NO. 21-1422

In the Supreme Court of the United States

BRETT FERRIS,

Petitioner,

v.

CHRYSTAL SCISM, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOSHUA SCISM,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF PETITIONER

ROBERT S. LAFFERRANDRE
COUNSEL OF RECORD
RANDALL J. WOOD
JEFFREY C. HENDRICKSON
JESSICA L. DARK
PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P.
1109 NORTH FRANCIS AVENUE
OKLAHOMA CITY, OKLAHOMA 73106
(405) 235-1611
RLAFFERRANDRE@PIERCECOUCH.COM

JUNE 6, 2022 *COUNSEL FOR AMICUS CURIAE*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

JUDICIAL RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE AMICUS CURIAE[1]

The National Police Association is an Indiana non-profit corporation founded to provide educational assistance to supporters of law enforcement and support to individual law enforcement officers and the agencies they serve. The NPA seeks to bring important issues in the law enforcement realm to the forefront of public discussion in order to facilitate remedies and broaden public awareness.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Consider two perspectives. First, that the average police officer will be exposed to roughly 188 critical incidents—high-stress events that provoke a trauma response—throughout her career. Second, that when under psychological and emotional stress, a person's complex cognitive functions, like conducting verbal communication or processing the arrangement of persons in a set space, tend to falter. Combining the

[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Under Rule 37.2, *amicus curiae* states that Petitioners received timely written notice and have consented in writing to the filing of this amicus brief. As noted in the foregoing *Motion*, Respondent has been provided notice but has not consented to the filing of this brief.

two with a bit of statistical estimation suggests that the average officer will experience *at least* 150 incidents over his career during which his complex cognitive functions suffer some impairment while in the middle of the event—events which frequently pose a threat of violence to the officer and the citizen involved. Not to mention the fact that many citizens with whom law enforcement interact are themselves suffering from a mental health disorder, under the influence of a mind-altering substance, or both. All while the specter of constitutional liability looms over the officer in every single one of those interactions.

This is no small thing. That police officers typically stand at the intersection of crime and law is why certain state-deferential doctrines of interpretation developed under the applicable constitutional amendments. At issue here is the requirement that fact-finders in a Fourth Amendment use-of-force case assess the "totality of the circumstances" surrounding the underlying use of force from the perspective of a reasonable officer on the scene. This perspective highlights important enviornmental details that officers use mid-incident to shape their next move, such as the removal of a gun from a waistband, or a failure to follow a direct command. It affords officers room to exercise their constitutional authority without fear that a reasonable mistake will result in constitutional liability.

But where courts ignore the "totality perspective", (as this brief will call it), patent injustice ensues. The underlying case is a perfect example. Here, the Second Circuit, like the district court before it, failed to comprehend several observational facts as undis-

puted when they clearly were.[2] Namely, that Mr. Scism, the Decedent, defied Petitioner's directive to go to the ground and placed his hand on a semi-automatic handgun in his waistband in view of Petitioner mere seconds before Petitioner fired his own gun. *See* Petition for Certiorari, at 16-17; *see also* Summary Order, App.5a. These facts are key to whether Petitioner committed a constitutional violation. While the failure to comprehend them as undisputed certainly gives life to Petitioner's qualified-immunity argument, it also animates a more fundamental problem. There is a growing trend among lower courts to give short shrift to the totality perspective in doing a Fourth Amendment use-of-force analysis. This failure completely undermines the point of doctrinal deference to a profession where life-threatening danger is a routine occurrence.

Given this state of affairs, the Court should take this case to reinforce the totality perspective's centrality to the Fourth Amendment's bar on unreasonable searches and seizures. It is a worthy vehicle for such a ruling. Not only does the Court's precedent demand it, but sound scientific evidence supports the existence of a deferential standard for the women and men who protect the Nation's citizenry every day.

---

[2] In some circuits, review of a denial of qualified immunity is jurisdictionally limited to answering the immunity question using only the facts found by the District Court (with very limited exceptions). Not so in the Second Circuit, where the court is empowered to render a decision on based on "an independent review of the record, including the district court's explanation of facts in dispute." *Lennox v. Miller*, 968 F.3d 150, 154 n.2 (2d Cir. 2020); *see also* App.4a.

ARGUMENT

Petitioner Ferris's appeal puts the before the Court the reality that lower courts routinely, and wrongly, avoid ruling on qualified immunity before trial by defining the law at a high level of generality and then saying that they could not define the law at any lower level of specificity because the facts required to do so were disputed. Petitioner Ferris rightly argues that this analytical process subverts the qualified-immunity regime this Court keeps explaining over (*Kisela v. Hughes*) and over (*D.C. v. Wesby*) and over (*Plumhoff v. Rickard*) again. Indisputably, the Court should take this case for the reasons explained in Petitioner Ferris's Petition for Writ of Certiorari.

That said, Petitioner Ferris's case identifies a more fundamental problem. When a court handles a set of facts as the Second Circuit did here, it fails to analyze the "totality of the circumstances" in which the underlying use of force took place. In other words, by referring as "disputed" to facts that are anything but, the court ices those facts out of the analysis—even when those facts provide key context for why an officer acted the way he or she did in a dangerous, high-stress situation.

Far from a harmless externality, this failure to assess the totality of the circumstances confronting an officer runs afoul of long-settled Fourth Amendment principles and the scientific basis supporting the existence of those principles in the first place. This wreaks a significant injustice on law enforcement officials, who benefit from deferential standards of

review that acknowledge the exceptional difficulty of their day-to-day circumstances. *Amicus Curiae* writes now to emphasize that the Court should take this important case as a vehicle to reinforce to lower courts the fundamental nature of the totality inquiry, especially in light of the legal and scientific principles which comprise its foundations.

I. THE COURT SHOULD GRANT CERTIORARI TO REINFORCE THAT THE "TOTALITY OF THE CIRCUMSTANCES" PERSPECTIVE IS CENTRAL TO ANY FOURTH AMENDMENT INQUIRY.

Whether intended or not—the language at issue does not refer, as a basis for its reasoning, to any foundational scientific principles—this Court's discussion in *Graham v. Connor* of the totality perspective perfectly encapsulates both its legal and scientific bases, and why those each counsel in favor of the Court taking this case.

A. This Court Has Long Held That Fourth Amendment Reasonableness Requires Viewing the "Totality of the Circumstances".

First, as suggested, a key feature of this Court's Fourth Amendment excessive-force precedent is the two-part requirement that judges and juries consider (1) the "totality of the circumstances" in which the use-of-force occurred (2) through the eyes of a reasonable officer on the scene. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). This perspective accounts for the fact that police officers—unlike nearly any other profession—are routinely forced to make "split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving[,]" *id.*, not to mention often

life-threatening. Recognizing as much, this Court has interpreted the Fourth Amendment to afford officers a measure of justifiable leeway in doing their jobs. As the Court explained in *Graham*, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment." *Id.* (citation omitted). The same is certainly true even when the stakes are much, much higher.

This principle springs from the text of the Fourth Amendment itself. The amendment famously offers reasonableness as the standard for searches or seizures. *See* U.S. Const. Amend. IV. Yet Fourth Amendment reasonableness differs from the concept of reasonableness in other contexts—in ways material to the outcome of Petitioner's appeal. *See Bridges v. Wilson*, 996 F.3d 1094, 1100 (10th Cir. 2021). Unlike state negligence law, or even common-law excessive force claims (*see, e.g.*, *Morales v. City of Oklahoma City ex rel. Oklahoma City Police Dep't.*, 230 P.3d 869, 880 (Okla. 2010)), Fourth Amendment reasonableness is the product of balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the instruction." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

This balance, the "key principle of the Fourth Amendment," *see Michigan v. Summers*, 452 U.S. 692, 700, n. 12 (1981), plainly requires an assessment of the entire underlying situation. "Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." *Garner*, 471 U.S. at 7 (citing *United States v. Ortiz*, 422 U.S. 891,

895 (1975) and *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968)). In each case, therefore, the question is whether "the totality of the circumstances justified a particular sort of search or seizure." *Garner*, 471 U.S. at 8-9. Shortly thereafter, in *Graham*, the Court provided the judicial gloss of interpreting the totality of the circumstances via the perspective of the officer on the scene. *See* 490 U.S. at 396-97.

Thus, under *Garner* and its progeny, including *Graham*, the applicable rules are clear. It is, as it has been for some time, a matter of this Court reminding the lower courts that its precedent is to be followed. Here, the Second Circuit failed to consider key, undisputed facts about what Petitioner Brett Ferris observed in the brief interaction with Decedent Scism. Most plainly, that (1) Mr. Scism did not go to the ground as Petitioner ordered him to and (2) Mr. Scism displayed and grabbed the grip of his handgun in the officers' sight. There are others, but these facts are the principal ones. By ignoring their undisputed nature, the Second Circuit implicitly rejected this Court's directive to evaluate the totality of the circumstances underlying Petitioner's use of force. As *Amicus Curiae* has argued before, this is not an isolated incident, but a reflection of a general pattern among lower courts in assessing Fourth Amendment use of force claims. *See*, *e.g.*, *Thomas v. County of Sacramento*, No. 20-16443, 2021 WL 4988025 (9th Cir. 2021), *cert. denied*, *County of Sacramento v. Thomas*, No. 21-1220, 2022 WL 1205861 (U.S., Apr. 25, 2022); Br. of Amicus Curiae in Support of Pet. for Certiorari, *Cty. of Sacramento v. Thomas*, 2022 WL 1093240, at *13-16 (U.S., Apr. 7, 2022); *see also Castro v. Martin*, 854 F. App'x. 888 (9th Cir. May 10, 2021), *cert. denied*,

Martin v. Castro, 142 S. Ct. 1108 (Mem) (2022); Br. of Amicus Curiae in Support of Pet. for Certiorari, *Martin v. Castro*, 2021 WL 5343496, at *13-18 (U.S., Nov. 11, 2021). It is becoming urgent that this Court rectify the lower courts' increasingly wayward Fourth Amendment analysis on this point, and this case is the ideal vehicle to do so. For that reason alone, the Court should grant Petitioner's request.

B. Settled Scientific Principles Support the Ongoing Viability of the Totality Perspective.

The foregoing makes clear that the totality perspective is, as a matter of law, a key component of any Fourth Amendment inquiry. The failure to perform such an evaluation merits this Court's review. In addition to its legal foundation, however, the totality perspective also finds strong support in scientific research about the human body's response to high-stress situations. As will be borne out below, officers routinely suffer temporary mental and physical impairments in the middle of those exact high-stress scenarios. A deferential standard of constitutional liability is, therefore, a must.

i. The Mental Impairments Imposed on Officers and Suspects in High-Stress Scenarios.

As noted at the beginning, research suggests that the average police officer will be exposed to roughly 188 critical incidents throughout her career. *See* Brian A. Chopko, et al., *Critical Incident History Questionnaire Replication: Frequency and Severity of Trauma Exposure Among Officers from Small and Mid-*

size Police Agencies, JOURNAL OF TRAUMATIC STRESS, March 21, 2015, https://doi.org/10.1002/jts.21996 (last accessed June 2, 2022). Complicating this is that many critical incidents arise spontaneously during otherwise regular response calls, which denies officers the ability to plan or mentally rehearse for a situation that rapidly spirals out of control. *See* Colin Burrows, *Critical Decision Making by Police Firearms Officers: A Review of Officer Perception, Response, and Reaction*, POLICING: A JOURNAL OF POLICY AND PRACTICE, Sept. 24, 2007, https://doi.org/10.1093/police/pam046 (last accessed June 3, 2022).

It is also well-established that when under significant mental stressors, a person's complex cognitive functions, like conducting verbal communication or processing the arrangement of persons in a set space, tend to falter. *See* Eamonn Arble, et al., *Differential Effects of Psychological Arousal Following Acute Stress on Police Officer Performance in a Simulated Critical Incident*, FRONTIERS IN PSYCHOLOGY, April 9, 2019, https://doi.org/10.3389/fpsyg.2019.00759 (last accessed June 2, 2022). Thus, in other words, officers will encounter repeated, critical, and often surprise scenarios where *their own* mental capacity for decision-making is reduced. And that is just the officer.

Making matters worse, however, is the reality that many citizens with whom law enforcement interact are themselves suffering from a mental health disorder, under the influence of a mind-altering substance, or both. This increases the chances that these citizens will act aggressively towards officers. A 2018 study found that even low doses of alcohol revealed a significant relationship between prefrontal cortex activity and aggression. *See* Thomas F. Denson, et al., *The*

Neural Correlates of Alcohol-Related Aggression, 18 COGNITIVE, AFFECTIVE & BEHAVIORAL NEUROSCIENCE, 203, 214 (January 8, 2018), https://link.springer.com/content/pdf/10.3758/s13415-017-0558-0.pdf. This conclusion, the authors noted, "corroborate[d] the predictions of many of the major theories of intoxicated aggression." *Id.* Such as, for example, that when combined with hostile situations or dispositional aggressiveness, alcohol can promote aggressive behavior. *Id.* at 203.

The suggestion that individuals who interact with law enforcement have, generally, an increased propensity for aggression is not limited to those with substance-abuse issues, however. In a 2006 article discussing neuroscientific components of the legal insanity defense, one legal commentator described a meta-analysis of studies that concluded that "[e]ven minimal frontal lobe dysfunction may cause impulsive aggression, as studies have found relationships between sub-clinical frontal lobe deficits and aggression in normal populations." *See* Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 61-62 (2006). In other words, whether substance-related or not, there is support for the conclusion that citizens interacting with officers are more likely to possess altered mental states and/or react aggressively to simple conduct. The upshot of this literature, therefore, is that *many* of the most complex officer-citizen interactions suffer from temporarily diminished mental capacity on both sides for different reasons.

Here is the primary problem. In any given event, as one group of researches described it, officers have to make "immediate decisions of great consequence

across a variety of unpredictable situations." Arble, et al., *supra*. For example:

> [A]n officer approaching a reportedly armed suspect must attempt to communicate with the suspect while simultaneously visually scanning for the presence of weapons, considering other threats within the environment (*e.g.*, other potential suspects, nearby civilians who could be in danger), evaluating the suspect's potential escape routes, potentially coordinating movements with a partner, maintaining radio communication, and considering the nature of the suspect in question (*e.g.*, the suspect's mental state, or if the individual is in fact the actual suspect). These extreme cognitive demands must also be done while the officer is likely to be highly emotionally aroused. In this context of demanding cognitive engagement and emotional arousal, the police officer will be required to make a split-second decision not only to potentially discharge their firearm but also to do so accurately.

Those exceptional demands, which are part and parcel with most law enforcement positions, require a degree of deference that the totality perspective provides. In few other professions does the specter of uncapped liability dovetail with the opportunity for claim-generation.

ii. The Physical Impairments Imposed on Officers by High-Stress Scenarios.

The final point made by the authors in the above-quoted paragraph also drives home that officer in critical incident situations suffer not only from mental impairments, but physical ones. Notably, high-stress situations often impair performance in areas like tactical decision-making, rendering officers less able to make considered decisions about when to shoot at, as opposed to pursuing, a citizen-suspect. *See* Lorraine Hope, *Evaluating the Effects of Stress and Fatigue on Police Officer Response and Recall: A Challenge for Research, Training, Practice and Policy*, JOURNAL OF APPLIED RESEARCH IN MEMORY AND COGNITION, Sept. 2016, https://www.sciencedirect.com/science/article/abs/pii/S2211368116300572 (last accessed June 3, 2022).

And when officers *do* elect to fire their weapons in high-stress circumstances, their physical ability to do so likewise appears impaired. One group of researchers described how, in training situations, shooting hit rates reached 90%, but in real life shootings, the shooting hit rates did not exceed 50%. *See* Laura Giessing, et al., *Effects of Coping-Related Traits and Psychophysiological Stress Responses on Police Recruits' Shooting Behavior in Reality-Based Scenarios*, FRONTIERS IN PSYCHOLOGY, July 3, 2019, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6617500/ (last accessed June 3, 2022). As these researchers observed, "in case[s] of performance failures, police shootings can have tremendous consequences for the officers themselves, colleagues, suspects, or innocent bystanders." *Id.*

iii. The Benefits of the Deference Encompassed by the Totality Perspective.

Given the above, it is painstakingly clear that a deferential standard of decision is necessary because officers, by virtue of the profession, are placed in scenarios which compromise their mental and physical ability to respond on a regular basis. *See* Marian Pitel, et al. *Giving Voice to Officers Who Experienced Life-Threatening Situations in the Line of Duty: Lessons Learned About Police Survival*, SAGE JOURNALS (Sept. 14, 2018), https://doi.org/10.1177/2158244018800904 (last accessed June 3, 2022). As such, the totality perspective is crucial to ensuring that every factor in a use-of-force incident is documented when assessing constitutionality. It ensures that officers operating at diminished capacity due to the extreme stress of their job are not exposed to liability when reasonable mistakes are made.

In the present case, the Second Circuit simply failed to properly analyze all relevant details of Petitioner's use of force. Those details are fundamental to determining whether the Petitioner's conduct was constitutional. Without them, it is an incomplete ruling that does not satisfy the Court's precedent nor the policy-based scientific principles behind the "totality of the circumstances" perspective.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

ROBERT S. LAFFERRANDRE
COUNSEL OF RECORD
RANDALL J. WOOD
JEFFREY C. HENDRICKSON
JESSICA L. DARK
PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN, L.L.P.
1109 NORTH FRANCIS AVENUE
OKLAHOMA CITY, OKLAHOMA 73106
(405) 235-1611
RLAFFERRANDRE@PIERCECOUCH.COM

COUNSEL FOR AMICUS CURIAE

JUNE 6, 2022