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# **EVALUATING EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT**

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*Why the “Moment of the Threat” Doctrine Undermines Fourth  
Amendment Jurisprudence*

## Table of Contents

INTRODUCTION .....	2
QUESTION PRESENTED .....	3
BACKGROUND .....	3
STATEMENT OF THE CASE.....	4
ANALYSIS .....	4
I.    The “Moment of the Threat” Doctrine Conflicts with Supreme Court Precedent and instead Courts should utilize a more holistic Totality-of-the-Circumstances Analysis.....	5
II.   Limiting Fourth Amendment Review to a Single Instant Undermines Objective Reasonableness and Shields Officer-Created Danger. ....	8
CONCLUSION.....	10

## INTRODUCTION

Often split-second decisions by law enforcement officers occur under high-stakes, life-or-death conditions. The constitutional framework for evaluating the reasonableness of force used in such encounters must account for more than the instant a weapon is discharged. Increasingly, courts are asked to decide whether they may evaluate excessive force under the Fourth Amendment by examining only the precise moment an officer fires a weapon, or whether the entire encounter, including the officer’s own actions leading up to that moment, must be considered. This question lies at the center of a growing divide between circuits applying the Supreme Court’s “totality-of-the-circumstances” standard and those embracing the narrower “moment of the threat” doctrine.<sup>1</sup> The answer has consequences not only for police accountability, but also for the integrity of Fourth Amendment jurisprudence.

This article analyzes that question in two parts.

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<sup>1</sup> *Barnes v. Felix*, 91 F.4th 393, 400 (5th Cir. 2024)

- 1) How the “moment of the threat” doctrine departs from Supreme Court precedent and misreads the decisions it claims to follow.
- 2) How this narrowed “moment of the threat” approach undermines objective reasonableness by insulating officer conduct that contributes to the escalation of force.

The “moment of the threat” doctrine is doctrinally flawed and constitutionally dangerous. It conflicts with binding Supreme Court precedent, particularly *Graham v. Connor* and *County of Los Angeles v. Mendez*, which require a holistic, context-sensitive analysis of objective reasonableness.<sup>2</sup>

Courts should reject the “moment of the threat” doctrine and reaffirm the prevailing approach among the circuits. The “totality-of-the-circumstances” framework should be the proper standard for adjudicating excessive force claims under the Fourth Amendment.

### **QUESTION PRESENTED**

Whether a court evaluating a Fourth Amendment excessive force claim may constitutionally restrict its analysis to the single instant, the “moment of the threat” doctrine, when force was used, or must instead consider the officer’s preceding conduct, the “totality of the circumstances,” in determining whether the use of force was objectively reasonable?

### **BACKGROUND**

In *Graham v. Connor*, the Court stated that law enforcement officials have used excessive force are “properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard.”<sup>3</sup> Later, in *Tennessee v. Garner*, the Court held that the use of deadly force to

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<sup>2</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Cnty. of L.A. v. Mendez*, 581 U.S. 420, 427 (2017); see *Barnes*, 91 F.4th at 400

<sup>3</sup> *Graham*, 490 U.S. at 388

apprehend a fleeing suspect is a “seizure” and must also meet the requirements of reasonableness under the Fourth Amendment.<sup>4</sup> Additionally, in *County of Los Angeles v. Mendez*, the Court further clarified the scope of Fourth Amendment excessive force analysis.<sup>5</sup>

## STATEMENT OF THE CASE

The “moment of the threat” doctrine undermines Fourth Amendment protections by limiting the excessive force analysis to the exact moment force is used, rather than considering the full sequence of events.<sup>6</sup> Reducing review to a single instant insulates officer-created danger from scrutiny and incentivizes reckless policing. In contrast, the “totality-of-the-circumstances” framework aligns with constitutional text, reflects the complexity of real-world policing, and is adopted by most circuits.<sup>7</sup> Because the “moment of the threat” rule distorts both law and logic, it should be rejected by the courts.

## ANALYSIS

The “moment of the threat” narrows Fourth Amendment excessive force analysis to a single instant, ignoring relevant events that happened moments before, contradicting both Supreme Court precedent and constitutional reasonableness standards.<sup>8</sup> The applicable framework established in both *Graham v. Connor* and *County of Los Angeles v. Mendez* mandate an objective inquiry considering all relevant facts and circumstances.<sup>9</sup> First, the “moment of the threat” doctrine conflicts with these controlling decisions and misreads the precedent it purports

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<sup>4</sup> *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)

<sup>5</sup> *Mendez*, 581 U.S. at 426-28

<sup>6</sup> *Mendez*, 581 U.S. at 427-28; *Graham*, 490 U.S. at 395-96

<sup>7</sup> *See Graham*, 490 U.S. at 394-97

<sup>8</sup> *Graham*, 490 U.S. at 396; *see Mendez*, 581 U.S. at 427 (reaffirming that excessive force claims must be evaluated based on the totality of the circumstances and rejecting rules that distort or bypass the objective reasonableness inquiry)

<sup>9</sup> *Graham*, 490 U.S. at 396; *see also Mendez*, 581 U.S. at 427 (requiring courts to assess excessive force claims under an objective reasonableness standard based on the totality of the circumstances, and thereby considering all relevant facts)

to follow. Second, reducing the analysis to a single moment would shield officer-created danger from constitutional scrutiny and fosters dangerous policing incentives.

Together, these arguments lead to a single conclusion: courts should reject the “moment-of-threat” doctrine and reaffirm the Fourth Amendment’s totality-based test for reasonableness.

**I. The “Moment of the Threat” Doctrine Conflicts with Supreme Court Precedent and instead Courts should utilize a more holistic “Totality-of-the-Circumstances” Analysis.**

The Supreme Court has repeatedly held that Fourth Amendment excessive force claims must be evaluated under an objective reasonableness standard that considers the totality of the circumstances.<sup>10</sup> The “moment of the threat” doctrine narrows this analysis to only the instant the officer uses force, disregarding preceding events that may be highly relevant.<sup>11</sup>

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. Claims of excessive force by law enforcement officers are considered “seizures” and are evaluated according to a reasonableness standard.<sup>12</sup> A fourth amendment analysis should be conducted “from the perspective of a reasonable officer on the scene,” rather than through the “20/20 vision of hindsight,” and should consider factors such as the severity of the crime, whether the suspect posed an immediate threat, and whether the suspect was resisting or fleeing.<sup>13</sup>

In *Graham v. Connor*, the Court stated that “all claims that law enforcement officials have used excessive force, deadly or not, in the course of an arrest, investigatory stop, or other

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<sup>10</sup> *Graham*, 490 U.S. at 395–96; *Mendez*, 581 U.S. at 427

<sup>11</sup> *Barnes*, 91 F.4th at 400

<sup>12</sup> *Graham*, 490 U.S. at 395

<sup>13</sup> *Id.* at 396

‘seizure’ of a free citizen are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard,” and that “[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene... not with the 20/20 vision of hindsight.”<sup>14</sup> The Court further instructed that this analysis requires “a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”<sup>15</sup> Similarly, the Court reiterated that the “operative question in excessive force cases is whether the totality of the circumstances justified” a particular action on behalf of the law enforcement officer.

*Graham* and *Mendez* confirm that courts must evaluate all relevant facts, not reduce the inquiry to a single frame of time.<sup>16</sup> Use-of-force incidents unfold in complex, dynamic environments.<sup>17</sup> Officers’ decisions are often shaped by prior events, escalating behavior, and split-second judgment. A totality-based standard captures this complexity, allowing courts to weigh whether earlier choices contributed to the need for force.<sup>18</sup>

The objective reasonableness standard is the constitutional test courts use to evaluate Fourth Amendment excessive force claims. This standard remains the controlling framework for determining whether a law enforcement officer’s use of force during a seizure was lawful.

In *Mendez*, the Court reaffirmed that the primary question in “excessive force cases is whether the totality of the circumstances justifie[d] a particular sort of search or seizure.”<sup>19</sup> Importantly, the Court emphasized that this analysis must remain rooted in objective factors, not “bright-line rules or isolated moments,” and it must assess the officer’s actions in their full

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<sup>14</sup> *Id.* at 388

<sup>15</sup> *Id.* at 396

<sup>16</sup> *Graham*, 490 U.S. at 396; *Mendez*, 581 U.S. at 428

<sup>17</sup> *Graham*, 490 U.S. at 396; *Mendez*, 581 U.S. at 428

<sup>18</sup> *Graham*, 490 U.S. at 396; *Mendez*, 581 U.S. at 427

<sup>19</sup> *Mendez*, 581 U.S. at 427

context.<sup>20</sup> This flexible framework accommodates the complexities of real-world policing without stripping courts of the ability to meaningfully review conduct that leads to the use of force.<sup>21</sup>

*Barnes* involved a Fourth Amendment excessive force claim brought after officers fatally shot a suspect while clinging to the outside of a moving vehicle during a traffic stop.<sup>22</sup> The Fifth Circuit held that the officers' use of deadly force was objectively reasonable because they faced an immediate threat at the moment the shots were fired.<sup>23</sup> The court expressly rejected any consideration of the officers' prior conduct, stating that an "excessive force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer's shooting."<sup>24</sup> Judge Higginbotham criticized this narrow approach, warning that "the moment-of-threat doctrine starves the reasonableness analysis by ignoring relevant facts to the expense of life."<sup>25</sup> He argued that this approach "trims *Garner* with predictable results," removing critical context from constitutional review, precisely the type of factual context *Graham* and *Mendez* require courts to evaluate.<sup>26</sup>

Proponents of the "moment of the threat" doctrine may argue that limiting the Fourth Amendment inquiry to the instant when force is used protects officers who must make split-second decisions in dangerous and unpredictable circumstances.<sup>27</sup> This argument relies too heavily on language in *Graham* acknowledging that officers operate in "circumstances that are tense . . . and rapidly evolving" and must make split second decisions.<sup>28</sup> However, this language

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<sup>20</sup> *Graham*, 490 U.S. at 396–97; *Mendez*, 581 U.S. at 427

<sup>21</sup> *Barnes*, 91 F.4th at 394

<sup>22</sup> *Id.* at 395–96.

<sup>23</sup> *Id.* at 399.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 400.

<sup>26</sup> *Barnes*, 91 F.4th at 399–400; *Graham*, 490 U.S. at 396; *Mendez*, 581 U.S. at 428

<sup>27</sup> *Barnes*, 91 F.4th at 395; *Graham*, 490 U.S. at 397

<sup>28</sup> *Graham*, 490 U.S. at 397

does not authorize courts to disregard the events that led to the moment of force. Rather, it affirms that courts must account for the full scope of the officer's perspective, which includes the buildup to the encounter and any opportunities for de-escalation. The *Graham* Court explicitly instructed that reasonableness must be judged under the totality of the circumstances, not isolated in a vacuum.<sup>29</sup> By shielding preceding conduct from review, the “moment of the threat” doctrine undermines this analysis and erodes accountability for avoidable uses of force. The doctrine does not enhance clarity or fairness; it introduces a constitutional blind spot. The Supreme Court's framework already accommodates the real-world pressures of policing without abandoning the comprehensive analysis that ensures constitutional rights are meaningfully protected.<sup>30</sup> While the Fifth Circuit's decision in *Barnes* adopts the “moment of the threat” doctrine, most circuits continue to apply *Graham*'s full-context standard.<sup>31</sup> The Fifth Circuit stands as a minority view, out of step with the broader consensus and Supreme Court guidance.

Because the “moment of the threat” doctrine is inconsistent with the Supreme Court's clear directive to assess the reasonableness of force under the totality of the circumstances, it should be rejected in favor of a more holistic, constitutionally-grounded approach.

## **II. Limiting Fourth Amendment Review to a Single Instant Undermines Objective Reasonableness and Shields Officer-Created Danger.**

The objective “‘reasonableness’ of a particular use of force” under the Fourth Amendment requires courts to consider all relevant facts, including an officer's prior conduct.<sup>32</sup>

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<sup>29</sup> *Graham*, 490 U.S. at 396 *Mendez*, 581 U.S. at 427; *Barnes*, 91 F.4th at 400

<sup>30</sup> *Graham*, 490 U.S. at 396-97

<sup>31</sup> *Barnes*, 91 F.4th at 400; *Graham*, 490 U.S. at 396; *Mendez*, 581 U.S. at 427-28

<sup>32</sup> *Graham*, 490 U.S. at 396



The “moment of the threat” doctrine undermines objective reasonableness by restricting the reasonableness analysis to the “precise millisecond at which an officer deploys deadly force. And prevents courts from “evaluating an officer’s prior conduct, even where that conduct unreasonably created the need for deadly force.”<sup>33</sup> By limiting review to the “precise millisecond” force is used, the “moment of the threat” doctrine blocks scrutiny of officer-created danger and weakens constitutional oversight. Courts should reject this approach and apply the “totality-of-the-circumstances” standard instead.<sup>34</sup>

Under *Graham v. Connor*, excessive force claims under the Fourth Amendment are governed by an objective reasonableness standard, judged “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>35</sup> This standard requires courts to assess all relevant facts and circumstances surrounding the use of force, including the severity of the crime, the threat posed by the suspect, and any resistance or flight.<sup>36</sup>

In *Barnes v. Felix*, the Fifth Circuit confined its analysis to the “act that led the officer to discharge his weapon,” expressly rejecting any review of the officer’s conduct leading up to that point.<sup>37</sup> This approach “starves the reasonableness analysis by ignoring relevant facts to the expense of life.”<sup>38</sup> The truncated review fails to meet *Graham*’s mandate for a comprehensive and fact-sensitive analysis.<sup>39</sup> *Barnes* shows that officers who escalate an encounter are often shielded from scrutiny when courts ignore pre-seizure conduct.<sup>40</sup> Officers may engage in

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<sup>33</sup> *Id.* at 396 (1989); *Mendez*, 581 U.S. at 427; *Barnes*, 91 F.4th at 400

<sup>34</sup> *Graham*, 490 U.S. at 396; *Mendez*, 581 U.S. at 428; *Barnes*, 91 F.4th at 400

<sup>35</sup> *Graham*, 490 U.S. at 396

<sup>36</sup> *Id.*

<sup>37</sup> *Barnes*, 91 F.4th at 399

<sup>38</sup> *Id.* at 400.

<sup>39</sup> *Graham*, 490 U.S. at 396

<sup>40</sup> *Barnes*, 91 F.4th at 399

reckless conduct knowing that judicial review will focus only on the final moment, not the actions that provoked the threat.

Here, the “moment of the threat” doctrine fails to account for the full context of an officer’s use of force. Just as the Fifth Circuit in *Barnes* limited review to a single instant, ignoring the events that led to the officer clinging to a car window, courts applying this rule overlook conduct that might have rendered the use of force avoidable.<sup>41</sup> The doctrine is unworkable in practice, forcing courts to artificially isolate a moment while disregarding the officer’s conduct leading up to, and sometimes creating the need for, the use of force.<sup>42</sup> This undermines fairness and predictability, creating a rule of law exception that protects law enforcement who may have provoked or escalated the encounter. It fails to reflect real-world police-citizen interactions, where decisions unfold over time.

## CONCLUSION

For these reasons, because the “moment of the threat” doctrine contradicts Supreme Court precedent, narrows judicial inquiry, ignores officer-created danger, and departs from the constitutional and doctrinal consensus among the majority of circuits, courts should reject the doctrine.

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<sup>41</sup> *Id.* at 398

<sup>42</sup> *Id.* at 400