

*Fourth Amendment — Excessive Force — Criminal Procedure —  
Barnes v. Felix*

Of all the places where people and police interact, the road is the most common.<sup>1</sup> Perhaps a driver fails to turn on their blinker while changing lanes, and a law enforcement officer pulls them over. Most often, the officer issues a warning or citation and the driver carries on with their day.<sup>2</sup> But, for many people, especially people of color, the traffic stop is deadly.<sup>3</sup> Last Term, in *Barnes v. Felix*,<sup>4</sup> the Supreme Court held that courts should evaluate Fourth Amendment deadly force claims under a non-time-limited totality of the circumstances test, resolving a consequential circuit split.<sup>5</sup> In unanimously rejecting the Fifth Circuit’s “moment of threat doctrine,”<sup>6</sup> the Court issued a narrow ruling to invalidate the often-rookie circuit’s<sup>7</sup> time-based inquiry. It was the four-Justice concurrence, however, that offered the greatest insight into the potential future of deadly force claims. Under traditional flight doctrine, the plaintiff’s decedent, Ashtian Barnes, was not “fleeing” from the officer when he was shot. Yet the concurrence mischaracterized his failure to comply with a police order to exit his vehicle as flight. The concurrence imprecisely applied the Court’s flight precedent to Barnes’s noncompliance, an analytical approach lower courts would be remiss to adopt. Doing so would broaden the scope of behavior that can result in officers legally deploying deadly force, potentially facilitating the use of such force in everyday traffic interactions.

On April 28, 2016, Officer Roberto Felix Jr. received a radio broadcast about a prohibited vehicle on the road.<sup>8</sup> The Toyota Corolla had “outstanding toll violations.”<sup>9</sup> Felix spotted the vehicle while patrolling the highway and initiated a traffic stop, prompting the driver, Ashtian

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<sup>1</sup> *National Coalition Launched to Modernize Traffic Enforcement and Safety*, CTR. FOR POLICING EQUITY (Mar. 25, 2025), <https://policingequity.org/national-coalition-launched-to-modernize-traffic-enforcement-and-safety> [<https://perma.cc/JX4C-7STW>].

<sup>2</sup> See SUSANNAH N. TAPP & ELIZABETH J. DAVIS, U.S. DOJ, BUREAU OF JUST. STAT., NCJ 304527, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2020, at 8 (2022) (“In 2020, about 10% of drivers in traffic stops experienced no enforcement action by police, while about 43% were given a warning and 43% were given a ticket.”). See generally C.R. DIV., U.S. DOJ, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) (describing officers’ revenue-generating efforts when conducting traffic stops).

<sup>3</sup> See Emily Widra, *Despite Fewer People Experiencing Police Contact, Racial Disparities in Arrests, Police Misconduct, and Police Use of Force Continue*, PRISON POL’Y INITIATIVE (Dec. 19, 2024), [https://www.prisonpolicy.org/blog/2024/12/19/policing\\_survey\\_2022](https://www.prisonpolicy.org/blog/2024/12/19/policing_survey_2022) [<https://perma.cc/2234-PWML>].

<sup>4</sup> 145 S. Ct. 1353 (2025).

<sup>5</sup> *Id.* at 1356; *Barnes v. Felix*, 91 F.4th 393, 400 (5th Cir. 2024).

<sup>6</sup> *Id.* at 394.

<sup>7</sup> Kimberly Strawbridge Robinson, *Conservative Fifth Circuit Is an Outlier for Supreme Court*, BLOOMBERG L. (Jan. 20, 2025, at 04:45 ET), <https://news.bloomberglaw.com/us-law-week/conservative-fifth-circuit-is-an-outlier-for-supreme-court> [<https://perma.cc/BL7Z-EJSW>].

<sup>8</sup> *Barnes v. Felix*, 532 F. Supp. 3d 463, 466 (S.D. Tex. 2021).

<sup>9</sup> *Barnes*, 91 F.4th at 395.

Barnes, to pull over to the highway's shoulder.<sup>10</sup> After parking behind Barnes's Corolla, Felix approached the driver-side door and requested to see Barnes's license and proof of insurance.<sup>11</sup> While "rummaging" through the car for the paperwork, Barnes informed Felix that the Corolla was a rental and that he did not have his license with him.<sup>12</sup> Felix instructed Barnes to stop "digging around."<sup>13</sup> He then remarked that he smelled marijuana and asked Barnes "whether he had anything in the vehicle he should know about."<sup>14</sup> Barnes said the requested documentation may be in the trunk.<sup>15</sup> Barnes opened the trunk from his seat at Felix's request and turned off the vehicle's ignition.<sup>16</sup> This entire sequence of events occurred in under two minutes.<sup>17</sup>

Felix instructed Barnes to exit the vehicle while simultaneously placing his hand on his holster.<sup>18</sup> Barnes opened the door but, rather than exiting, turned the vehicle's ignition back on; the car began moving forward.<sup>19</sup> Felix then unholstered his gun and jumped onto the moving Corolla's doorsill, "'shov[ing]' his gun into Barnes's head."<sup>20</sup> With his head above the roof, Felix shouted "[d]on't fucking move" twice before blindly firing two shots into the vehicle.<sup>21</sup> About three seconds elapsed between when the vehicle began "mov[ing] forward" and when Felix shot Barnes.<sup>22</sup> Two seconds after Felix fired his first shot, the car came to a stop.<sup>23</sup> Barnes bled out in the driver's seat as Felix waited for backup; he was pronounced dead at the scene.<sup>24</sup>

Barnes's parents filed suit on his behalf on December 29, 2017.<sup>25</sup> The suit, brought in state court, alleged that Felix used excessive force in violation of Barnes's Fourth Amendment rights.<sup>26</sup> Defendants removed the claim to federal court,<sup>27</sup> where the Southern District of Texas granted their motion for summary judgment.<sup>28</sup> The court reasoned that Barnes's claim could prevail only if Felix's actions were "objectively

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<sup>10</sup> *Barnes*, 532 F. Supp. 3d at 466.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

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

<sup>15</sup> *Barnes v. Felix*, 91 F.4th 393, 395 (5th Cir. 2024).

<sup>16</sup> *See id.*; *Barnes*, 532 F. Supp. 3d at 466.

<sup>17</sup> *Barnes*, 145 S. Ct. at 1356.

<sup>18</sup> *Barnes*, 532 F. Supp. 3d at 466.

<sup>19</sup> *Barnes*, 145 S. Ct. at 1356.

<sup>20</sup> *Barnes*, 91 F.4th at 395.

<sup>21</sup> *Barnes*, 145 S. Ct. at 1356.

<sup>22</sup> *Barnes*, 532 F. Supp. 3d at 470.

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

<sup>24</sup> *Id.* at 467.

<sup>25</sup> *Barnes*, 91 F.4th at 396.

<sup>26</sup> *Id.*; *Barnes*, 145 S. Ct. at 1356.

<sup>27</sup> *Barnes*, 532 F. Supp. 3d at 467.

<sup>28</sup> *Id.* at 472. The court granted defendants' first motion for summary judgment in March 2021, *see id.*, and second motion for summary judgment in September 2022, *Barnes v. Felix*, No. 18-CV-725, 2022 WL 5239297, at \*4 (S.D. Tex. Sep. 29, 2022).

unreasonable.”<sup>29</sup> It then distinguished between an excessive force claim, under which reasonableness is determined based on the surrounding circumstances, and a deadly force claim.<sup>30</sup> Under the Fifth Circuit’s precedent, the court reasoned that Felix’s use of *deadly* force was subject to a “much narrower” reasonableness inquiry.<sup>31</sup> The Fifth Circuit’s inquiry asked only if the officer’s actions were reasonable “at the moment of the threat” that precipitated the use of deadly force,<sup>32</sup> here defined as the two seconds that Felix stood on the doorsill before he fired into the vehicle.<sup>33</sup> The court held that “because Barnes posed a threat of serious harm to Felix” at this moment, “[Felix’s] use of deadly force was not excessive.”<sup>34</sup>

The Fifth Circuit affirmed.<sup>35</sup> Writing for the panel, Judge Higginbotham<sup>36</sup> remained “[f]aithful to Circuit precedent on the moment of threat analysis.”<sup>37</sup> The panel reiterated that the doctrine is concerned with only “the act that led the officer to discharge his weapon.”<sup>38</sup> Accordingly, the panel held that the district court properly limited the reasonableness inquiry to whether Felix reasonably responded to the danger he faced while standing on the doorsill.<sup>39</sup> The events leading up to that moment,<sup>40</sup> including Felix’s decision to jump onto the doorsill, had no bearing on the analysis.<sup>41</sup> Concluding that Felix could have reasonably believed his life was in danger, the panel held that Felix’s use of force did not violate Barnes’s Fourth Amendment rights.<sup>42</sup> Judge Higginbotham also concurred, raising concern about the moment of threat doctrine’s narrowing of Fourth Amendment protections.<sup>43</sup> Under the Supreme Court’s “totality of the circumstances” test, Judge Higginbotham would have found that Felix violated Barnes’s constitutional rights.<sup>44</sup> Barnes petitioned for a writ of certiorari.

The Supreme Court vacated and remanded.<sup>45</sup> Writing for a unanimous Court, Justice Kagan explained that whether an officer’s use of deadly force is objectively reasonable depends upon “the ‘totality of the

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<sup>29</sup> *Barnes*, 532 F. Supp. 3d at 468 (quoting *Ramirez v. Martinez*, 716 F.3d 369, 377 (5th Cir. 2013)).

<sup>30</sup> *Id.* at 468–69.

<sup>31</sup> *Id.* at 469.

<sup>32</sup> *Id.* (emphasis omitted) (quoting *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011)).

<sup>33</sup> *Id.* at 471.

<sup>34</sup> *Id.* at 472.

<sup>35</sup> *Barnes v. Felix*, 91 F.4th 393, 394 (5th Cir. 2024).

<sup>36</sup> Judge Higginbotham was joined by Judges Smith and Elrod.

<sup>37</sup> *Id.* at 398.

<sup>38</sup> *Id.* at 397 (quoting *Amador v. Vasquez*, 961 F.3d 721, 728 (5th Cir. 2020)).

<sup>39</sup> *See id.* at 397–98.

<sup>40</sup> *Id.* at 399 (Higginbotham, J., concurring).

<sup>41</sup> *See id.* at 400–01.

<sup>42</sup> *See id.* at 397–98 (majority opinion).

<sup>43</sup> *Id.* at 398 (Higginbotham, J., concurring).

<sup>44</sup> *Barnes*, 145 S. Ct. at 1357.

<sup>45</sup> *Id.* at 1360.

circumstances.”<sup>46</sup> This analysis requires a court to “‘slosh [its] way through’ a ‘factbound morass.’”<sup>47</sup> Courts may account for factors like “the ‘severity of the crime,’”<sup>48</sup> the officer’s actions during the stop,<sup>49</sup> and “the suspect’s attempt ‘to evade’ the officer ‘by flight.’”<sup>50</sup> A court cannot shortchange the inquiry with a restrictive rule; it must examine the facts and circumstances of the event as the officer knew them.<sup>51</sup> Consequently, the moment of threat cannot be the beginning and end of the inquiry — the use of force must be understood in the broader context of the stop and within a “lengthier timeframe”<sup>52</sup> than the moment the officer felt threatened.<sup>53</sup> In short, the “moment of threat” analysis is impermissibly narrow.

Justice Kavanaugh<sup>54</sup> concurred in the judgment and wrote separately to highlight the “dangers of traffic stops for police officers.”<sup>55</sup> The four-Justice concurrence stated that officers face a “‘tactical disadvantage’ when ‘approaching an unknown vehicle, with limited visibility and unpredictable threats.’”<sup>56</sup> Drivers could be belligerent or armed, even if the officer merely stopped them for a broken taillight.<sup>57</sup> Worse yet, the driver may have committed a serious crime: They could be the modern-day Timothy McVeigh or Ted Bundy.<sup>58</sup>

The concurrence emphasized that when a driver “suddenly pulls away” during a stop, “the risks [to the officer and the public] multiply.”<sup>59</sup> Thus, flight could indicate greater danger.<sup>60</sup> As such, the totality of the circumstances test must account not only for the “underlying traffic violation” and its accompanying public safety risks, but also for whether flight may “enable” such public safety risks.<sup>61</sup>

“There are no . . . risk-free answers” to an officer who encounters a fleeing driver, according to Justice Kavanaugh.<sup>62</sup> The officer could (1) “let the driver go,” but this could cause a moral hazard for drivers,<sup>63</sup> (2)

<sup>46</sup> *Id.* at 1356 (quoting *Graham v. Connor*, 490 U.S. 386, 396, 397 (1989)).

<sup>47</sup> *Id.* at 1358 (alteration in original) (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)).

<sup>48</sup> *Id.* (quoting *Graham*, 490 U.S. at 396).

<sup>49</sup> *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 12 (1985); *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015)).

<sup>50</sup> *Id.* at 1362 (Kavanaugh, J., concurring) (quoting *Graham*, 490 U.S. at 396).

<sup>51</sup> *Id.* at 1358 (majority opinion).

<sup>52</sup> *Id.* at 1360.

<sup>53</sup> *Id.* at 1358.

<sup>54</sup> Justice Kavanaugh was joined by Justices Thomas, Alito, and Barrett.

<sup>55</sup> *Barnes*, 145 S. Ct. at 1360 (Kavanaugh, J., concurring).

<sup>56</sup> *Id.* at 1361 (quoting Brief of the National Fraternal Order of Police as *Amicus Curiae* in Support of Respondents Roberto Felix, Jr., *et al.* at 4, *Barnes*, 145 S. Ct. 1361 (No. 23-1239)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing *Lange v. California*, 141 S. Ct. 2011, 2035 (2021) (Roberts, C.J., concurring in the judgment)).

<sup>61</sup> *Id.* at 1362.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 385 (2007)).

“give chase,” but this enhances the public safety risk;<sup>64</sup> (3) shoot at the car’s tires, but this is often ineffective or even dangerous;<sup>65</sup> or (4) “attempt to stop the fleeing driver . . . by jumping on or reaching into the car,” as Felix did, but this could endanger the officer and the public.<sup>66</sup> All of these scenarios require officers to make “life-or-death decisions.”<sup>67</sup> Thus, when applying the reasonableness analysis, courts should “appreciate the extraordinary dangers and risks facing police officers and the community at large,” particularly in cases “where the driver has suddenly pulled away.”<sup>68</sup>

Observers have heralded *Barnes* as a beacon of police accountability,<sup>69</sup> but the concurrence could lead lower courts astray, effectuating adverse doctrinal and practical consequences. The majority did not address the merits and thus did not provide additional guidance on which factors courts should weigh in the totality analysis. As such, lower courts attempting to “slosh [their] way through’ a ‘factbound morass’”<sup>70</sup> may look to Justice Kavanaugh’s concurrence for additional insight. But they would be remiss to conflate Barnes’s noncompliance with “flight,” as the concurrence suggests.<sup>71</sup> While the four-Justice concurrence discussed *Barnes* in the context of the Court’s flight jurisprudence, Barnes cannot be said to have “fled” in any legal or conventional sense of the word. He did not instigate a high-speed car chase in a crowded area, risking danger to the officer or the community. Rather, he turned on the ignition when instructed to exit the vehicle.<sup>72</sup> Turning on the ignition may have been a failure to comply with an order, but it cannot be fairly characterized as flight. Thus, the concurrence mistakenly conflated flight, where courts have indicated the use of deadly force is justified, with mere noncompliance, where it is not.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1363.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* This Comment was drafted prior to the Fifth Circuit’s rehearing of *Barnes v. Felix*. The Fifth Circuit released an opinion on September 18, 2025, affirming the district court’s grant of the defendants’ motion for summary judgment. *Barnes v. Felix*, No. 22-20519, 2025 WL 2674139, at \*6 (5th Cir. Sep. 18, 2025). The opinion heavily invoked the logic of Justice Kavanaugh’s concurrence to hold that the totality of the circumstances supported Felix’s use of deadly force. *See id.* at \*1, \*3, \*5–6.

<sup>69</sup> *See, e.g.,* Ian Millhiser, *The Supreme Court Just Got an Important Police Violence Case Right*, VOX (May 17, 2025, at 07:00 ET), <https://www.vox.com/scotus/413340/supreme-court-police-shooting-barnes-felix> [<https://perma.cc/S2EG-5A8F>]; *LDF Applauds Supreme Court Decision Advancing Police Accountability*, LEGAL DEF. FUND (May 16, 2025), <https://www.naacpldf.org/press-release/ldf-applauds-supreme-court-decision-advancing-police-accountability> [<https://perma.cc/C8DB-N26G>]; Mike Fox, *Keeping Cops Accountable: Supreme Court Issues Decision in Barnes v. Felix*, CATO INST. (May 21, 2025), <https://www.cato.org/commentary/keeping-cops-accountable-supreme-court-issues-decision-barnes-v-felix> [<https://perma.cc/QKU6-2SU7>].

<sup>70</sup> *Barnes*, 145 S. Ct. at 1358 (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)).

<sup>71</sup> *See id.* at 1362 (Kavanaugh, J., concurring).

<sup>72</sup> *See Barnes v. Felix*, 91 F.4th 393, 395 (5th Cir. 2024).

The Court has primarily analyzed flight as a factor supporting an officer's Fourth Amendment stop or seizure.<sup>73</sup> The doctrine developed within the context of street policing and thus initially focused on flight on foot.<sup>74</sup> In recent years, however, the Court has also analyzed flight as an element justifying deadly force in high-speed car chase cases<sup>75</sup> — resulting in two branches of doctrinally significant flight precedent. In the context of either line of cases, Barnes's actions do not qualify as "flight." The concurrence's discussion thus marks a subtle — yet consequential — reframing of precedent to equate noncompliance with flight.

The Court has deemed flight on foot legally significant when it is headlong and evasive, and/or done in a populous or high-crime area. In *Illinois v. Wardlow*,<sup>76</sup> an officer stopped and frisked an individual who, after seeing the police, absconded in an area known for narcotics trafficking.<sup>77</sup> The Court noted his "[h]eadlong flight" — characterized as "the consummate act of evasion"<sup>78</sup> — as justification for the officers to conduct a stop.<sup>79</sup> Similarly, in *California v. Hodari D.*,<sup>80</sup> an individual fled through a dense urban area after seeing the police.<sup>81</sup> The ensuing pursuit spanned several blocks.<sup>82</sup> *Wardlow* and *Hodari D.* suggested that when someone flees headlong in a high-crime area, their flight may give rise to reasonable suspicion.<sup>83</sup>

While the Court has not precisely defined the lower bounds of flight, it is clear that brief, gradual movement does not qualify as such. In the context of *Wardlow* and *Hodari D.*, the behavior the Court labeled "flight" was protracted.<sup>84</sup> That the defendants absconded in a populous or high-crime area heightened the concern that they intended to evade detection.<sup>85</sup> In contrast, Barnes did not dart off in an urban area; his few seconds of movement did not take him far, and his actions were

<sup>73</sup> See Paul J. Larkin, Jr., & David L. Rosenthal, *Flight, Race, and Terry Stops: Commonwealth v. Warren*, 16 GEO. J.L. & PUB. POL'Y 163, 179, 183 (2018).

<sup>74</sup> See *id.* at 184–86; see also Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 71 (2015) (illustrating that evasive and furtive movements, including changes in direction, were factors in nearly fifty-five percent of New York Police Department street stops between 2004 and 2012).

<sup>75</sup> See *infra* notes 86–95 and accompanying text.

<sup>76</sup> 528 U.S. 119 (2000).

<sup>77</sup> *Id.* at 121–22.

<sup>78</sup> *Id.* at 124.

<sup>79</sup> *Id.* at 124–25.

<sup>80</sup> 499 U.S. 621 (1991).

<sup>81</sup> *Id.* at 622–23.

<sup>82</sup> *Id.* at 623.

<sup>83</sup> *Wardlow*, 528 U.S. at 124–25; see also *Hodari D.*, 499 U.S. at 623 n.1. The Court has also examined the implications of on-foot flight in excessive force cases. For example, the Court tacitly addressed the definition of "flight" in *Tennessee v. Garner*. See 471 U.S. 1, 3–4 (1985). There, the plaintiff's decedent "fle[d]" when he ran through a backyard and attempted to scale a six-foot-high fence after being confronted by police. *Id.*

<sup>84</sup> See *supra* notes 76–83 and accompanying text.

<sup>85</sup> See *supra* notes 76–83 and accompanying text.

gradual enough for Felix to jump on the doorsill. Thus, Barnes did not “flee” within the Court’s traditional understanding of flight.

The concurrence also diverged from the Court’s doctrinal framework in cases addressing vehicular flight. These cases involved high-speed car chases and accompanying public safety threats, which played a dispositive role in the Court’s determinations that deadly force was justified. The Court has heard few excessive force cases involving fleeing motorists,<sup>86</sup> and even fewer evaluated the totality of the circumstances.<sup>87</sup> In *Scott v. Harris*,<sup>88</sup> an officer attempted to pull over a speeding driver.<sup>89</sup> A chase — exceeding eighty-five miles per hour in a fifty-five-mile-per-hour zone — ensued.<sup>90</sup> The Court held that when the driver endangered the public “by unlawfully engaging in . . . reckless, high-speed flight,”<sup>91</sup> the officer’s deliberate collision with Harris’s car did not violate his Fourth Amendment rights.<sup>92</sup> Building on this public safety rationale, in *Plumhoff v. Rickard*,<sup>93</sup> the Court held that an officer could reasonably fire at a fleeing motorist to neutralize a “lengthy, high-speed pursuit [reaching one hundred miles per hour<sup>94</sup>] that indisputably posed a danger both to the officers . . . and to any civilians . . . nearby.”<sup>95</sup> In both of these cases, the danger, speed, and length of the chase and the resulting public safety threat informed the Court’s holdings.

The *Barnes* concurrence relied heavily upon the logic of *Harris* and *Rickard*. Justice Kavanaugh wrote, “when, as in this case, the driver suddenly pulls away in the midst of a stop, the risks multiply.”<sup>96</sup> He used the same rationale as in the Court’s vehicular flight cases, stating that “[a] driver speeding away from a traffic stop could easily endanger bystanders and other drivers.”<sup>97</sup> The concurrence concluded that similarly situated courts “must appreciate the extraordinary dangers and risks facing police officers and the community” when analyzing the reasonableness of an officer’s actions.<sup>98</sup>

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<sup>86</sup> Sharon R. Fairley, *The Police Encounter with a Fleeing Motorist: Dilemma or Debacle?*, 52 U.C. DAVIS L. REV. ONLINE 155, 169 (2018). In this context, as of 2018, the Court had never ruled in favor of the victim of police violence. *Id.*

<sup>87</sup> For example, in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), and *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam), the Court did not evaluate the totality of the circumstances because the cases were decided on qualified immunity grounds. *Brosseau*, 543 U.S. at 195; *Mullenix*, 577 U.S. at 11.

<sup>88</sup> 550 U.S. 372 (2007).

<sup>89</sup> *Id.* at 374.

<sup>90</sup> *Id.* at 374–75.

<sup>91</sup> *Id.* at 384.

<sup>92</sup> *See id.*

<sup>93</sup> 572 U.S. 765 (2014).

<sup>94</sup> *Id.* at 776.

<sup>95</sup> *Id.* at 780.

<sup>96</sup> *Barnes*, 145 S. Ct. at 1361 (Kavanaugh, J., concurring).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1363.

One could argue, as the concurrence suggested, that Barnes's behavior had every indication of flight, but doing so would fail to account for the factual differences between a minutes-long, eighty-five to one-hundred-mile-per-hour pursuit and Barnes's turn of the ignition. Barnes's "car started to move";<sup>99</sup> it did not "speed[] away."<sup>100</sup> Three seconds elapsed between the movement and Felix's use of force,<sup>101</sup> not six minutes, as in *Harris*.<sup>102</sup> Since Barnes's car only moved for five seconds,<sup>103</sup> it presumably did not reach eighty-five miles per hour<sup>104</sup> or one hundred miles per hour.<sup>105</sup> His turning of the keys in the ignition carried none of the attendant public safety risks in the car chase cases.<sup>106</sup> Moreover, the risk of future danger is distinct from the reality of present danger in the excessive force context.<sup>107</sup> Just as Barnes *could* have instigated a high-speed chase, the Corolla could have simply rolled forward — the record leaves unclear whether Barnes even hit the gas.<sup>108</sup> Even if he did hit the gas, he could have complied with an order to stop mere seconds later.<sup>109</sup> The Court must assess the facts as they were and not as they might have been. Based on the facts at hand, Barnes did not "flee" in the Court's traditional understanding of flight.

More accurately, Barnes failed to comply with a police order to step out of the vehicle by "grabb[ing] his keys and turn[ing] on the vehicle."<sup>110</sup> Failure to comply with an officer's orders may mean disregarding an officer's instructions or actively resisting their authority.<sup>111</sup> Noncompliance on its own has not justified deadly force; the Court has deemed deadly force justified only when the driver posed a significant threat of

<sup>99</sup> *Barnes v. Felix*, 91 F.4th 393, 395 (5th Cir. 2024).

<sup>100</sup> *Barnes*, 145 S. Ct. at 1361 (Kavanaugh, J., concurring).

<sup>101</sup> *See Barnes v. Felix*, 532 F. Supp. 3d 463, 470 (S.D. Tex. 2021).

<sup>102</sup> *Scott v. Harris*, 550 U.S. 372, 375 (2007).

<sup>103</sup> *See Barnes*, 532 F. Supp. 3d at 470.

<sup>104</sup> *Harris*, 550 U.S. at 375.

<sup>105</sup> *Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014).

<sup>106</sup> *Cf. Mullenix v. Luna*, 577 U.S. 7, 17 (2015) (per curiam) (concluding Trooper Mullenix was justified "in perceiving grave danger and responding accordingly, given that Leija was speeding toward a confrontation with officers he had threatened to kill"); *Plumhoff*, 572 U.S. at 776; *Harris*, 550 U.S. at 384.

<sup>107</sup> *See Anderson v. Avond*, 631 F. Supp. 3d 721, 737 (D. Minn. 2022) ("A future hypothetical — plausible or not — is not a justification for the use of significant force because a threat cannot be immediate when it has not yet materialized." (citing *Tatum v. Robinson*, 858 F.3d 544, 548–49 (8th Cir. 2017))).

<sup>108</sup> *See Barnes v. Felix*, 91 F.4th 393, 395 (5th Cir. 2024).

<sup>109</sup> *Cf. Tatum*, 858 F.3d at 548–49 ("[A] reasonable officer might have thought that Tatum's angry arguing could eventually escalate to physical violence. But a reasonable officer would not think Tatum . . . posed an 'immediate' safety threat.").

<sup>110</sup> *Barnes v. Felix*, 532 F. Supp. 3d 463, 466 (S.D. Tex. 2021).

<sup>111</sup> *See Alice Ristroph, The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1212–13 (2017) (describing the "use of force continuum" adopted by many police departments); *see also Jennings v. Jones*, 499 F.3d 2, 12–13 (1st Cir. 2007) (same); *United States v. Bunke*, 412 F. App'x 760, 764 & n.9 (6th Cir. 2011) (same).

danger to others, often through flight.<sup>112</sup> The Court determines whether deadly force is objectively reasonable from an officer’s perspective given the totality of the circumstances.<sup>113</sup> According to some lower courts, an objectively reasonable officer would not deploy deadly force in response to mere noncompliance. For instance, the Ninth Circuit has said that “when a suspect’s resistance is not ‘particularly bellicose,’ the use of even non-lethal force is not reasonable.”<sup>114</sup> Moreover, the Sixth Circuit has said if an individual is “physically resisting arrest” but does not intend “to seriously harm the officer,” his actions likely do not “pose[] an imminent danger of *serious* physical harm to the officer or to others.”<sup>115</sup> Without a threat of danger, then, noncompliance may not justify deadly force.

By law enforcement’s own standards, Barnes’s behavior is better characterized as mere noncompliance. Force is justifiable only when an objectively reasonable officer would use it in light of the totality of the circumstances.<sup>116</sup> Law enforcement agency standards inform an officer’s understanding of how much force is reasonable in response to varying levels of resistance. “Most law enforcement agencies” adhere to a “use of force continuum.”<sup>117</sup> The continuum distinguishes between several types of resistance<sup>118</sup>:

Table 1: Simplified Use of Force Continuum

	TYPE OF RESISTANCE	PERMISSIBLE RESPONSES
TYPE 1	Passive resistance, such as a failure to obey an order	“[H]ands-on tactics,” <sup>119</sup> such as pepper spray
TYPE 2	“[A]ctive resistance,” meaning “efforts to escape or avoid arrest that are unlikely to inflict injury” <sup>120</sup>	Use of “batons, Tasers, and other non-deadly force” <sup>121</sup>

<sup>112</sup> See Rachel Harmon, *Law and Orders*, 123 COLUM. L. REV. 943, 962 n.101 (2023) (“The Supreme Court has allowed deadly force only when suspects both resist and endanger others.” (citing *Plumhoff v. Rickard*, 572 U.S. 765, 776–77 (2014); *Scott v. Harris*, 550 U.S. 372, 384 (2007); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985))).

<sup>113</sup> *Barnes*, 145 S. Ct. at 1356.

<sup>114</sup> *Johnson v. Myers*, 129 F.4th 1189, 1194 (9th Cir. 2025) (quoting *Nelson v. City of Davis*, 685 F.3d 867, 882 (9th Cir. 2012)).

<sup>115</sup> *Bougress v. Mattingly*, 482 F.3d 886, 891 (6th Cir. 2007).

<sup>116</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>117</sup> *Ristroph*, *supra* note 111, at 1212.

<sup>118</sup> *Id.* at 1212–13.

<sup>119</sup> *Id.* at 1212.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

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TYPE 3	Resistance that poses a “threat of death or serious bodily injury to the officer or anyone else” <sup>122</sup>	Deadly force
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Barnes’s behavior — turning the keys in his ignition instead of exiting the vehicle — was not Type 3 resistance; it was not vehicular flight that posed the threat of death.<sup>123</sup> Barnes’s actions were “unlikely to inflict injury” or, absent Felix’s jumping on the doorsill, endanger the officer or others.<sup>124</sup> As a result, his conduct more closely resembled either Type 1 passive resistance or Type 2 active resistance, neither of which should be met with deadly force.<sup>125</sup> Suggesting Barnes’s behavior was “flight” — which, in a car, would usually resemble Type 3 resistance — is a consequential misnomer.

Lower courts would be remiss to adopt Justice Kavanaugh’s logic, because then even modest acts of noncompliance — such as a failure to keep both hands on the wheel — could justifiably be met with deadly force. Police officers conduct more than fifty thousand traffic stops per day, pulling over roughly twenty million civilians a year.<sup>126</sup> Traffic stops, then, are “the most common interaction between civilians and law enforcement.”<sup>127</sup> The concurrence’s logic suggests that more of these everyday interactions could result in legally justifiable deadly force if the driver fails to comply. Excessive force claims are already notoriously difficult to pursue.<sup>128</sup> Narrowing the scope of Fourth Amendment protections by emphasizing noncompliance in the name of “flight” would further limit the number of viable claims. Thus, under the concurrence’s framework, more civilians will risk death in a system where they are supposed to be innocent until proven guilty.

Finally, the racially disparate impact of traffic stops paired with the concurrence’s logic could lead to even more fatal consequences for the most burdened communities. An officer may conduct a lawful traffic stop, even if his reason is pretextual, so long as there is probable cause

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<sup>122</sup> *Id.* at 1212–13.

<sup>123</sup> *See id.* at 1212.

<sup>124</sup> *Id.*

<sup>125</sup> *See id.*

<sup>126</sup> *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> [<https://perma.cc/AS4S-UQ6W>].

<sup>127</sup> *National Coalition Launched to Modernize Traffic Enforcement and Safety*, *supra* note 1.

<sup>128</sup> *See generally* Schyler B. Burney, Comment, *Sorry, Not Sorry: An Empirical Review of Excessive Force Claims Focusing on Inconsistent Reasonableness Standards and Expressions of Sympathy*, 91 *MISS. L.J.* 127 (2022) (outlining barriers plaintiffs face when bringing excessive force claims).

of a minor traffic infraction.<sup>129</sup> As a result, officers lawfully pull Black drivers over more often than white drivers.<sup>130</sup> After the stop, officers more frequently search Black and Hispanic drivers than white drivers.<sup>131</sup> Unfortunately, this leaves drivers of color more exposed to the consequences of this potential shift in doctrine.

Justice Kavanaugh's maneuvers in *Barnes* may seem insignificant given the relative victory of the unanimous majority opinion. But the subtle conflation of "flight" with noncompliance could carry significant doctrinal and practical consequences. Lower courts ought not follow the concurrence's logic. Rather, they should proceed cautiously when distinguishing between noncompliance and flight, given the extraordinary intrusion on civilians' Fourth Amendment rights.

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<sup>129</sup> See *Whren v. United States*, 517 U.S. 806, 808, 813–14 (1996) (holding that pretextual stops are permissible as long as there was probable cause of a traffic violation, even where a reasonable officer would not have been motivated to stop the car for a desire to enforce traffic laws); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 427 (1997) ("The *Whren* Court left African-Americans and Latinos without an effective remedy for discriminatory pretextual traffic stops when it suggested the Equal Protection Clause as the appropriate constitutional basis for challenging these stops.")

<sup>130</sup> *Findings*, *supra* note 126. However, officers "stop Hispanic drivers at similar or lower rates than white drivers." *Id.*

<sup>131</sup> *Id.*