFFIC STOPS 7 (2024), available at https://tinyurl.com/3zarcnpe.

[40] *Id.*

A rule like the moment of threat test only heightens the risk that an officer will kill where there is not an objectively reasonable need to do so. Indeed, this Court noted in 1985's *Tennessee v. Garner* that "laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." 471 U.S. at 19 (citation omitted). Restricting the use of deadly force to cases of necessity had not "been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers' split-second decisions." *Id.* at 20. It had saved lives.

It is difficult to imagine a setting where taking a human being's life is *less* necessary than it was here. Laws that criminalize toll fees put police in a position where they do work well outside of the scope of their core responsibilities. The only service Constable Felix was providing in pulling over Mr. Barnes was collecting revenue for the county. There is no bona fide public-safety rationale that justifies stopping a driver for unpaid toll fees—nor that justifies many of the millions of other low-level traffic stops conducted nationwide each year.[41] There is, however, a clear economic incentive for doing so: the Harris County Toll Road Authority pays the salaries of many Houston constables.[42]

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[41] *Id.* at 2.

[42] *See id.* (noting that officers nationwide often have financial incentives to conduct low-level traffic stops); Eric Dexheimer, *Drivers Pay for 160 Constables to Patrol Sam Houston Tollway,*

Municipal governments' reliance on police officers as petty debt collectors not only poses a greater risk of violence, it also displaces higher-social-value police work. For instance, the Harris County budget for constables is over eighty percent of the amount allocated for patrol officers, even though constables arrested just six percent of the county jail population (and in most of Texas, do not engage in traditional policing at all).[43] Law enforcement resources should be used efficiently, with a focus on combating actual threats to public safety. Police officers typically spend only a fraction of their time responding to violent crimes like homicide, robbery, rape, and aggravated assault.[44] This has contributed to declining clearance rates, which has predictable and negative effects on public safety. *See, e.g.*, DATA RELEASE: GUN VIOLENCE CLEARANCE RATES AND CASE OUTCOMES, PHILA. CITY CONTROLLER (Jan. 15, 2022) (describing 36.7% clearance rate of fatal shootings and 18.9% clearance rate of non-fatal shootings in 2020, and noting rising homicides). But these violent crimes are precisely the issues we train and expect police officers to focus on.

Even When There's Little Road to Cover, HOUS. CHRON. (Mar. 18, 2024), https://tinyurl.com/27ueashm.

[43] Neena Satija et al., *What Is a Constable, and Why Are Harris County's 'Contract Deputies' in the News*?, HOUS. CHRON. (Mar. 18, 2024), available at https://tinyurl.com/2stem2de; Mike Morris et al., *How Did Constables Acquire Unprecedented Power in Harris County? Local Leaders Let Them.*, HOUS. CHRON. (Mar. 19, 2024), available at https://tinyurl.com/4f2a436m (noting that most constables elsewhere in Texas work as courtroom guards and process servers).

[44] Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (Nov. 8, 2021), available at https://tinyurl.com/2nuybezx.

Restricting the use of police in collecting toll-road debts enables them to prioritize combatting serious and violent crimes over the social issues for which they are ill-suited and ill-prepared to address.

Unnecessary killings by officers are likely to contribute to a further loss of public confidence in police.[45] Given the ubiquity of smartphones and other personal recording devices, citizens are documenting these encounters more frequently than ever, making them harder to ignore and further raising the stakes for a judiciary that too often ensures that the conduct depicted goes without adjudication or remedy. In the aftermath of many high-profile police killings—most notably, the video-recorded murder of George Floyd at by Minnesota police in May 2020—Gallup reported that trust in police officers had reached a 27-year low.[46] For the first time, fewer than half of Americans reported placing confidence in the police.[47] Confidence in the police has not recovered.[48]

One reason for the crisis of confidence is disparities in policing. The Center for Policing Equity found that

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[45] *See* Cedric L. Alexander, *Ex-cop: Atatiana Jefferson's killing further erodes police legitimacy*, CNN (Oct. 14, 2019), available at https://tinyurl.com/37vxd9dy.

[46] Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), available at https://tinyurl.com/4y4n9kbt.

[47] *See id.*

[48] *See* Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), https://tinyurl.com/59ffy57y (identifying 2023 as the low-water mark for public confidence in police); Gary Langer, *Confidence in Police Practices Drops to a New Low: POLL*, ABC NEWS (Feb. 3, 2023), https://tinyurl.com/32dunn2p.

in some jurisdictions, Black drivers were *five times likelier* to be searched by police than white drivers.[49] This was so even though in most jurisdictions, they were no likelier—and frequently less likely—to have contraband than white drivers.[50] Disparities extend to the use of force context: police are likelier to use force against Black drivers "regardless of stop reason, whether the stop involved a search, whether a search found contraband, and whether the encounter resulted in a warning, arrest, or citation."[51]

Public concerns about policing have also been driven by the perception that officers who commit misconduct are rarely held accountable.[52] Remarkably, a majority of police agree with this basic perception: according to a recent survey of more than 8000 police officers, 72 percent disagreed with the statement that "officers who consistently do a poor job are held accountable."[53] Between 2005 and 2021, despite thousands of police shootings, only "142 officers have been arrested for murder or manslaughter, but only seven have been convicted of murder. An additional 37 were convicted of lesser

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[49] *See* Graham et al., *supra*, at 4.

[50] *Id.*

[51] *Id.* at 7.

[52] *See* Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://tinyurl.com/u6rn9hm2.

[53] Rich Morin et al., *Behind the Badge* 40, PEW RSCH. CTR. (2017), available at https://pewrsr.ch/2z2gGSn.

offenses, and 53 were not convicted."[54] Many more are never indicted at all.[55]

Such a lack of accountability has dire social consequences. "[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness."[56] Burgeoning public distrust makes people much less likely to report crimes or cooperate with the police as witnesses.[57] HOUSING NOT HANDCUFFS, *supra*, at 65. This suspicion of law enforcement and lack of cooperation ultimately erodes public safety, because there is a direct relationship between trust in law enforcement and better outcomes for police and the communities they serve.[58]

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[54] Rick Rouan, *Fact check: Police Rarely Prosecuted for On-Duty Shootings*, USA TODAY (June 21, 2021), available at https://tinyurl.com/59593wcj.

[55] *See, e.g.*, J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), available at https://nyti.ms/2z0kbZl.

[56] Fred O. Smith, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018).

[57] HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY 15 (2019).

[58] *See*, *e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 5 (2006) ("Of particular importance is the impact of [people's] experiences [with legal authorities] on views of the legitimacy of legal authorities, because legitimacy in the eyes of the public is a key precondition to the effectiveness of authorities."); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054, 2059 (2017) ("Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood

When properly trained and supervised, the majority of police who follow their constitutional obligations will benefit if the legal system reliably holds rogue officers accountable.[59] But under the status quo, "[g]iven the potency of negative experiences, the police cannot rely on a majority of positive interactions to overcome the few negative interactions. They must consistently work to overcome the negative image that past policies and practices have cultivated."[60] The moment of threat doctrine unhelpfully—and unlawfully—shields the minority of officers who bring discredit upon the entire vocation and flout the law, and so it erodes relationships between communities and law enforcement.

In a recent survey, a staggering 93 percent of law-enforcement officers reported increased concerns about their safety in the wake of high-profile police shootings.[61] Responding officers also strongly supported more transparency, and—most importantly

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among African Americans to accept law enforcement officers' directives and cooperate with their crime-fighting efforts.") (citations omitted); *accord* U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 80 (Mar. 4, 2015) (a "loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime."), available at https://perma.cc/XYQ8-7TB4.

[59] *See Garner*, 471 U.S. at 10–11 (noting even in 1985 that "a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.").

[60] JACK MCDEVITT, AMY FARRELL & RUSSELL WOLFF, PROMOTING COOPERATIVE STRATEGIES TO REDUCE RACIAL PROFILING 21, available at https://tinyurl.com/mr3jx4kt.

[61] *See* Morin, *supra*, at 65.

for this case—did not think that problematic officers were held accountable.[62]

Unfortunately, "accountability" often serves as nothing more than a rhetorical cloak for unchecked abuse thanks to qualified immunity. Then-U.S. Attorney General William Barr recently told citizens facing potentially unlawful commands from police to meekly comply because there is "a time and place to raise . . . concerns or complaint."[63] A Los Angeles police officer similarly warned: "if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you"—and if a citizen is abused anyway, "Feel free to sue the police!"[64] Words of "assurance" like these come cheap, because rules like the moment of threat test substantially reduce the likelihood that victims of police misconduct will have their day in court on the merits of their claims.

This is especially true if the offenders are constables, who "have the least accountability of any Texas police department."[65] The Fifth Circuit has held that the conduct of constables does not give rise to liability under *Monell v. N.Y.C. Dep't of Soc. Servs.*,

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[62] *See id.* at 40, 68.

[63] Adam Shaw, *Barr Sounds Call to Push Back against Anti-Cop Attitudes, Adopt 'Zero Tolerance' to Resisting Police*, FOX NEWS (Feb. 27, 2020), https://tinyurl.com/2w5sx8c3.

[64] Sunil Dutta, *I'm a Cop. If You Don't Want to Get Hurt, Don't Challenge Me.*, WASH. POST (Aug. 19, 2014), available at https://tinyurl.com/55au2zpb.

[65] Eric Dexheimer et al., *Want to Sue a Harris County Constable's Office for Violating Your Rights? You Can't.*, HOUS. CHRON. (Mar. 19, 2024), https://tinyurl.com/5n938yw8 (citation omitted).

436 U.S. 658 (1978), because they are not county policy-makers.[66] Two justices of the Texas Court of Appeals have said that this immunity "neuters the protection set forth in *Monell*."[67] Thirty people have died in the custody of Houston constables since 2017, and over a hundred cases from a single precinct had to be dismissed in 2016 due to evidence destruction, but civil liability remains out of reach.[68] Texas constables are shielded from systematic accountability.

That makes individual accountability all the more critical. By clarifying that constables who kill Texans needlessly should be as liable as they would have been at common law, the Court can take a significant step toward restoring public confidence in police.

CONCLUSION

"Human life is too sacred" to let the Fifth Circuit's ahistorical moment of threat test to stand.[69] This Court should grant certiorari and reverse the judgment below.

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[66] *Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985); *but see id.* at 112 (Goldberg, J., dissenting) (writing of a constable that as a practical matter, "The bucks stop with him").

[67] *Harris Cnty. v. Coats*, 607 S.W.3d 359, 394 (Tex. Ct. App. 14th Dist. 2020) (Bourliot, J., dissenting from denial of reconsideration en banc), cited approvingly by *Rios v. State*, No. 14-18-00886-CR, 2021 Tex. App. LEXIS 6212, at *55 n.31 (14th Dist. Aug. 3, 2021) (Hassan, J., dissenting from denial of en banc relief).

[68] Dexheimer et al., *supra*.

[69] *Head*, 85 Ky. at 483.

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